



Summary of Public Comment on the Health and Safety Regulatory Package and WorkSafe Victoria's Responses

June 2007

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1. Introduction

The proposed Health and Safety Regulatory Package was released for public comment from 20 January 2007 to 28 February 2007.¹ The package was comprised of:

- the proposed *Occupational Health and Safety Regulations 2007*²;
- the proposed *Equipment (Public Safety) Regulations 2007*³; and
- an accompanying regulatory impact statement (RIS) and the technical appendix to the RIS.

Principles guiding the development of the Regulations

The principles guiding development of the new Regulations were endorsed in late 2005 following input/consultation with key stakeholders on the proposed scope of the review. The guiding principles were:

- Consolidating the existing regulations into one document;
- Translating the existing regulations;
- Removing mandatory risk assessment;
- Removing duplication with the *Occupational Health and Safety Act 2004* (the Act) and between the regulatory provisions;
- More closely aligning with National Standards while maintaining the level of protection already provided for Victorian workplaces; and
- No substantive policy change except if harmonising with National Standards.

WorkSafe Victoria⁴ (WorkSafe) also considered existing national commitments, such as Workplace Relations Ministers' Council agreements; Victorian Government and WorkSafe commitments; reducing regulatory burden; making the Act work; streamlining the licensing and registration schemes; proposing record-keeping only where appropriate; and maintaining consistency, as appropriate, between the EPS Regulations and the OHS Regulations.

Consultation process

WorkSafe undertook an extensive and innovative consultation process to canvas stakeholder views during the development of the Regulations. Stakeholder reference groups were convened to consider specific and overarching policy. Over 100 meetings were held involving more than 70 representatives of 44 stakeholder organisations – 27 employer organisations and 16 unions (including the Victorian Trades Hall Council). A dedicated website for publishing all key documents was made accessible to approximately 200 external stakeholders. Fourteen focus groups were held with individual employers to explore relevant costs and benefits. (The consultation process is detailed in Appendix C of the *Technical Appendix to the RIS*.)

During the public comment period, WorkSafe conducted 11 public information sessions at three metropolitan and eight regional locations. Another four presentations were provided in response to

¹ A notice advertising the release of the package for public comment was published in the *Victoria Government Gazette* on 19 January 2007 and in the *Herald Sun* and *The Age* newspapers on 20 January 2007.

² In summary, the OHS Regulations contain:

- general provisions, such as issue resolution and exemptions;
- physical hazard-provisions, covering manual handling, plant, noise, confined spaces and falls;
- hazardous substance- provisions, including asbestos and lead;
- industry-specific provisions covering mines, major hazard facilities and construction;
- provisions for licensing and registration of certain activities and persons; and
- transitional and saving provisions to ensure a smooth transition to the new regime.

³ The EPS Regulations:

- declare certain equipment to be prescribed equipment for the purposes of the *Equipment (Public Safety) Act 1994* (the EPS Act) and the Regulations;
- set out duties of various persons in relation to prescribed equipment;
- require notification to WorkSafe of prescribed equipment design; and
- contain provisions for the reporting of fatalities, serious injuries and dangerous occurrences in places other than workplaces involving prescribed equipment.

⁴ WorkSafe Victoria is the trading name of the Victorian WorkCover Authority.

speaking requests. Over 600 people attended these sessions. (**Attachment A** provides details of the interest in the package during the public comment period.)

The public comment process elicited 1282 submissions of which approximately 1,170 were "pro forma" submissions. (A breakdown of the submissions received, including the names of individuals or organisations making submission is at **Attachment B**). WorkSafe has considered all submissions received.

WorkSafe continued to engage with stakeholders after the public comment period. The Executive Director spoke to peak stakeholders on the Regulations in the week of 28 May 2007. Stakeholder Reference Groups were held in the week of 4 June 2007, and public information sessions are being conducted from 18 June to 9 July in metropolitan and regional centres.

This paper summarises the substantive issues raised in public comment and WorkSafe's responses to those issues.

Top issues

There was general support for the proposed OHS Regulations and the proposed EPS Regulations, although there were specific areas which were not supported by various stakeholders and elicited strong criticism. In particular the following issues generated a large amount of comment with stakeholders holding divergent views:

- new regulation setting out how to involve health and safety representatives in workplace consultation;
- coverage of asbestos;
- new regulations for construction work; and
- removal of risk assessment.

Licensing provisions, high risk work, issue resolution and noise also attracted a variety of comments.

Summary of main changes arising from issues raised in public comment

The main changes made to the OHS Regulations after consideration of public comment are:

- Removing all content within the Regulations of the current Dangerous Goods Order which deals with asbestos-contaminated dust – that Order will be remade;
- Including "notifiable incidents" under Part 5 of the Act in most of the "review of risk control" provisions, other than the Construction, Major Hazard Facilities (MHF) and Mines Parts and ensuring the wording of all "review of risk control" provisions are as consistent as possible;
- Inserting a "review of risk control" provision into Division 8 (activities involving asbestos) of the Asbestos Part;
- Clarifying and tightening the definition of "construction work" to ensure it does not inadvertently capture the assembly or manufacture of fixed plant, or the prefabrication of elements as standard stock for sale, or routine or minor testing, maintenance or repair work performed in connection with a building or structure, or mining activities;
- Increasing from 14 to 28 days, the period within which persons can work under direct supervision before completing construction induction training;
- Including a power to exempt a person or class of persons from complying with any provision of the Noise Part;
- Increasing the timeframe for plant registration renewals from 3 to 5 years; and
- Making technical amendments and other drafting changes, including improving consistency of language among like provisions, clarifying definitions, and improving navigation, all to improve the content and form of the regulations.

Minor technical amendments have been made to the EPS Regulations.

Conclusion

For the most part, the Regulations translate existing provisions without substantive policy changes. Two main exceptions to the "translation principle" have resulted in new regulations to meet recent Government commitments:

- clarifying the role of health and safety representatives in workplace consultation; and
- implementing the National Standard for Construction Work.

The changes made to the OHS Regulations and EPS Regulations following consideration of public comment are not significant and do not impact on the validity of the cost-benefit analysis contained in the RIS.

Note:

1. Where this paper makes reference to a specific chapter, part or regulation, the reference is to the chapter, part or regulation in the public comment draft of the proposed OHS Regulations or EPS Regulations.
2. A list of the main abbreviations used in this paper is provided at **Appendix C**.

2. Overarching Policy Issues and General Comments

A number of key policy issues were considered during the development of the proposed Regulations and shaped the regulatory approach. These “overarching” policy issues were canvassed in chapter 4 of the RIS. Public comment was received on a number of the overarching policy issues. This section summarises and responds to that comment, as well as general comments received on the Regulations, including comment on the consultation process.

Consolidation and form of the Regulations

Consolidation

Comment

In general those submissions that commented on the consolidation of the 13 existing OHS Regulations into a single statutory rule expressed support for the consolidation. The consolidation and streamlining of the regulations was regarded as making it easier for duty holders and the public. Similarly the consolidation of the two existing EPS Regulations was supported. However some submissions did not support the consolidation, believing the proposed OHS Regulations were unwieldy and that it is easier to be able to obtain just the regulations actually needed.

WorkSafe response

As workplaces are usually affected by more than one of Victoria's existing Regulations, WorkSafe considers that it is simpler for duty holders to comply if all of the requirements are located in a single document. Consolidation of the previous 13 OHS Regulations into a single document has reduced overlapping and duplicative requirements, thereby reducing the cumulative impact on the resources of duty holders.

Navigation and form of the Regulations

Comment

A number of submissions made comment about the importance of ensuring that duty holders could effectively navigate the consolidated Regulations and argued that improvements were needed in this area. It was suggested that it would be beneficial to have some form of explanatory section at the start of the Regulations which outlines how the Regulations need to be read. Inconsistencies in some headings for regulations and in the wording of like provisions were also raised.

WorkSafe response

Several improvements have been made to the OHS Regulations to make navigation easier. This includes increased use of Notes, improved cross-referencing and the inclusion of a comprehensive index. Other drafting changes have been made, including improving the consistency of language across like provisions, clarifying definitions, fixing grammar and punctuation and removing ambiguities, all to improve the form and content of the Regulations.

The proposal to include an explanatory section at the start of the Regulations is outside standard drafting practices for regulations. Guidance material on the Regulations as a whole is being prepared.

Removal of prescription of risk assessment

Comment

There was general concern about the removal of the risk assessment duty among unions, health and safety representatives, OHS consultants and some employers who argued for its retention. In particular, the removal from the Manual Handling and Noise Parts was the most vigorously opposed. Reasons given for the retention of risk assessment include:

- *It is a well established and understood step in risk management;*

- *Appropriate risk controls cannot be implemented without accurate risk assessment;*
- *Its inclusion is consistent with National Standards;*
- *It is included in other jurisdictions' risk management processes; and*
- *What is required by duty holders is unclear as there is currently no clear guidance material on risk management processes.*

Employer organisations and employers generally supported the removal and the increased focus on risk control. Reasons given in support of the removal of risk assessment include:

- *It supports and facilitates the appropriate focus of effort on control of risk;*
- *Many control measures can be identified without risk assessment, especially with the amount of information now available;*
- *Concentrating on risk control rather than the process has reduced the red tape burden by 15%;*
- *Often risk assessment is done purely for legal compliance; and*
- *It removes the potential for employers to be penalised where they have identified and implemented adequate risk controls, but have not done a formal risk assessment.*

WorkSafe response

The primary focus of the Regulations is on the control of risk. Risk assessment can be an important step towards risk control, but it is not always required in order to appropriately control a risk. It is not necessary to mandate that a formal risk assessment is carried out and recorded in every case.

Prescribed risk assessment reduces the flexibility of the duty holder to carry out obligations to control risk under the Act and the Regulations. Removing prescription of risk assessment gives duty holders flexibility in the methodology they use to determine appropriate controls and does not prevent them from assessing risks to determine practicable risk control measures.

There should not be a penalty for not having undertaken a risk assessment when adequate risk controls are implemented. Evidence indicates many employers are implementing adequate control measures in Victorian workplaces without going through the formal documented assessment process. It makes sense and is more cost effective to simply implement a known and accepted risk control measure.

A formal risk assessment process is still required where the complexity of the hazard or risk is such that appropriate decisions about control are unlikely to be made without a systematic analysis – that is, in the Mines, MHF and Construction Parts of the OHS Regulations.

Guidance material addressing the specific requirements of each duty holder under the Act and Regulations will include information on risk assessment. A guide under development – *Your health and safety guide to Controlling OHS hazards and risks* – will include guidance on when to assess risk.

Hazard identification

General hazard identification provision

Comment

Unions and some individual respondents sought the inclusion of a general hazard and risk identification provision to ensure that "health" hazards including stress, psychological health, bullying, violence and fatigue are regulated in the same way as traditional physical hazards. Employers put their opposition to a general provision during the development of the proposed Regulations.

WorkSafe response

During the development of the Regulations, WorkSafe considered the introduction of a general hazard and risk identification provision but ultimately considered that it was outside the translation exercise

and that it was preferable to translate the targeted, subject-specific identification duties from existing OHS Regulations into the consolidated Regulations. WorkSafe maintains this position. Hazards and risks not subject to specific provisions in the Regulations are covered under the Act. The obligation to proactively identify hazards is an inherent part of the general duties in Part 3 of the Act. Employers fulfilling their duty would identify hazards covering risks to both the physical and mental health of employees, which include psycho-social hazards.

A range of guidance material on psycho-social issues, such as psychological health, stress and bullying etc, is currently available.

Comment

Unions and some other respondents submitted that the provisions dealing with identification of hazards are inconsistent. Unions proposed hazard identification duties for all subject-specific parts, including Noise and Hazardous Substances.

WorkSafe response

The Regulations are consistent with the translation policy that existing hazard identification duties are translated.⁵ Standardisation of the wording has not been feasible in every circumstance because the hazard identification duties need to be specifically framed for the hazard in question.

Separate hazard identification provisions are not considered necessary for the Hazardous Substances, Noise or Construction Parts. They are covered respectively by: requirements for a register and copies of Material Safety Data Sheets; the requirement to determine noise exposure where there is uncertainty as to whether the exposure standard is being exceeded; and the process of preparing safe work method statements for high-risk construction work.

Measuring hazard exposure

Comment

Unions and some OHS professionals were concerned about the apparent inconsistencies in provisions dealing with the duty to monitor exposure levels in the Noise, Hazardous Substances, Asbestos and Lead Parts. They proposed that monitoring be required if an employee may be exposed to the hazard at a level in excess of the exposure standard for the hazard.

WorkSafe response

WorkSafe considers that where an employer knows an exposure standard is being exceeded, the employer can move straight to control. Monitoring is triggered if there is uncertainty about exposure based on reasonable grounds. Consequently exposure measurements have generally been mandated where there is uncertainty as to whether the exposure standard is or may be exceeded.

Risk Control

General hierarchy of risk control

Comment

Unions requested the inclusion of a hierarchy of control to apply generally to all workplace risks. They argued that the hierarchy of controls is widely accepted as the most effective approach to risk management, is consistent with both sections 4 and 20 of the OHS Act 2004 and should be the accepted regulatory approach to all risks. Their concern is that there will be an over reliance on personal protective equipment or lower order controls which are the least effective.

WorkSafe response

The OHS Regulations do not include a general hierarchy for the control of all risks in the workplace. The specific risk control hierarchies in existing OHS regulations have been translated into the hazard-specific parts of the regulations. WorkSafe believes hierarchies of control that are framed specifically

⁵ This translation did not include the translation of triggers that prompt duty holders when to conduct and/or review hazard identification as this may have the effect of focussing duty holder's attention more on hazard identification rather than risk control. The duties on employers in the proposed OHS Regulations to identify hazards are ongoing duties.

for particular hazards are more likely to be effective. Translation of these provisions into the hazard-specific parts maintains a strong focus on control in those parts.

Further, there is no National Standard that applies to workplace risks and which sets out such a hierarchy and, while most other States have a general hierarchy of control in their regulations, there is no uniformity as to how many levels are prescribed.

Guidance will be used to foster the application of higher order controls for other risks.

Review of risk controls

Comment

Unions believe that the provisions dealing with review of risk control measures need to be made consistent across the Regulations. In particular they believe that all such provisions must include a specific trigger to review risk controls when an incident or injury occurs. Some employers also called for greater consistency of like provisions across the Regulations.

WorkSafe response

The wording of all triggers has been made as consistent as possible, although there will be variations by virtue of the different subject matter of each part.

The occurrence of a serious injury or incident should be the cause for a review. A standard incident/injury trigger – the occurrence of a notifiable incident – has been added to all of the “review of risk control” provisions in the hazard-specific Parts (i.e. Chapters 3 and 4). This addresses the requirement to focus on risk control and improves consistency of review provisions across the Parts.

A “notifiable incident” trigger will not be inserted into the review provisions in the Mines or Major Hazard Facilities Parts as they retain their formal risk management approaches incorporating review mechanisms directed at preventing mining and major incidents. The Construction Part also has a formal risk management process in relation to high risk construction work in the form of safe work method statements (SWMSs). The review provision for SWMSs includes an “incident” trigger.

While reviewing triggers, it was identified that Division 8 of the Asbestos Part of the OHS Regulations did not have a provision for review of risk control. This was an anomaly and has been rectified.

National uniformity and adoption of National Standards

Comment

Some submissions raised as issues inconsistencies in the adoption of National Standards in relation to asbestos, construction, plant, confined spaces and hazardous substances.

Others supported the adoption of National Standards as a means of achieving national harmonisation, but the support was qualified where it was seen the national standard imposed unnecessary red tape or where the compliance burden could not be justified through the regulatory impact process.

WorkSafe response

Overall, this round of regulation consolidation has resulted in a higher degree of alignment with national standards but does not fully adopt all provisions. WorkSafe has adopted WRMC endorsed National Standards to the greatest extent possible after considering:

- if the scope of the National Standard provisions go beyond the scope of the Act;
- the age of the National Standard;
- the level of protection compared with that provided by the current regulatory framework;
- the review of the costs and benefits indicates the costs significantly outweigh the benefits;
- if the provision(s) of the standard is not workable or enforceable; and
- the likelihood that any current review of the standard will substantially change it.

Reducing regulatory burden

Comment

An employer organisation did not want to see the reduction in red tape gained through the regulatory review process being lost if the red tape is simply being transferred to alternative instruments, such as through Compliance Codes, section 12 guidelines or guidance materials.

WorkSafe response

Guidance material cannot create new regulatory duties. It can only provide guidance on how to comply with obligations imposed by the Act or the Regulations. WorkSafe has no intention of losing the gains made in reducing the regulatory burden and is actively engaging with stakeholders on the issue of the appropriateness of guidance material.

Scope of the OHS Regulations

A number of submissions included proposals to expand the scope of the proposed OHS Regulations to regulate other hazards, industries or activities. These proposals are outside the scope of the current regulatory review. Comment was also received on the duties that should be imposed on employees, self-employed persons and designers of building and structures.

Workplaces and first aid

Comment

Unions and union members opposed WorkSafe's decision not to regulate workplaces and first aid. They believed that regulation is the only way to ensure duty holders will provide basic facilities, and that Victoria should adopt regulatory provisions similar to those in other states even though other jurisdictions are not in agreement on all topics for regulation. During the stakeholder engagement process employers strongly opposed regulating for workplaces.

WorkSafe response

Regulating these matters is outside the scope and principles of the current regulatory review. Other states have regulated workplaces and first aid to varying degrees but there is no consistency in their approach and content. Nearly all jurisdictions have a code of practice to assist duty holders to discharge their duties on first aid.

WorkSafe is developing guidance on workplace issues and first aid. WorkSafe has also committed to considering regulatory provisions for workplaces/first aid in the future when there is a greater capacity to determine the breadth of the issues that may warrant specific regulation; deal with harmonisation with other jurisdictions; and consult on what is "Greenfield" regulation.

Electrical safety

Comment

One submission expressed concern at the lack of coverage of electrical safety and recommendations were made on how the individual parts should be amended to take account of electrical hazards.

WorkSafe response

Specific coverage of electrical hazards is outside the scope of the current regulatory review. There is currently no National Standard on electrical safety which would support harmonisation on this issue.

Coverage of other areas

Comment

There were also proposals from various respondents for the Regulations to include provisions regarding safe work hours, the agricultural industry, spray painting, sports, nanotechnology and the aging population.

WorkSafe response

Regulating these matters is outside the scope and principles of the current regulatory review. Any National Standard declared on these areas in the future and endorsed by the WRMC would be considered in Victoria. In the absence of a National Standard, a compelling case for regulation would need to be made to Government.

In respect of spray painting, while there is national guidance material for spray painting there is currently not a declared National Standard addressing this activity specifically. The hazardous substances used in spray painting are covered by the Hazardous Substances Part of the OHS Regulations and employers must control risk associated with those substances at a workplace.

Duties on employees

Comment

Some employers argued there was no attempt to include regulations to further define the employee's duties under section 25 of the Act even where the previous regulations had reference to employee obligations. They believed a number of specific regulations that place a duty on employers require a reciprocal regulation for employees.

WorkSafe response

Reciprocal duties in the existing OHS Regulations have been translated where they do not duplicate the general duties imposed on employees by section 25 of the Act. The new OHS Regulations therefore do impose some specific obligations on employees. For example, the Lead Part contains specific duties for employees that are aimed at helping to prevent the spread of lead contamination.

Duties on self-employed persons

Comment

A suggestion was made that a "declaratory statement" for self-employed persons, similar to that for independent contractors, be made that states a self-employed person has the same duties as an employer in relation to not exposing others to risks to health and safety.

WorkSafe response

Previous regulations placing duties on self-employed persons were translated, but duties were not extended for those specific hazards where they did not exist. This is consistent with two of the overarching principles of translation and no major policy change.

Stringent duties still apply to self-employed persons under section 24 of the Act.

Designers of buildings and structures

Comment

A couple of submissions argued for a chapter to set out specific duties on the designers of buildings and structures and to require them to identify and assess any hazards and risks, including manual handling, noise and lighting, and control those risks associated with the design of a building or workplace.

One employer organisation suggested a new duty on designers to eliminate confined spaces from the design of buildings.

WorkSafe response

This matter is covered by the Act. Section 28 of the Act imposes a duty on persons who design buildings or structures to be used as workplaces to ensure, so far as is reasonably practicable, they are designed to be safe and without risks to the health of persons using them. As this duty only came into effect on 1 July 2006, WorkSafe considers that it is premature to consider the need for further specific duties on designers in relation to particular hazards.

Guidance material has been developed, including the guide *Designing Safer Buildings and Structures*, which includes a recommended process on hazard identification and risk management in design.

Penalties

Comment

Requests were made for clear definition/explanation to duty holders on potential penalties associated with breaches of the OHS Regulations and the Act and how penalty units apply.

WorkSafe response

The RIS outlined how offences were determined and penalties allocated for the Regulations (see section 4.14 of the RIS). Penalties (given in "penalty units") for failure to comply with a regulatory duty or obligation are stated at the foot of the provision in the OHS Regulations unless the provision sets out the way in which a person's duty or obligation under the Act is to be performed, in which case an "Act compliance" note is stated at the foot of the provision. "Act compliance" notes are explained in regulation 1.1.7 of the OHS Regulations. Failure to comply with a duty or an obligation under a section of the Act referred to in an "Act compliance" note is an offence to which a penalty applies. A regulation with "Act compliance" at the foot will only be prosecuted as an element of an overarching Act duty breach, not as a stand-alone breach of the regulations.

"Penalty unit" is defined in the *Sentencing Act 1991*. The term is also included in section 38 of the *Interpretation of Legislation Act 1984*, meaning the term is of such broad usage that it does not need to be defined in any other piece of legislation. The actual monetary value of a penalty unit is never set down in regulations, primarily because the value changes. (The value of a penalty unit as from 1 July 2007 will be \$110.12)

Consultation on the Regulations

Comment

A number of submissions by stakeholders who had participated in the stakeholder reference group meetings expressed appreciation for the opportunity provided to participate in the review and express their views during the process. Comment was also received about the professional and productive manner in which WorkSafe conducted the regulation translation process.

One submission criticised the consultation process in relation to the new regulations for Construction, arguing that the public comment period had been restricted to the beginning of the year coinciding with the holiday break and the busy start-up period after Christmas. It was further claimed that WorkSafe had not made direct contact with builders and that its appalling record in consultation is ongoing. Another respondent commented that there had been insufficient time for response.

There was also comment that there was no real consultation during the development of the proposed OHS Regulations regarding the proposed provision setting out how health and safety representatives (HSRs) are to be involved in consultation.

WorkSafe response

As discussed in the introduction section above, the formal public comment process was preceded by a comprehensive consultation process that involved over 100 meetings with stakeholders between October 2005 and November 2006. More than 70 members of stakeholder organisations participated in those meetings. In addition a dedicated website provided stakeholders with access to key documents, including drafts of regulations. The proposed Regulations and RIS were released for public comment on 20 January. The public comment period ran for 39 days rather than the minimum 28 days required by law.

WorkSafe undertook extensive consultation with stakeholders on the proposed Construction Part of the Regulations prior to its release for public comment. Ten organisations representing employers and employees in the construction industry participated in the stakeholder reference group for the Construction Part. In addition a number of employers, including smaller and larger builders, were invited to attend focus group meetings to provide views that would assist in analysing the costs and benefits of the proposals through the regulatory impact statement process.

As was the case with all overarching policy issues, it was agreed with stakeholders that consultation on the proposed provision clarifying the role of health and safety representatives would be discussed in the overarching Stakeholder Reference Group meetings. A draft provision was tabled following review by the Office of the Chief Parliamentary Counsel. A request was made to reconvene the "General provisions sub-group" so that unions and employer representatives could hear from each other. This meeting occurred on 20 September 2006. Both employers and unions put their positions and WorkSafe agreed to consider all the points.

Guidance Material

Comment

Unions raised the lack of progress in the development of new or revised Compliance Codes and other supporting guidance. They argued that for a number of hazard chapters, large numbers of important issues/provisions were not included on the basis that they would be included in a Compliance Code. This has caused them some discomfort for two reasons: it may be potentially a long time before the codes and other material are developed and implemented; and already the original undertaking to include these matters in Compliance Codes has shifted to "Compliance Codes or other guidance material". They argued that such items must be assessed for re-inclusion in the Regulations to ensure that commitments on harmonisation are delivered.

A number of requests were made by employers and employer groups for guidance material to support specific issues.

WorkSafe response

WorkSafe continues to work with stakeholders on identifying the appropriate form and content of guidance material. WorkSafe acknowledges that progress has not been as quick as originally planned for two reasons: first, the need to give priority to the making of the consolidated Regulations; and second, initial concepts for the guidance being rejected by stakeholders.

Guidance material to support the new Regulations will be available on WorkSafe's website by 1 July 2007.

3. Specific Comment on the OHS Regulations

Chapters 1 & 2 - Preliminary, General Duties and Issue Resolution

Definitions

Comment

There were suggestions for some definitions to be re-located to that part of the Regulations dealing with the subject matter rather than being located in Chapter 1.

WorkSafe response

Most definitions remain in Chapter 1 (regulation 1.1.5). This provides a central location to find out if a term used in the Regulations has been defined. If a term is only referred to in one particular regulation, its definition is located with it.

Comment

Some submissions proposed that definitions should be included for "hazard" and "risk".

WorkSafe response

The ordinary dictionary definition will apply. The terms are used in the Act and not defined there. The terms have not been defined in the Regulations as it may inadvertently narrow their meanings.

Comment

There is a need for a definition of "reasonable" as it has appeared in a number of different ways throughout the regulations without clear meaning i.e. "reasonable time", "reasonable request", "reasonable inquiries".

WorkSafe response

The ordinary dictionary meaning (and any judicial interpretations) of "reasonable" will apply.

Comment

Amend definitions – "administrative controls", "engineering control", "personal protective equipment", "hazardous manual handling", and "reviewable decision".

WorkSafe response

WorkSafe believes the definitions of "administrative control", "engineering control", "personal protective equipment" and "hazardous manual handling" are sufficiently well understood by employers in the relevant industries. The definition of "reviewable decision" for the purposes of the regulation is set out in regulation 6.3.1.

Comment

There should be a definition of "direct supervision" and "incorporated documents".

WorkSafe response

The relevant provisions in Part 3.6 (High Risk Work) provide clarity on "direct supervision" both in relation to employers and the person conducting the training and include direction and monitoring of the trainee.

Regarding "incorporated documents", Part 1.2 sufficiently describes these documents. It also follows standard drafting across the statute book.

Comment

Two emergency service organisations requested that the definition of "emergency service employee" cover all personnel, both permanent employees and volunteers. They argued that a number of emergency services have many volunteers and to exclude these volunteers from the definition and therefore the exemptions prescribed for emergency service employees under the Confined Spaces and the Prevention of Falls Parts would mean that they would have to operate differently when

attending the same incident as permanent personnel. They argued that this could compromise safety.

WorkSafe response

The definition of "emergency service employee" in the previous regulations does not have the effect of extending employers' duties owed to employees to volunteer members of the emergency services. Regardless of whether the definition in the Regulations refers to "personnel" or "employees" this cannot change the status of volunteers under the Act.

Emergency services employers have duties under section 23 of the Act to persons other than employees, including volunteers. It is an operational matter for employers to decide how to manage health and safety when they have both paid and unpaid personnel. While there are different duties to each, this does not mean employers are required to apply different standards.

Comment

A number of comments recommended the adoption of the definition of "confined space" in AS/NZ 2865 to align with other jurisdictions. In particular, coverage of stored liquids was proposed.

WorkSafe response

Neither the Australian Standard nor the National Standard was settled at the time of drafting and the direction the Australian Safety and Compensation Council (ASCC) was taking in relation to the scope of the National Standard status was unclear. Without a national decision, WorkSafe's position was to translate the Victorian regulations and maintain their scope.

Stored liquids are not included in the definition because this would capture spaces not normally considered "confined spaces", e.g. ponds and dams, where the risks would not justify the specific requirements of the confined spaces regulations and can be controlled by other measures.

Comment

There was comment that "manufacture" should be defined in relation to hazardous substances.

WorkSafe response

The term "manufacture" was not defined in the previous OHS Act, the current Hazardous Substances Regulations, the *National Model Regulations for the Control of Workplace Hazardous Substances* (NMR) or the new Act. The ordinary dictionary meaning (and any judicial interpretations) of "manufacture" will apply.

Comment

One submission proposed that the definition of "hazardous substance" establish a hierarchy of the ASCC classification instruments referenced in the definition.

WorkSafe response

The definition of "hazardous substances" in the Regulations is a translation of the definition in the previous Hazardous Substances Regulations but updated to refer to the Hazardous Substances Information System (HSIS) instead of the *List of Designated Hazardous Substances*. The intent of the definition remains unchanged. The introduction of a hierarchy in the definition is inappropriate and would be inconsistent with the definition in the NMR.

Comment

One submission believed the definition of "asbestos-containing material" must be changed to: "Any material containing asbestos (other than plant in which asbestos is fixed or installed)" on the basis that any material containing asbestos presents the same risks to workers and the public.

WorkSafe response

The Regulations contain many provisions that make reference to "asbestos" which is intended to capture asbestos in any form (i.e. any material which contains asbestos). The definition of "asbestos" has been amended to make this clear. The amended definition of "asbestos" provides clarity that the term covers any material or object, whether natural or manufactured, that contains asbestos. The term "asbestos-containing material" is therefore appropriately defined in terms of manufactured materials containing asbestos.

Comment

Definition of "object" should be amended to include "packaging".

WorkSafe response

The definition of "object" is sufficiently broad to encompass packaging. The regulation targets the issue in general terms because the duty holder must consider reducing the risk by "changing the objects used in the task".

Comment

It is not clear if audiometric testing and audiological examinations are included in the definition of health surveillance, so there is confusion over who must pay.

WorkSafe response

Audiometric testing and audiological examination are intended to be covered by the definition of "health surveillance". The definition has been amended to make this clear. This therefore clarifies that the audiometric testing and audiological examination is at the employer's expense.

Comment

The definition of "temporary access equipment" will lead to confusion and is unnecessary. The equipment is covered in other definitions and, by its nature, the system of work is temporary.

WorkSafe response

Inclusion of this definition clarifies that the items are covered and avoids such equipment being inadvertently excluded under the hand held or manually powered plant provision.

Comment

The definition of "industrial lift truck" should specifically exclude tractors with or without attachments so there is no misunderstanding in the farming community in relation to licensing for forklifts.

WorkSafe response

The definition for "industrial lift truck" along with the definition of "tractor" makes it clear that they are separate.

Comment

The definition of lift should be specific enough to cover the total lift installation not just the lift car, i.e. ancillary equipment such as lift doors.

WorkSafe response

The lift is the entire unit including the lift doors. This definition is in line with the definition in the National Standard.

Consultation provision

The proposed provision (regulation 2.1.5) prescribing the procedure on how to involve health and safety representatives (HSRs) in consultation elicited more comment from employer organisations and individual employers than any other issue. Employers and employer organisations were keen for the provision to be removed completely.

Unions, health and safety representatives and union members felt the provision did not go far enough and proposed further amendments to assist the HSRs in their roles representing their members.

Comment

Employers and employer organisations submitted that the provision is unnecessarily prescriptive, restrictive, unworkable, particularly in multiple work sites, and is unenforceable. They argued that it undermines existing consultation arrangements and discourages workplace consultation. The requirements of the Act were regarded as sufficiently clear and prescriptive and therefore the regulation was unnecessary.

It was also argued that the provision is out of power, duplicates the Act and promotes delegation to the HSR of the employer's duty to consult. It was also argued that the provision imposes a new duty, thereby creating new offences.

It was further argued that the regulation creates an unnecessary level of bureaucracy and increases the regulatory burden. It was claimed that there is no demonstrated need for the regulation and the RIS did not assess the cost of it. Employers preferred non-statutory guidance material only to support the duty in the Act to involve HSRs in consultation.

Some employers believe that the provision has the potential to be abused for gaining entry to workplaces on non-OHS issues.

WorkSafe response

The regulation does not create a new and separate duty to consult with HSRs. The regulation is designed to add clarity to the existing requirement to "involve" an HSR (where there is one) in consultation imposed by section 36(2) of the Act. It clarifies that an HSR must be involved in active participation during the whole consultation process. It makes clear that an employer cannot exclude an HSR nor bring the HSR in at some late stage of the process. It removes any misunderstanding about what are the minimum requirements for consultation in those workplaces that have HSRs.

The provision is consistent with current Government policy to encourage and support HSRs and has prepared with the involvement of the Office of the Chief Parliamentary Counsel.

HSR powers and entitlements are granted by the Act. Consultation with employees through HSRs is an employee entitlement created by the Act and not the regulation. The regulation is consistent with the overarching objectives of the Act and does not extend beyond the requirements of sections 35 or 36. It grants HSRs no more powers or entitlements than those granted under the Act.

The regulation only affects those workplaces that have HSRs – that is, workplaces where the employees have decided that they wish to be represented by elected HSRs. (WorkSafe estimates between 70 and 80 per cent of workplaces do not have HSRs.)

The Act requires employers to consult HSRs and for such consultation to be effective, WorkSafe believes that consultation must provide the HSR with the opportunity to represent their designated work group (DWG) in those matters that are the subject of the consultation. This requires that HSRs be consulted in their capacity as an elected representative, which the regulation seeks to facilitate.

The Act contains safeguards against the prospect of HSRs abusing their powers under the Act. WorkSafe will respond to allegations or complaints of abuse of an HSR's power. An alleged breach of the regulation would be viewed on a case by case basis in line with WorkSafe's Enforcement and Prosecution Policy.

The Act provides (section 36(3)) that if the employer and employees have agreed procedures for undertaking consultation, the consultation must be in accordance with those procedures. The agreed procedures must comply with the Act's requirements for how employees are to be consulted, including the involvement of HSRs. Workplaces that have procedures for consultation who do not meet the requirements of the regulation will need to review their procedures to align with the regulation.

WorkSafe understands the requirement most likely to create a burden for employers is that employers provide information to HSRs before the same information is given to employees. It may not be practicable in all circumstances; hence the qualifier of "reasonable practicability" is expressly applied to this requirement. Employers are still able to consult with HSRs and employees directly and at the same time.

This provision was not costed in the RIS as any costs arising from compliance with the duty to consult with HSR are attributable to the Act and not the regulation and any costs arising from the requirements of sub-regulation (b) and (c) to (d) are considered negligible (see section 5 of this paper which summarises specific comment on the RIS).

WorkSafe maintains that an employer already effectively involving an HSR in consultation would be well placed to comply with this regulation.

Guidance material will support the regulation.

Comment

The regulation does not assist employers/employees in those workplaces that do not have HSRs.

WorkSafe response

The regulation does not apply to workplaces that do not have HSRs. WorkSafe is of the view that section 36(1) of the Act is sufficiently clear about how employees are to be consulted.

Comment

Some pro forma responses by workers stated that HSRs should be consulted first in relation to health and safety issues in the workplace.

WorkSafe response

Regulation 2.1.5(2)(b) allows for the provision of information to HSRs before employees where reasonably practicable. This provision, along with the other provisions of regulation 2.1.5, assists HSRs to fulfil their role to represent members of their DWG.

Comment

Unions requested an addition to the regulation to allow HSRs time to consult with their DWG and the removal of the reasonably practicable qualifier in relation to the provision of information to the HSR prior to employees [regulation 2.1.5(2)(b)].

WorkSafe response

It is implicit within the regulation that the employer allows reasonable time for HSRs to consult with DWG members to adequately represent them and to ensure the consultation is effective.

The qualifier is for circumstances where it is not practicable to provide the HSR with information before other employees.

Independent contractors

Comment

One employer group argued that having some regulations making specific reference to independent contractors as well as having regulation 1.1.8 created some confusion. They argued the RIS stated that the inclusion of independent contractors would be addressed by a declaratory provision (i.e. regulation 1.1.8) and therefore recommended those other regulations referring to independent contractors be removed and replaced with notes that cross-reference to regulation 1.1.8.

WorkSafe response

The Act extends the meaning of employee under sections 21 and 35 such that employer duties owed to employees under those sections are also owed to independent contractors (and their employees) over matters that the employer has or would have control. Regulation 1.1.8(1) is declaratory in nature and makes it clear that a provision of the OHS Regulations that sets out a way that the employer complies with a duty under section 21 or 35 of the Act in relation to employees *extends* to the employer's duty under that section to an independent contractor engaged by the employer and any employees of the independent contractor.

There is no equivalent extension of the meaning of "employee" under the Act in the case of health monitoring duties. (Section 22 of the Act is the relevant section that imposes a duty on an employer to monitor the health of employees.) Consequently the Regulations need to specifically require employers to provide health surveillance for independent contractors (and their employees).

Thus regulation 1.1.8(1) clarifies that for those regulations made under sections 21 and 35 of the Act, employer duties owed to employees extend to independent contractors engaged by the employer. Other regulations, generally concerning health surveillance, are not covered by those sections and so must make specific reference to independent contractors.

Comment

Some submissions sought clarity on the practical impact of health surveillance obligations being owed to independent contractors, in particular in relation to principal contractors' duties. It was recommended that WorkSafe develop a Guidance Note on health surveillance in relation to contractors to clarify where responsibility lies when a contractor employs their own staff.

WorkSafe response

The Regulations do not change the situation that existed under the previous OHS Regulations that required health monitoring of employees to be undertaken in prescribed circumstances. These obligations have been translated. Similarly, the Regulations incorporate only health monitoring regulatory duties already owed to independent contractors under the previous regulations, such as asbestos, lead and mines.

The situation in asbestos depends on the work being performed. Asbestos removal work can only be performed by a licence holder or an employee of a licence holder. Therefore, in practice, the obligation to provide independent contractors carrying out asbestos removal work with health surveillance will be limited to an independent contractor who is not provided with health surveillance under the regulations (e.g. self-employed licence holder). Health surveillance required for Division 8 activities is owed to independent contractors.

The previous Noise Regulations excluded independent contractors from health monitoring provisions and Hazardous Substances Regulations were silent on the issue, and therefore there is no duty placed on the employer.

Where an employer owes a duty to provide health surveillance to independent contractors this is made clear in the relative health surveillance provision and the matter of control is relevant. Regulation 1.1.8(2) provides that where an employer's duty is extended to independent contractors (and employees of the contractor), the duty extends in relation to matters over which the employer has control or would have control if not for any agreement purporting to limit or remove that control.

Provision of information, instruction and training

Comment

Some submissions contained recommendations that this regulation should reflect the duty in section 21(2)(e) of the Act to also provide supervision to employees exposed to the risk and should not limit the general duty under section 21(2)(e) to provide information, instruction and training, for example in relation to a substance that is not a hazard.

WorkSafe response

Regulation 2.1.2 refers to particular aspects of the provision of "information, instruction and training" in relation to specific control measures and are translated from the previous Regulations. They did not include supervision as they deal with the nature of the hazard and risk, and the need for, and proper use and maintenance of, control measures.

The regulation does not limit the employer's duty under the Act. The Act applies if something is not a "hazardous substance" as defined in the Regulations but there is a risk - the employer must comply with the duties of section 21(2)(e).

Comment

Unions argued that the Hazardous Substances Part should include provisions setting out specific requirements for information, instruction and training in relation to hazardous substances, such as on the role of MSDS and emergency procedures.

WorkSafe response

The Regulations have consolidated a number of provisions that were common in the previous OHS Regulations. Information, instruction and training duties were common to a number of the previous Regulations and consequently have been consolidated into a general duty in Chapter 2 of the Regulations. That duty covers risk associated with hazardous substances and therefore requires an

employer to provide each employee exposed to the risk with information, instruction and training on the nature of the hazard and measures to control the risk.

Health surveillance reports

Comment

A submission expressed concerns about privacy and confidentiality issues relating to health surveillance records/reports.

Privacy and confidentiality issues were considered during stakeholder engagement. Regulation 2.1.4 requires that reports of health surveillance are to be confidential. Section 69 of the Act also sets out conditions under which an HSR may have access to medical information.

Issue resolution procedures

Comment

Some employer organisations recommend that "issue" be defined. They argued that uncertainty is created if there is no clear guidance. It was also argued that it enables an HSR to disrupt the employer's operations by claiming there is an OHS issue.

WorkSafe response

The term is used in the Act and not defined there as it is intended to have a broad meaning to cover any "health and safety issues" as outlined in section 73. WorkSafe is not seeking to define the term in the regulation as it may inadvertently narrow its meaning or cause inconsistency between workplaces with an agreed issue resolution procedure based on section 73 of the Act and workplaces without an agreed procedure which use the default issue resolution regulations.

WorkSafe's view is that current guidance material on Part 7 of the Act amply explains the term "health and safety issues".

There are safeguards in the Act to deal with a situation if an HSR uses the issue resolution procedures to disrupt the employer's operations. If an issue is not resolved within a reasonable time, the parties can ask an inspector to enquire into the issue (section 75). Section 56 allows an employer to apply to the Magistrates' Court to have a HSR disqualified on the grounds the HSR intended to cause harm to the employer.

Comment

Unions and HSRs argued for an additional provision to enable HSRs at any time in the resolution of an issue to consult with any member of their work group who may be affected by the issue.

WorkSafe response

An additional provision in the regulations is not appropriate. Part 7 of the Act deals with the role and powers of HSRs. Consulting with the members of the DWG is a fundamental part of the role of an HSR. Although the Act does not have an explicit provision enabling HSRs to consult with the DWG, the intent of sections 58, 69 and 73 is that HSRs consult with members of their DWG.

Comment

Suggested amendment from two respondents to regulation 2.2.2(3) to allow employees other than the HSR to represent an employee in the resolution of an issue.

WorkSafe response

Section 73 of the Act requires an HSR, where there is one, to attempt to resolve health and safety issues. Sub-regulations 2.2.2(3) & (4) provide for representation by an HSR, a deputy HSR or an employee/s where there is no HSR. The election of representatives in addition to HSRs and deputy HSRs is inconsistent with Part 7 of the Act. Furthermore it would duplicate effort, undermine the role of the elected HSR (and the deputy HSR) and cause confusion.

Comment

Unions requested regulation 2.2.2(4) (which enables employees to nominate an employee to act on their behalf when there is no HSR) be amended to include where employees of a contractor do not

have an HSR they may nominate the HSR of the host employer, to ensure greater consistency with the broader representation provisions in the Act.

WorkSafe response

The Act provides that contractors may be represented by the HSR if they are part of the DWG. HSRs can only use their powers in relation to their DWG.

Comment

It was suggested that regulation 2.2.2(5), which allows the parties to seek assistance from an employee or employer organisation, might be seen as a way of circumventing the limitations placed on authorised representatives under Part 8.

WorkSafe response

The provision does not give employees the right to call in a union without the employer's agreement. The words "may seek the assistance" replace "call in" in the previous regulations to make this clear.

Comment

A union requested an amendment to the regulation to allow HSRs, Health and Safety Committees or employee parties to seek the assistance of any person in any capacity in the resolution of an issue.

WorkSafe response

It is outside the scope of the regulation. HSRs wishing to seek assistance from any person would rely on their powers under section 58 of the Act rather than the issue resolution regulations.

Comment

A number of employers and employer associations suggested regulation 2.2.3(1), where an employee raising a health and safety issue is required to report it to the HSR, be amended to include "if reasonably practicable" as currently it is unworkable, unnecessary and unfairly excludes employees affected by an issue from the process of resolving it.

WorkSafe response

Regulation 2.2.3(1) does not require that issues are reported firstly or only to the HSR (it may not always be practical). To clarify this regulation 2.2.3(4) allows for the reporting of the issue to the employer or any other person.

The intent of the regulation is to ensure that the HSR is informed of an issue and can be involved in its resolution. This approach is consistent with the principle in section 4 of the Act that employees be encouraged to be represented in relation to health and safety issues.

Comment

Regulation 2.2.3(3) includes the words "if the steps are reasonable in the circumstances". These words create confusion and are open to interpretation. A variety of amendments were proposed including the previous wording, "An employee may take all steps that are necessary" to report an issue.

WorkSafe response

Some amendment of the wording was necessary to ensure that it is in line with the language of the new Act.

Comment

One submission found the duty on the employer to set out in writing the details of the issue and its resolution to the "satisfaction of all parties" was ambiguous and could cause confusion. It was proposed that this be amended to either the satisfaction of "the party requesting" or "the original party who raised the issue".

WorkSafe response

"All parties" is translated from the previous regulations and means the employer (or representative) and the employees involved in the resolution of the issue (or their representative/s). Usually, the HSR or an employee representative will make the request to document the process. The employer must provide this record and ensure that the other party is satisfied with it. This is not an onerous task and

protects the process.

To ensure transparency and the integrity of the process, all the parties (such as the HSR or employee representative) and not just the person who made the request should be able to see the document and be satisfied that it captures their view of the issue and how it was resolved. In the unlikely event that one employee out of a group of employees involved in the resolution requests the written document, they would all need to be satisfied, not just that employee.

Comment

One submission requested retention of two factors from the previous regulation in the procedure for resolving issues in regulation 2.2.4(2) – whether the hazard or risk can be isolated; and whether the environmental monitoring is desirable.

WorkSafe response

At the time of drafting, it was considered the wording of the previous regulation had the potential to confuse duty holders and to undermine section 20 duties of the Act because it seemed to provide an alternative way of controlling risks to section 20. The provision was restructured to make it clear that it is about ensuring timely resolution of issues. Both union and employer stakeholders agreed to the restructured provision.

Comment

It was proposed that there should be an employer duty to train the employer representative as they might evade their duty under section 32 of the Act (not to recklessly endanger persons at the workplace) due to ignorance of the legislation.

WorkSafe response

This is addressed in the Act. Section 22(2)(b) places a duty on employers to have suitably qualified person(s) to advise them on employee health and safety. Section 73(2) places a duty on the employer to ensure the representative has an appropriate level of seniority and competence.

Whether a person breaches section 32 is dependent on if they acted recklessly, rather than any ignorance of the legislation.

Part 3.1 – Manual Handling

There was much comment on the removal of risk assessment from the Manual Handling Part of the Regulations. Broadly, stakeholders were divided evenly on the matter. See discussion under "Overarching Policy Issues and General Comments" heading above.

Duties of designers, manufacturers, importers and suppliers

Comment

One submission considered the duties of designers, manufacturers, importers and suppliers should be retained as manual handling is a significant cause of injury in the workplace and thereby merits special emphasis. It was argued that precedents are in the Plant, Confined Spaces and Hazardous Substances Parts of the Regulations.

WorkSafe response

The duties on designers, manufacturers and suppliers of plant have been removed as they duplicate the general duties placed on those duty holders by the Act.

A note has been inserted under regulation 3.1.2 summarising the duties on designers, manufacturers and suppliers of plant under sections 27-30 of the Act and specifically mentions musculoskeletal disorders.

Where existing Regulations impose specific requirements on designers, manufacturers and suppliers, they have been translated, such as prescribed labels and material safety data sheets in the Hazardous Substances Part.

Hazard identification

Comment

A submission by an individual recommended that the first regulation be an application provision establishing that the part applies only to hazardous manual handling and the second regulation to require the identification of prescribed factors currently set down in sub-regulation (4) of the risk control provision (i.e. regulation 3.1.2). The risk control duty would not specify factors.

WorkSafe response

Both the National Standard and existing regulations are based on identifying hazards that may arise from manual handling providing a broader application than that recommended by the respondent.

The factors to be considered when identifying hazards and controlling risk are better incorporated into the risk control duty to ensure they are clearly addressed. The hazard identification provision requires employers to identify tasks undertaken (or to be undertaken) involving hazardous manual handling.

A note has been inserted at the foot of the hazard identification duty to make it clear that hazardous manual handling is a defined term.

Comment

An employer noted that grouping tasks by "class" for hazard identification is a positive and practical approach and an improvement to the previous regulation.

WorkSafe response

The previous Manual Handling Regulations allowed for hazard identification for a class or type of tasks. This was a translation.

Comment

Unions supported the retention of triggers for hazard identification in the regulations.

WorkSafe response

As the intention is to focus on risk control, the triggers for hazard identification and risk assessment have been translated into triggers for the review of risk control in the Manual Handling Part where appropriate, as with the other parts. The introduction of a new task still requires the identification of any hazardous manual handling associated with it.

Risk control and record-keeping

Comment

The hierarchy of control should be changed so that the "system of work" is not given equal importance as the other forms of risk listed because it is more an administrative control.

WorkSafe response

"System of work" covers higher order controls including job design aspects such as work rates, pacing, work flow, along with administrative controls such as job rotation and team lifting.

Comment

One union proposed patient lifting equipment should be mandatory in all hospitals and aged care institutions.

WorkSafe response

Given the diversity of hazardous handling tasks in workplaces, the Manual Handling Part does not mandate the use of any specific equipment as a risk control measure. Instead, the Regulations prescribe the hierarchy of control. Application of the hierarchy to patient lifting tasks may determine that lifting equipment is a suitable and appropriate control. Indeed, because of a range of programs carried out by both the Department of Human Services and WorkSafe, patient lifting equipment is widely used as a control measure in Victoria.

Comment

One employer suggested that removal of the risk assessment provision means all hazards need to be controlled. Expectations of HSRs and employees may be for a risk control action plan for all identified hazardous manual handling tasks, creating an unreasonable burden for employers.

WorkSafe response

There is no obligation to prepare risk control plans every time a manual handling risk is identified. The obligation is to control the risk.

Comment

A submission by an individual discussed the removal of the requirement to conduct a risk assessment and the subsequent removal of the duty to record and retain these results. It was argued that there are many cases where the risk control measures will not be completed within 6 months of deciding what control measures are to be implemented. It was proposed there should be a written record of risk control measures regulation similar to that in the Noise Part.

WorkSafe response

Records are required in the Regulations where it is necessary to ensure health and safety outcomes or to allow others to discharge their duties. In the case of hazardous manual handling, the introduction of another record-keeping requirement is considered to be an unnecessary administrative burden to impose on businesses. It does not accord with the government commitment to reducing regulatory burden. (The noise provision is discussed under the "Part 3.2 – Noise" heading below.)

Comment

The Prevention of Falls Part requires that where a risk is controlled only by an administrative control, there must be a record of that control. There should be a similar record provision in the Manual Handling Part if they are relying solely on administrative controls.

WorkSafe response

While consistency of approach is sought where possible, it is also recognised that the nature of the hazard may require different approaches. WorkSafe's position therefore recognises differences in

approach to controls of specific hazards and WorkSafe does not consider it practical or beneficial to mandate the documentation of administrative controls for all hazardous manual handling.

Comment

A union believed that regulation 3.1.2(3) had "watered down" the existing requirement and that the provision should state that "the employer must not use information, training or instruction in manual handling techniques as the sole or primary means of controlling risks".

WorkSafe response

The provision is not watered down. The hierarchy for control measures for hazardous manual handling tasks has been reframed to be more consistent with other risk control hierarchies in the regulations. The provision maintains its requirement that information, training and instruction can only be used as the sole or primary means of controlling risks if the other higher order measures prescribed are not reasonably practicable.

Comment

It is not sufficiently clear in relation to when information, instruction or training can be employed to control risks.

WorkSafe response

A note has been added at the foot of regulation 3.1.2(3) that an employer must not rely solely or primarily on the use of information, instruction or training to control a risk unless none of the measures set out in subregulation (2) is reasonably practicable.

Part 3.2 – Noise

A number of employer groups and employers supported the Noise Part. Unions and a number of other respondents opposed the specific removal of risk assessment from this part.

There was also comment on the need for the Authority to have the power to grant exemptions from requirements under the Noise Part. (See comment under “Part 7.2 – Exemptions” heading below.)

Duty on suppliers of plant

Comment

The supplier only has a duty to obtain and provide the record of sound power on supply of plant. Suppliers should have an obligation to assess sound power levels if not obtained from the manufacturer in accordance with the National Code on Occupational Noise.

WorkSafe response

The Act places a duty on the supplier to ensure, so far as is reasonably practicable, that plant supplied to a workplace is safe and without risks to health. There is no duty on the supplier to carry out any testing of plant. Consequently, the duty on suppliers under the Noise Part is to obtain the record of sound power level and pass it on. This is consistent with the Plant Part which requires suppliers to provide information that is available.

Removal of risk assessment

Comment

A number of submissions argued against the removal of risk assessments for noise, including unions and some OHS consultants. They stated that noise assessments are necessary to: ascertain whether the noise exposure standard is exceeded, as people may have insufficient knowledge or experience about noise issues; effectively control noise, otherwise efforts are misdirected, wasting time and resources; and effectively plan for noise controls as noise sources need to be ranked in order of contribution.

WorkSafe response

Removal of mandatory risk assessment has been supported by a provision which requires determination of employees' noise exposure where there is “uncertainty” about whether the noise exposure standard is exceeded. If a workplace party has a reasonable belief that the exposure standard is exceeded, the employee's exposure would need to be determined.

WorkSafe is of the view that employers who are able to identify simple, effective and readily available noise control solutions, should be able to introduce these into the workplace without the need to conduct a noise assessment and incur unnecessary costs.

If the lower order control measure of hearing protection is being provided, the regulations set out what must be considered in the selection of appropriate hearing protection for employees.

Comment

OHS professionals were concerned that without risk assessments employers will obtain advice on suitable hearing protection from suppliers avoiding the need to engage occupational health and safety consultants who may also provide advice on other practicable noise control solutions.

Concerns about poor quality risk assessment reports are not a reason to remove mandatory risk assessment. Implementation of effective noise controls is best achieved by seeking to improve the competency of assessors.

WorkSafe response

Noise assessments are not the only avenue to enable the implementation of practicable higher order control measures. There are other strategies, not prescribed by regulations, which can be engaged in order to implement appropriate controls. In some instances, in order to comply with the risk control duty, employers may need to seek the advice of appropriately trained and knowledgeable persons on

assessing and ranking the severity of noise problems and to investigate and cost noise control solutions.

Comment

The price of a noise assessment every five years is insignificant against the cost of the simplest control measures and would provide an opportunity for employers to conduct a review of risk control measures and for OHS staff and HSRs to obtain expert advice on a range of OHS issues.

WorkSafe response

The Noise Part contains a duty to review risk control measures if one of a range of circumstances arises, without the limitation of a time frame. These include when there is a change to plant or systems of work which may result in exposure to noise above the standard; where there is an audiological report that an employee has suffered a hearing loss; or when a risk control measure has failed. This duty and the duty to determine exposure to noise if there is uncertainty that the noise exposure standard is or may be exceeded, negate the need for a five year assessment.

Comment

A measurement-based, regulatory risk assessment approach is needed for workplace noise. The particular properties of noise, such as the variations in sound level through a working day, make exposure measurement necessary. Requiring it also has the advantage of encouraging employers to prioritise and budget for noise suppression.

WorkSafe response

The complexity in dealing with noise exposure is addressed in the Noise Part. There is a provision requiring an employee's noise exposure be determined where there is uncertainty (based on reasonable grounds) about whether the exposure standard would be exceeded. The "uncertainty based on reasonable grounds" test is an objective one. In addition, noise exposure levels must be considered where hearing protection devices are being provided to control noise exposure.

Noise exposure standard and determination of exposure to noise

Comment

A union supported the expansion of the regulation to cover 12 hour shifts and include requirements for consultation with the HSR and employees to ensure the adequacy of the control measures used for the extended work shifts.

WorkSafe response

The Aeq8 (exposure level of 85 dBA over 8 hours) and C peak noise exposure standard, consistent with the national noise exposure standard, has been adopted.

The Victorian and national exposure standard refers to an eight-hour equivalent continuous A-weighted sound pressure level, Aeq,8h. This represents the amount of noise that a person is exposed to in the course of their daily work and is intended to include making adjustments to take account of extended work shifts.

Section 35 of the Act requires employers to consult when making decisions about measures to control health or safety risks at the workplace.

Comment

It was suggested that the noise exposure standard should take into account the number of sound peaks and their loudness, given that studies are showing that sudden impacts can be more harmful to the ear than their energy-equivalent in continuous noise.

WorkSafe response

This means a change would have to be made to the national noise exposure standard which is adopted in the Regulations, consistent with the exposure standard adopted by other jurisdictions.

Consideration of a change in the national exposure standard needs to occur at the national level. It is understood that review of the noise standard is planned in the near future.

Control of exposure to noise

Comment

An employer was concerned about mandatory compliance with regulation 3.2.4 (b). This part of the regulation is further stated in regulations 3.2.4 (c) and 3.2.4 (d). Paragraph (b) only gives an employer the ability to substitute or use engineering controls. It is not always possible to substitute or introduce engineering controls for maintenance activities.

WorkSafe response

Regulation 3.2.4 sets out the hierarchy of controls. Subregulations 3.2.4(c) and (d) allow for the use of administrative controls and hearing protection where an employer has implemented the higher order controls so far as is reasonably practicable. "Reasonably practicable" is set out in section 20(2) of the Act. It recognises that higher order controls cannot be implemented in some circumstances.

Comment

Provision of hearing protectors should not be considered a noise control measure. It should be a separate provision to the hierarchy of control measures.

WorkSafe response

The provision of hearing protection is generally recognised by occupational health and safety practitioners as a control measure to ensure noise exposure is below the exposure standard. Due to the limitations of hearing protectors, it is appropriately placed as the last resort, only to be implemented where higher order controls have failed to control the risk adequately.

Written record of risk control measures

Comment

An employer group viewed it as inappropriate to maintain a requirement for a written record of control in a set of consolidated Regulations which do not require the documentation of any other risk controls. They argued that the provision was inserted in the 2004 regulations as a compromise to removing the requirement for a written control plan.

WorkSafe response

A written record is only required where an employer has identified a control measure in accordance with 3.2.4(1) (a) and (b) but it is not reasonably practicable to implement it within 6 months. It is a record of the necessary actions for implementation of the control and the timeframe in which it will be done. The Noise Part is the only part of the Regulations that requires a record of control measures intended to be implemented. This written record was a requirement under the previous Noise Regulations and it was inserted into those Regulations to assist workplaces in some circumstances to move to higher order controls rather than rely only on the use of hearing protectors.

Review of risk control measures

Comment

The regulations must adequately describe when re-assessment is conducted and in the absence of other issues triggering a review of the noise hazard and control, a review of adequacy of noise exposure control measures should be required every 5 years.

WorkSafe response

The review of risk control measures provisions in regulation 3.2.9 are extensive. For example, a review is required before any change to plant or a system of work that could result in exposure above the exposure standard, or when requested by an HSR. For many workplaces, a review is likely to occur more frequently than 5-yearly. Review when none of the prescribed circumstances applies is considered unnecessary.

Comment

Suggested changes to wording in regulation 3.2.9 to clarify intention to bring about exposure to below the exposure standard.

WorkSafe response

The provision has been amended to improve its clarity.

Audiometric testing and audiological examinations

Comment

Audiometric testing is still required, but this is testing for injury without dealing with the hazard, which is the fundamental ethos behind Victorian OHS Regulations.

WorkSafe response

Audiometric testing is required where there is a reliance on hearing protectors to control noise exposure. An audiological examination must be provided by the employer if the results of two consecutive tests show a prescribed reduction in hearing loss. This in turn is a trigger for a review of the risk control.

Comment

A suggestion was made to include a provision to cover lower losses in hearing. It was argued that the adoption of the audiological test method and referral criteria of AS1260.4 would allow smaller changes in hearing level (both temporary and permanent) to be detected and trigger action to review controls at an earlier stage.

WorkSafe response

The referral criteria for audiological examinations are a translation of existing provisions. Testing at 3,000, 4,000 and 6,000 Hz is considered to be most sensitive and appropriate for detecting noise-induced hearing loss at the workplace.

Considering the errors associated with this audiometric screening and the purpose of the Regulations, WorkSafe is of the view that the criteria for referral of audiological examination are appropriate.

In order to address gradual hearing loss, there is a provision requiring the review of risk control measures if, for any reason, they do not adequately control noise exposure to below the exposure standard. This ensures that proactive action is taken before permanent hearing loss is incurred.

Comment

Another amendment was suggested to allow the HSR to be provided with previous test results for comparison. The HSR should be able to validate employer's decisions as to who is sent for audiological testing.

WorkSafe response

Section 69(2) of the Act only allows test results to be provided to HSRs with the consent of the individual, or if the results do not reveal the identity of the individual. Employees and employers both receive the results and the duty is on the employer to maintain those records for as long as is applicable. HSRs can receive aggregate results, which do not identify individuals, and can keep those as part of their HSR role.

Comment

The Regulations should require persons performing audiometric testing or audiological examinations to be competent and qualified.

WorkSafe response

The definitions for "audiometric testing" and "audiological examination" imply that a level of expertise is required to fulfil the requirements and ensure that the testing or examination is adequate and suitable.

Comment

The records of noise monitoring and noise dosimetry should be retained for 30 years.

WorkSafe response

Retention of records for 30 years has been restricted to hazards with a long latency period for the onset of disease, such as asbestos and hazardous substances which can cause cancers.

Part 3.3 – Prevention of Falls

Application of the Part

Comment

A variety of comments were received from employers, employer groups and other respondents about mention of the height threshold in regulation 1.1.5 and not in the specific Part. It was proposed that the definition be located in the Prevention of Falls Part or a footnote provided.

WorkSafe response

The Note to regulation 3.3.3 includes a brief definition and reference to the definition in regulation 1.1.5.

Comment

A union stated that the exclusions from the Part under regulation 3.3.1(1)(b) should be deleted as there is still an exposure to falls in the circumstances covered. It was also suggested that reference to the year of publication be removed from the AS 1657:1992 as specifying a publication year does not allow for re-publishing.

WorkSafe response

To change the application of the Prevention of Falls Part in this way would be a significant change in scope. Although the regulations do not apply in the instances listed under regulation 3.3.1 (b), employers still have a general duty under the Act to control the risk of all falls. This is specifically mentioned in the guidance material for the Prevention of Falls in Housing and General Construction.

Part 1.2 covers the use of incorporated documents in the Regulations and how the documents are to be amended.

Application to employers of emergency service employees

Comment

There was comment about the inconsistency in provisions relating to emergency service employers between the Confined Spaces and Prevention of Falls Regulations.

WorkSafe response

Extending the broader exemption in the Confined Spaces Part to the Prevention of Falls Part, is not consistent with translation and would be a significant change in scope.

Use of ladder as a control measure

Comment

An employer found the ladder requirement leaves doubt as to when and where a ladder may be used, and does not address the step platform that is now available. A step platform could possibly be regarded as a passive fall protection device.

WorkSafe response

Safe use of ladders is specifically mentioned in the guidance material for the Prevention of Falls in Housing and General Construction. Since March 2004, WorkSafe's advice on temporary work platforms (step platforms) is that they are considered passive fall prevention devices.

Comment

One submission said it should be specified that ladders be used in accordance with manufacturer's requirements.

WorkSafe response

WorkSafe does not wish to defer the employer's responsibility to ensure a ladder is used safely to the manufacturer's requirements, as they may vary in quality and detail.

Use of administrative control only

Comment

Two emergency service organisations argued that the requirement to record administrative controls before a task is undertaken during a response to an emergency is not practicable. It was also stated that it is not practicable to prepare safe work method statements (SWMSs) in accordance with regulation 5.1.9 to achieve compliance with regulation 3.3.6(1).

WorkSafe response

The application of the Prevention of Falls Part to employers of emergency service employees (ESOs) (regulation 3.3.2) now includes the record-keeping duty so far as is reasonably practicable, when their employees are undertaking prescribed activities.

WorkSafe considers that in most circumstances it will be reasonably practicable for ESOs to make such records, especially given that many of the activities undertaken at an emergency response are covered in training modules, standing orders, standing operating procedures, fire ground practices and generic risk assessments.

Regulation 3.3.6(4) is *only* relevant to employers undertaking high risk *construction work*, which requires the preparation of an SWMS. If the SWMS documents an administrative control for the risk of a fall, there is no requirement to make an additional record.

Emergency procedures

Comment

An employer believes the emergency procedure clause, requiring the establishment of emergency procedures where 2, 3, 4, or 5 of the hierarchy are used, will restrict persons working one-out on a scaffold deck, e.g., a painter or a finishing carpenter. Where a scaffold is complete or guard rails are in place, the risk is therefore removed. Specific emergency procedures for working at height should only be required to be documented when a person is using controls 3, 4 or 5.

WorkSafe response

The requirement to establish emergency procedures does not actually restrict any work from occurring. The emergency procedures are required to be established so that appropriate assistance can be provided in the event of a fall.

Threshold height

Comment

In one submission it was claimed there has been conflicting information over the past two years regarding the applicable height requirements for tilers and metal roof installers who assert that they can work 3 metres from the ground. It was claimed that the 3 metre allowance had been in WorkSafe literature in the past. They sought clarification on the requirement.

WorkSafe response

The height threshold of "more than two metres" has been in existence since the commencement of the Prevention of Falls Regulations in 2004 and applies to all work, regardless of the industry or type of work being carried out. This height threshold has been translated without change.

Victoria's Prevention of Falls in Housing Construction Code of Practice gives clear advice on this issue in regard to both tile and metal deck roofs with no exception. The advice is current and remains WorkSafe's policy until a review of that guidance is undertaken. The review is pending the finalisation of the National Code of Practice for Fall Prevention in Housing currently being developed under the auspices of the ASCC. This code is expected to be finalised by the last quarter of 2007.

If there is a risk of a fall of more than two metres, the risk must be controlled, so far as is reasonably practicable, according to the specific hierarchy of control in the regulations. If there is a risk of a fall of two metres or less, the risk must still be controlled according to the general duties of the Act.

Part 3.4 - Confined Spaces

A number of submissions discussed what should be in the definition of "confined spaces". See comment on this issue in the "Definitions" section above. Concern was also expressed about the removal of risk assessment, which is covered under the "Overarching Policy Issues and General Comments" section above. A variety of industry groups supported the Confined Spaces Part.

Application

Comment

An employer group supported the application provision giving primacy to the requirements of the Confined Spaces Part over the parts for plant, hazardous substances and carcinogenic substances but suggested broadening the range of parts to which that provision (regulation 3.4.1) would apply.

WorkSafe response

The provision was intended to address potential inconsistencies between the Confined Spaces Part and the other three parts. As no obvious conflicts have been identified, the provision has been removed from the Regulations.

Comment

Unions viewed the continued exemption for Emergency Services Organisations (ESOs) as too broad because it exempts ESOs from the whole regulation not just the administrative requirements (such as signage and entry permit requirements). It was proposed that "suitably trained and equipped" be added before the word "employee" to reflect the actual operation of this provision.

WorkSafe response

This issue was raised by stakeholders during the development of the Regulations (see section 5.5 of the RIS). While concerns about the current exemption are acknowledged, no compelling reasons were given to go outside the scope of the current regulatory review and no evidence was put that OHS standards were compromised. ESOs argued that removing the exemption could compromise their rescue obligations. Although the specific requirements of the Confined Spaces Part do not apply to ESO employers if their employees are undertaking a rescue from a confined space or providing first aid in a confined space, the duties of the Act still apply. ESO employers have obligations to ensure the health and safety of their employees when undertaking those activities.

Duties of designers and manufacturers

Comment

One submission suggested the regulations 3.4.3 and 3.4.4 for designers and manufacturers be combined under the one heading as the wording in each provision is identical; and that regulations 3.4.22(1) and 3.4.22(2) for emergency procedures and PPE also be combined.

WorkSafe response

The duties of designers and manufacturers as stand-alone duties reflect the structure of the Act. If the two regulations were combined simply for brevity, duty holders might incorrectly understand the combined regulation to mean that the duty is shared between the two parties.

The two provisions both deal with PPE in emergencies, but one is for PPE for dealing with unsafe levels of oxygen; the other is for PPE for dealing with harmful levels of contaminant. The provisions do not provide for the same PPE, or for the same hazards.

Signage

Comment

An employer group suggested the regulations be amended to include a requirement that signs be fixed to confined spaces at all times and noted the proposal was discussed several times during the stakeholder process.

WorkSafe's response

Some spaces are 'confined spaces' and remain so over time, but this is not true of many spaces. Whether or not a space is 'confined' depends on the circumstances at the time of entry and the activities undertaken in the space, and these can only be assessed accurately immediately prior to entry. For example, a space that is not a confined space under the regulations will become one if a person intends to enter it and use a petrol-powered tool that introduces contaminants (carbon monoxide) into the atmosphere. The regulations focus on the things that must be done immediately before entry into and work in a confined space.

A permanent label on a space may create a risk that persons enter unlabelled spaces believing that it is safe to do so. Because the nature of a space may change over time, a space permanently labelled may at some stage also not meet the definition. For these reasons, WorkSafe does not support the above proposal.

Entries into confined spaces

Comment

An employer proposed the regulations should provide exemptions from the need for "safe work methods for every entry" for those employers who have procedures including confined spaces entry permits (i.e. identification of control measures). It was also asked if licences are required for work in confined spaces.

WorkSafe's response

If the employer has appropriate procedures in place (including confined spaces entry permits that include appropriate control measures for identified hazards), then the employer should be in compliance with the regulations. The Regulations do not provide for exemptions because each space must be identified as a confined space before each entry.

In relation to construction work in a confined space, any confined space entry permit that covers the information required to be included in a safe work method statement (SWMS) would ordinarily constitute compliance. (See also discussion of SWMS under the "Part 5.1 – Construction" heading.)

There is no requirement for "licences" for work in a confined space.

Communication and emergency procedures

Comment

One industry group proposed regulation 3.4.17(a) should mandate "continuous means to summon stand-by person" and "continuous means to immediately initiate rescue procedures". They also proposed that regulation 3.4.25 include the emergency procedures and their rehearsal, and the use, fit, inspection and storage of equipment related to rescue procedures. Another respondent queried whether a standby person was mandated under regulation 3.4.17

WorkSafe's response

"Continuous communication" is required under regulation 3.4.17(a), and therefore the requirement for the means of continuous communication is implicit; requirement for the means to immediately initiate the rescue procedures is also implicit in the provision. The way an employer can meet the duty for continuous communication is through the provision of a standby person. Employers can use alternative means to comply as long as all the elements of the regulation are met.

Rehearsal of emergency procedures is covered in regulation setting out the requirements for emergency procedures. The regulation setting out the requirements for information, instruction and training, covers the need for, and proper use of, measures to control risk; selection, use, fit, testing and storage of personal protective equipment; and emergency procedures.

Part 3.5 – Plant

Scope of the Plant Part

Comment

A number of submissions discussed expanding the scope of the regulations to include hand-held and manually powered plant. It was argued that this type of plant has a history of causing injury and that the Regulations should align with the National Standard on this issue.

Others expressed their support for the existing scope. It was argued that if the existing exclusion was removed there would be practical implications that would be wide-ranging and costly, particularly in relation to the documentation required to be provided by upstream duty holders.

WorkSafe response

The decision to maintain the exclusion of manually powered and powered hand-held plant from the Regulations was based on a number of factors, including cost benefit analysis. Both the 1995 RIS for the previous Plant Regulations and the RIS for the new Regulations arrived at the conclusion that the cost of expanding the scope to cover this type of plant would outweigh any likely benefits. (Note Expanding the scope of the Plant Part to cover manually powered and hand held plant was considered as an alternative in section 9.5 of the RIS.)

Manually powered and powered hand-held plant fall under the definition of “plant” in the Act and therefore regulated under the general duties of the Act.

Removal of risk assessment

Comment

One respondent believes the removal of risk assessment from the plant section has resulted in the omission of the need to take into account ergonomic considerations. These are not generally regarded as hazards so could easily be missed by only focusing on hazard identification and risk controls.

WorkSafe response

It is considered that ergonomic considerations would be taken into account during the hazard identification and risk control stages required of designers, manufacturers and employers.

Comment

A union noted the requirement to do risk assessments for plant will vary depending on the location, for example construction and manufacturing, and therefore provide different levels of protection.

WorkSafe response

A construction workplace is dynamic, with activities and conditions constantly changing. The requirement for a risk assessment (Safe Work Method Statement) applies to high risk construction work as defined in the Construction Part. Generally the complexity of the hazard or risk is less in a manufacturing setting, as the activities and conditions relating to the use of plant are not subject to such rapid change. Prescription of risk assessment has been removed from the Plant Regulations as it is not necessary in all cases. (See discussion of this issue in the “Overarching Policy Issues and General Comments” section.)

Design verification

Comment

Unions did not support the requirements for design verification in Victoria's previous Plant Regulations. They were concerned that the Plant Regulations which call for independence from the design process, allows design and verification to be done by the same organisation, rather than requiring an independent third party to prepare compliance statements as in the National Standard. They argued that the provisions of the National Standard should be implemented.

WorkSafe response

The role of the verifier is to ensure that the plant design meets the technical standards or engineering principles recorded by the designer. The onus to ensure the design is compliant with the Act and regulations is on the designer, not the verifier. The Regulations require the verifier to have the skills and experience to be able to verify the design. The verifier must not have participated in the design.

The use of an external verifier for every design could place considerable financial burden on the designer and, in some cases, it may not be commercially desirable to provide a design to a third party. Alignment with the National Standard on this matter would increase the compliance costs for designers without any perceivable gain in health and safety.

Comment

One submission noted design verification requirements were in both the proposed OHS Regulations and the EPS Regulations and suggested that design validation (i.e. the use of performance tests to prove that the design "works" and is "safe" should also be covered.

WorkSafe response

The regulatory requirement for design verification is regarded as adequate. Testing of plant is covered by the Act. Section 27 of the Act imposes a duty on designers of plant to carry out, or arrange the carrying out, of such testing and examination as may be necessary for the performance of the designer's duty to ensure that plant which is to be used at a workplace, is safe and without risks to health if it is used for the purpose for which it is designed. (The *Equipment (Public Safety) Act 1994* imposes a similar duty on designers of prescribed equipment.)

Agents who sell plant

Comment

Some submissions expressed support for the changes to the auctioneer's duty. One submission queried whether the change will impact the ability of agencies to auction seized plant without adequate documentation.

WorkSafe response

Regulation 3.5.17(2) allows for the supply of plant where the supplier is unable to obtain and supply the required information. In this case, the receiver must be advised that the plant should not be used as plant without that information.

Registration of items of plant

Comment

Some employer organisations questioned why the requirement to register pressure vessels (including boilers, compressed air receivers) continued. It was argued that the requirement creates paper work and fees for registration whenever renewal is due without adding to the safety of vessels.

WorkSafe response

Pressure vessels are high risk plant and have the potential to cause serious injury. Registration provides a means for WorkSafe to target compliance programs and to communicate with owners when safety issues arise with specific types of plant. Requiring the registration to be renewed periodically ensures that WorkSafe has up to date records.

In addition, this registration requirement is consistent with the *National Standard for Plant* and facilitates mutual recognition when plant is relocated to another jurisdiction.

The retention of a fee is to offset the costs involved with processing an application for registration. WorkSafe has extended the registration period from 3 to 5 years (see response under "Chapter 6 – Licensing and Registration" heading), which will reduce compliance costs for businesses over the life of the Regulations.

Industrial lift trucks

Comment

A submission suggested the regulation for industrial lift trucks should be expanded to include all forms of powered mobile plant.

WorkSafe response

The regulation for industrial lift trucks follows the National Standard and was incorporated for purposes of national consistency. Powered mobile plant is addressed in a separate regulation [regulation 3.5.34(5)].

Comment

One respondent suggested that because the regulations for warning devices on powered mobile plant and industrial lift trucks are essentially the same, only one is necessary as industrial lift trucks are a form of powered mobile plant.

WorkSafe response

The provision for warning devices on powered mobile plant is "if there is a risk". The provision for warning devices for industrial lift trucks is without qualification.

Electrical plant and electrical hazards

Comment

A union supported the "No Go Zone" requirements having a higher priority in the Regulations. It was argued that they should be expanded to specifically cover plant contacting with electricity. They further suggest regulation 3.5.39(c) be expanded so that permit to work systems include "avoiding contact with electricity".

WorkSafe Response

Regulation 3.5.39(b) provides a general duty regarding the safe use of plant near electrical hazards. The term "exposed to an electrical hazard" is sufficiently broad to include plant coming into "contact" with an electrical hazard.

Regulation 3.5.39(c) is not intended to require permit systems in all circumstances where plant may be potentially exposed to contact with electricity. The proposal to extend the regulation has the potential to require permit systems in circumstances where other controls are in place to address the risks of contact with electricity.

Other issues

Comment

One submission commented that trucks are still not covered by the Plant Regulations despite the high incidence of injuries associated with persons operating trucks.

WorkSafe response

The Plant Part does have some application to trucks. The duties of employers who use plant apply in relation to trucks being used in a workplace other than a public road. Therefore the Plant Part does not overlap or duplicate with other legislation that covers the operation of trucks on the road.

Comment

An industry group proposed amendment to allow for dual lifts (e.g. tower crane erection, precast element rotation) as a benefit to safety when elements can be modularised on ground or solid support, and placed in position.

WorkSafe response

The requirement is that no load be lifted simultaneously *so far as is reasonably practicable* by more than one piece of plant. This provision is consistent with the National Standard. The regulation is sufficiently flexible to enable dual lifting if it is not practicable for the lift to be achieved by one piece of plant. (Note dual lifting of loads requires the person(s) doing the lift to hold a high risk work licence for intermediate rigging.)

Comment

An industry group in commenting on regulation 3.5.40(3)(b)(iii) argued that simply providing a safety harness to be worn if plant is lifting or suspending people does not satisfy the hierarchy of control or duty of care. Emphasis should be on the adequacy of the attachment and competency of operatives.

WorkSafe response

The Regulations place obligations in relation to plant that is lifting or suspending people. These duties extend to the safety of attachments and competence of operators. Employers also have obligations to provide information, instruction and training on the proper use of risk control measures. Harnesses are one of four specific requirements imposed by regulation 3.5.40(3)(b) and these are mandatory irrespective of how other obligations are met.

Comment

Scaffolding occurs in various configurations in many areas of a workplace. Each is subject to varied access and security controls. Clarity was sought as to whether "unattended" means during normal operational hours, out of hours or both.

WorkSafe response

The regulation refers to preventing access to "people who would not ordinarily be using the scaffold". There is no time period specified and as such includes operational hours and out of hours.

Comment

One respondent suggested consistency with the CE marking requirements ("Conformité Européenne" or "European Conformity") of the European Commission Machinery Directive in the European Union where manufacturers are required to carry out self declaration for compliance with relevant Directives before the machine can be sold in the market. They claimed it has been used for electrical safety and electromagnetic compatibility compliance and proposed the principle be applied to machine safety.

WorkSafe response

The introduction of a system of compliance marking similar to that in the European Union is outside the scope of the current regulatory review. It is currently subject to discussion in the ASCC review of the National Standard but there is no agreement yet on whether such a scheme should be adopted or on any details of what such a scheme would comprise.

Part 3.6 – High Risk Work (HRW)

A number of employer and industry organisations and an employer stated support for the regulations for high risk work. Unions supported changes to the Certification provisions and the alignment with the National Standard.

Terminology

Comment

Two submissions believed that “High Risk Work” is wrong terminology. It was argued that the use of the term “risk” in this context is inaccurate and that “High Hazard Plant” or “High Hazard Work” would be more appropriate. It would also be more consistent with the current terminology used when referring to Major Hazard Facilities.

WorkSafe responses

The regulation adopts the term used in the new National Standard – that is, the *National Standard for Licensing Persons for Performing High Risk Work*.

Scope

Comment

One submission argued that scissor lifts are motorised plant/equipment, just like a forklift, and are very dangerous if not used accordingly. It was argued that they are widely used around construction sites and alleged that most people cannot prove competence. It was therefore proposed that operators should be licensed.

Another respondent was concerned that there is no licence for fall protection systems, in particular harness-based fall arrest systems. It was argued that this is a complex area and needs supporting documentation to assist the understanding of compliance.

WorkSafe response

The OHS Regulations implement licensing requirements in accordance with the agreed National Standard. That National Standard aims to facilitate the operation of a nationally uniform, competency-based licensing system for persons performing certain types of high risk work. Currently the National Standard does not identify the operation of scissor lifts as high risk work. Nor does it identify the operation fall protection systems as high risk work. The ASCC is currently reviewing if there should be further inclusions in the licensing scheme for high risk work. If there is national agreement to license the operation of scissor lifts or the operation of fall protection systems, subject to an adequate cost-benefit analysis being conducted at the national level, WorkSafe would implement that decision.

Comment

An employer group maintained riggers engaged in crane and/or hoist erection/dismantling/alteration must hold the appropriate operational competency or work in a composite crew with appropriately qualified persons.

WorkSafe response

The regulation is clear that the rigger's permission to operate a crane without holding a crane operator's licence is limited to only those operations that are “integral to the setting up or dismantling of the crane or hoist”.

Removal of exemption applying to primary production and forestry operations

Comment

An industry group opposed the removal of the current exemption for primary production in the certification of plant users and operators regulation, namely for forklift trucks. They argued that no evidence has been provided to show forklift accidents were caused or linked to the exemption. They did not believe that alignment with the National Standard was a sufficient reason for the change.

WorkSafe response

The latest iteration of the National Standard in 2006 includes the licensing of forklift operation in response to concerns that forklift certification was being treated inconsistently across jurisdictions. The new National Standard does not provide for the provision of an industry exemption.

As discussed in the RIS, forklift operators in agriculture do suffer injuries and fatalities. Retention of the exemption was considered as an alternative in section 9.6 of the RIS but found that it could not be preferred on cost-benefit grounds. Moreover it would mean that Victoria would be inconsistent with the National Standard.

The exemption was removed because, regardless of specific industry circumstances, the operation of forklift trucks presents inherent risks to health and safety, requiring operators be trained and qualified.

WorkSafe is working cooperatively with industry representatives to assist in the transition to the new arrangements.

Introduction of renewable licences

Comment

Some submissions opposed paying for renewable licences. Noting that currently a certificate of competency is valid for a life time, one respondent argued that the new requirement for renewable licences makes no valid contribution to safety and is an unnecessary cost, with the user now having to pay the costs of reissuing a licence every couple of years or so.

WorkSafe response

The existing certification system has been changed to a licensing scheme consistent with the new National Standard. In conformity with the National Standard, licences for high risk work will have to be renewed every five years. The requirement for renewable licences assists in reducing the potential for fraud through more regular updates of photo identification; ensuring skills are kept current with contemporary work practices through "self assessment" at renewal; and maintenance of an up-to-date database of licence holders to facilitate monitoring and compliance activity.

To facilitate uptake of the new licensing scheme for high risk work, the fee for renewal of a licence has been struck at \$45 which is below the cost-recovery level. (See section 4.15 of the RIS for a discussion of setting of fees under the Regulations.)

Comment

A number of comments were made about the opportunity provided by the new regulations to bring significant improvement in the operation of high risk plant and significant reductions in high risk plant related fatalities and injuries, if every operator of high risk plant, over the next 5 years has to undergo re-training and licensing. Some submissions proposed that licence renewal should require refresher training to be undertaken or re-assessment of competency.

WorkSafe response

Assessing competency during the licence renewal process was considered during the development of the National Standard. This was not supported nationally as there was insufficient evidence of the need to do so and the recurring costs involved in assessing competency would be prohibitive. To ensure national consistency and maintain recognition of licences across jurisdictions, the Regulations do not require refresher training and/or competency assessment during licence renewal. Consistent with the National Standard there is, however, a declaration on the renewal form that requires the applicant to state that they have maintained their competency.

Comment

An employer body considered there is a need to have a well-structured process to make employers and licence holders aware of nominal "expiry" dates to trigger the seeking of a new licence.

WorkSafe response

The transitional provisions for HRW provide for a phased expiry of all certificates issued or granted from before August 1978 to 30 June 2007. Not all certificates will have to be immediately replaced with a licence. Older certificates will expire sooner and newer certificates can be kept for a longer

period. Details of the phased expiry dates are included in Part 8.2 of the Regulations. Processes are being put in place to alert certificate holders to renew their licences well before the expiry date.

Assessors / Registered training organisations (RTOs)

Comment

The new regulations require persons to be trained and assessed under the supervision of a RTO to qualify for a licence. The proposed move to training and assessment through RTOs raises questions of WorkSafe's role in the management of RTOs, both in terms of participation in the quality of the work in producing suitable trained and qualified licence candidates but also in the monitoring of performance of RTOs/assessors and the implementation of counter fraud measures.

Unions believe that to ensure quality, participation and to minimise corruption, only those RTOs which hold the licences they are assessing and have the appropriate equipment can offer this training.

WorkSafe response

The regulations propose that RTOs will provide the necessary training and assessment and issue statements of attainment.

The regulations ensure that any direct training is provided by a person or body that holds the relevant HRW licence. The details of the course content, competency of trainers and resource materials (including access to proper plant/equipment) will be set out in the units of competency to be nationally agreed through ASCC.

WorkSafe will have a memorandum of understanding (MOU) with the Victorian Qualification and Registration Authority and the Office of Training and Technical Education, which administers RTOs and the register of the units of competence RTOs can deliver, to ensure that training and assessment are being provided in accordance with the nationally agreed standard and the regulations.

Comment

Victorian assessors should be able to continue to assess anywhere in Australia as they currently do and as they will be able to do from 1st July 2008 under an RTO banner.

An assessor was concerned that the proposed changes will affect the ability to assess licences interstate or overseas and are a restraint of trade. It was also stated the associated changes to the permissioning scheme for high risk work will exclude people living and working interstate or overseas.

WorkSafe response

The regulations give effect to the national agreement set out in the National Standard to provide training and assessment through RTOs in the Vocational Education and Training (VET) sector. The current assessor scheme, operating outside the VET system, cannot meet the requirements set out in the National Standard. The VET system enables RTOs to operate in any state. The regulations allow assessors up to two years to become RTOs or to form partnerships or associations with RTOs if they wish to continue to work as assessors and trainers.

The regulations do not restrain trade, nor do they hinder the ability of anyone to work as an assessor in another country. The current term of registration for assessors has been extended until June 2009, to allow time for them to make alternative arrangements.

WorkSafe's role is to issue permissions/licences to those who intend to perform high risk work in Victoria. It is not within our purview to issue licences to people who principally work interstate or overseas.

Comment

A large employer group considers further consultation will be required between WorkSafe and stakeholders to effectively implement the transition to the VET sector for licence assessors.

WorkSafe response

Further consultation will be conducted to effectively implement the transition to the VET sector for licence assessors. A complete transition to VET sector training and assessment has been agreed at

the national level. The regulations propose a phased introduction of the new arrangements for full implementation by 1 July 2009.

Direct supervision

Comment

Assessors and other individual respondents believe the regulations should specify the competency of the direct supervisor and the minimum qualification of the trainer.

WorkSafe response

This is not necessary. The regulations require the employer to ensure the direct supervisor holds a relevant high risk work licence and the person or body conducting the training to hold a relevant high risk work licence.

Comment

There was one objection to the person overseeing the training having the discretion to decide if the trainee needs direct supervision.

WorkSafe response

The discretion to waive direct supervision is limited. It allows for circumstances likely to arise as a trainee's competence develops. An absolute requirement for direct supervision would make the regulation unworkable in practice. However, as a safeguard, a decrease in the level of supervision must not put the trainee, or any other person, at risk.

Other issues

Comment

A couple of respondents noted a timeframe for reassessment when an applicant receives an unsatisfactory assessment was specified in the previous regulations, but not in the new ones.

WorkSafe response

An applicant can apply to a licence assessor for a reassessment following receipt of a notice of unsatisfactory assessment. The previous regulations provided for 21 days to elapse before an application could be made. It is not necessary for a candidate requesting a reassessment to wait a set period. The decision to conduct a reassessment is the licence assessor's and is best addressed through discussion with the candidate based on the circumstances that led to the notice of unsatisfactory assessment.

Comment

A union queried the circumstances in which a person may perform work until 14 days after they have been given written notice that the application for a licence has been refused and appeal provisions.

WorkSafe response

Part 6.1 sets out the terms and conditions for application, renewal, cancellation and suspension of licences, and application for review of decisions, including internal and Tribunal review.

Comment

An industry group requested flexibility for exemptions be inserted into the regulations. They argued that situations may occur in the future where a particular clause may not in practice be workable and that if changes are required, an exemption may alleviate the requirement for regulatory amendment.

WorkSafe response

Part 7.2 allows for an exemption for an employer or class of person in relation to specified high risk work performed by a person or class of person without a high risk work licence.

Part 4.1 - Hazardous Substances

Regulation of hazardous substances/scope

Comment

A number of submissions stated their support for the proposed regulations for hazardous substances. Unions expressed strong support for the proposed OHS Regulations having aligned with the National Standard by including hazardous substances created from non-hazardous substances. Unions argued that there were other inconsistencies with the National Standard that needed to be addressed.

An employer queried whether the scope of the Hazardous Substances Part had changed from the previous Regulations.

WorkSafe response

As discussed in the RIS, the Regulations expand the scope of the regulation of hazardous substances to include hazardous substances produced or generated from non hazardous substances at a workplace. The previous Hazardous Substances Regulations did not regulate those substances. Thus employers' duties now extend to substances such as welding fumes from welding rods, sawdust from wood etc. This aligns the Victorian Regulations with the National Model Regulations (NMR) with respect to scope of hazardous substances that must be controlled in the workplace.

(Other inconsistencies raised by the Unions are addressed in specific comments below.)

Hazard identification

Comment

Unions proposed that employers' duties should be extended to require them to classify hazardous substances manufactured in the workplace from hazardous substances.

WorkSafe response

Any person (including an employer) who manufactures a hazardous substance for exchange or sale to another workplace has all the duties of a manufacturer under the Hazardous Substances Part, including the duties to classify, prepare Material Safety Data Sheets (MSDSs) and label containers. Where employers manufacture hazardous substances at their own workplace, they have a duty to control any risk associated with the hazardous substance and also to provide their employees with information, instruction and training on the hazard and risk controls to enable the employees to work in a manner that is safe and without risks to health. In order to comply with these and other employer duties under the Hazardous Substances Part, an employer would need to identify that hazardous substances had been produced or generated at the workplace.

Comment

Some submissions argued that the obligations on employers to identify hazards are missing and that an explicit duty should be included.

WorkSafe response

There are duties on manufacturers and importing suppliers to determine whether a substance is hazardous before providing it for use at a workplace. The employers' obligation is to maintain a register containing a list of the product names of the hazardous substances supplied to the employer's workplace and a copy of the MSDS for each. Hazard identification is achieved by this process and any additional mandated method for hazard identification is unnecessary and may cause confusion. Employers are required to control risk associated with hazardous substances in their workplace, including hazardous substances produced or generated at the workplace from non-hazardous substances.

Duties of manufacturers and suppliers – Material Safety Data Sheets and labels

Comment

One comment supported providing MSDSs and labels in languages other than English as a positive measure.

WorkSafe response

Allowance for MSDSs and labels to also provide the required information in other languages has been included to meet requirements under the *Charter of Human Rights and Responsibilities Act 2006*. (There is still a requirement for the information to be provided in English.)

Comment

A supplier must update an MSDS every five years. This provision should cover the prospect of a product no longer being made or sold by not requiring an updated MSDS for it every 5 years.

WorkSafe response

The duty on a manufacturer or importing supplier is to review the MSDS as often as necessary to ensure it contains current and accurate information and at least every 5 years. If the MSDS is reviewed, the manufacturer or importing supplier must then provide that current MSDS when first supplying the substance to any person after the review. The employer's duty is to obtain the current MSDS on or before the first time the hazardous substance is supplied to the employer's workplace. Employers must make reasonable enquiries about the currency of an MSDS obtained, if it were prepared or reviewed more than 5 years beforehand.

Comment

One submission asked that the penalties for manufacturers and importing suppliers' failure to update MSDS every 5 years and failure to provide current MSDS be apparent under the provisions (similar to employers' duties concerning MSDS).

WorkSafe response

There is an "Act compliance" note under the relevant provisions (regulations 4.17 and 4.18) which refers to sections 29 and 30 of the Act. Failure to comply with a duty or obligation under a section of the Act referred to in the "Act compliance" note is an offence to which a penalty applies. (See also discussion of penalties in the "Overarching Policy Issues and General Comments" section.)

Comment

Unions and another respondent argued that the information obligations of manufacturers and suppliers should be consistent with the NMR which requires them to provide additional information on request. It was argued that MSDSs are often generic and do not contain information sufficient, or sufficiently specific, for employers to implement appropriate controls.

WorkSafe response

The MSDS should have all the information required for dealing with health and safety issues and implementing appropriate controls. If it does not, the manufacturer or supplier is non-compliant.

The NMR requirement for a manufacturer/supplier is to provide other relevant information to an employer on request. Not having such a provision neither precludes an employer from seeking further information, nor the supplier from providing it.

Comment

One submission found the acceptance of other labelling systems commendable but confusing.

WorkSafe response

Like the previous Hazardous Substances Regulations, the Hazardous Substances Part recognises other labelling systems. This means that a manufacturer or an importing supplier does not have to comply with the labelling duty set down in the Regulations if the container is labelled in accordance with equivalent legislation or other prescribed labelling system.

Comment

One submission believed that regulation 4.1.9(3)(f) should allow for alternative signal words, as the Hazardous Substances Regulations did.

WorkSafe response

Provision for other signal words is made in regulation 4.1.10(2) where the container has been labelled in compliance with other prescribed labelling systems and signal words are required to be displayed on the label under that system.

Duties of employers – material safety data sheets and labelling

Comment

An industry group submitted that farmers should be exempt from MSDSs in relation to agriculture and veterinary chemicals because risk assessments have already been carried out by professionals and MSDSs are written for industrial chemists not farmers. It was argued that farmers only need to follow the labels to be safe.

WorkSafe response

An MSDS contains more in-depth information than a label and is supplied by the manufacturer. The employer's main duties are to ensure that they obtain the current MSDS, keep a copy of it in a register and make it readily accessible to employees who may be exposed to the substance. The MSDS provides employees with relevant health and safety information about the substances that they are working with. It is not considered that there are grounds for an exemption from these requirements.

Comment

Farmers and others should be able to do just one risk assessment on the most toxic chemical and then use those risk mitigation measures for their other products. The use of agricultural chemicals is tightly regulated by the Department of Primary Industries (DPI) and onerous conflicting requirements by WorkSafe are really not necessary. There should be interaction between various governmental departments in relation to chemicals.

WorkSafe response

There is no requirement for risk assessment under the Hazardous Substances Part of the Regulations. Where the employer deems it appropriate to assess risks in order to determine adequate control measures, there is no impediment to undertake a generic risk assessment provided the hazardous substances are of a similar class and the tasks are similar. The requirements of these Regulations (which are based on the workplace) and the DPI's requirements (which are based on the product) are not in conflict.

Comment

A number of respondents proposed labelling requirements for decanted hazardous substances be expanded to align with the NMR and require risk and safety phrases as well as the product name.

WorkSafe response

WorkSafe considers the use of a product name on a decanted container to be a sufficient link to the original product, label, MSDS and its associated requirements.

Comment

One respondent expressed concern that the provision requiring an employer to ensure that labelling is in accordance with regulation 4.1.9(3) is too much of a burden. It was argued that the existing provision only should be translated.

WorkSafe response

An employer's duty is to ensure that a container of hazardous substance supplied to the workplace is labelled with the manufacturer's or supplier's label. It was never intended that the employer should check that the manufacturer or supplier had complied with their labelling duties. The provision has been changed to reflect that intent and provide consistency with the duty imposed on suppliers.

Registers

Comment

Some suggested the register of hazardous substances should be expanded to include those hazardous substances manufactured in the workplace.

WorkSafe response

It is considered that the register is most suited to tracking the hazardous substances supplied to the workplace and the MSDS for those substances. The register enables employees to readily identify which hazardous substances in the workplace have an MSDS. Employers are not required to prepare an MSDS for hazardous substances produced or generated in the workplace. It is considered that a register of substances produced in the workplace such as welding fumes, wood dust, particles from the hand sanding of lead-based paints, is too broad. It should be noted that the employer has a duty to provide information, instruction and training under the Regulations and this covers hazardous substances produced as the result of a process or activity. Employers would need to provide information, instruction and training, as necessary about hazardous substances produced in the workplace and the control measures for those substances so that employees can work in a manner that is safe and without risk.

Atmospheric monitoring and health surveillance

Comment

Unions and another respondent expressed concern that biological monitoring may be seen as a substitute for atmospheric monitoring. When the route of exposure is through respiration, it is preferable to undertake atmospheric monitoring to determine if contaminant levels are above, or approaching, the exposure standard and if the controls implemented are effective. If so, there is no need for biological monitoring.

WorkSafe response

Health surveillance, which includes biological monitoring, covers all routes of exposure (respiration, skin absorption, ingestion), work rates etc, and is considered the most important method of monitoring an employee's exposure. Atmospheric monitoring only considers the respiration route. Biological monitoring is more important when exposure is via other routes. It also applies in those situations where there is no exposure standard and it is not considered practicable to undertake atmospheric monitoring.

Other issues

Comment

One submission was of the view there is a wide body of opinion that emphasises the need to take action when the level of exposure to the hazard is a significant fraction of the exposure standard, i.e. "action levels". Limiting requirements to exceeding exposure limits ignores the importance of "action levels".

WorkSafe response

The inclusion of "action levels" could lead to them becoming exposure standards by default. As the National Standard does not set out "action levels" currently, action levels will not be included in the Regulations.

Comment

A submission by an individual argued that it is not enough just to have a register of the hazardous substances but that a written record of risk controls was also required. It was proposed that there should be a register of hazardous substances control measures and that this should also list the processes and tasks to which the control measures apply. It was argued that this would assist review.

WorkSafe response

Records are required in the Regulations where it is necessary to ensure health and safety outcomes or to allow others to discharge their duties. WorkSafe does not consider it practical or beneficial to mandate the documentation of all measures implemented to control exposure to hazardous substances. The focus of the risk control provisions in the Hazardous Substances Part is on achieving appropriate control. This is supported by the duty imposed on employers under Chapter 1 to provide information, instruction and training on hazards and measures to control risk so that employees can perform their work in a manner that is safe and without risks to health [regulation 2.1.1].

Part 4.2 - Carcinogenic Substances

Comment

An industry body recommended that, given the additional cost in licence fees and increase in time associated with licence applications, current notifications for Schedule 2 substances continue to be recognised with a clear and reasonable timeframe for workplaces to apply for a new licence under the proposed regulations.

WorkSafe response

The transitional provisions in Part 8.1 of the Regulations allow for the continuation of the previous notification until the date the Authority would have required re-notification.

Part 4.3 – Asbestos

The Asbestos Part has drawn the greatest amount of comment by virtue of proforma submissions submitted by HSRs and union members. Other submissions were made by unions, community groups and employers. A number of employer associations expressed support.

Comment

Union proforma and other submissions stated the regulations do not provide enough protection or have been watered down. It was argued that the highest level of protection is required for employees, others at work and members of the public such as clients, home renovators and people in offices and schools where asbestos is present.

In particular, there was concern about the coverage of unfixated and uninstalled asbestos, including asbestos contaminated dust and its removal, and the capabilities of Class B removalists. They contended that Class B licence holders do not have the training, equipment or expertise to clean up large quantities of asbestos-containing dust.

They had a fundamental objection to the content of the Dangerous Goods Order (DGO) which addressed the removal of unfixated or uninstalled asbestos (including asbestos-contaminated dust and debris) and its translation into the Asbestos Part. This translation was considered to be a “backward step” and a lessening of the regulation of asbestos.

Employers and employer groups supported the Asbestos Part, including the incorporation of the DGO. They noted that regulatory requirements apply to ensure that the removal work is carried out safely and do not reduce the level of protection provided to workers. Some believed that if the government considers any change to this position, it would need to be costed and reflected in an RIS.

WorkSafe response

The Asbestos Part in the draft Regulations released for public comment represented a translation of the *Occupational Health and Safety (Asbestos) Regulations 2003* (Asbestos Regulations) and the Dangerous Goods Order (DGO) that was made in December 2003. There was no lowering of the standard. The provisions in the Asbestos Part and the previous Asbestos Regulations aimed at controlling risk to health by eliminating or reducing the generation of airborne asbestos fibres associated with asbestos in the workplace. Victoria continues to have the most stringent requirements relating to asbestos removal work and activities involving asbestos.

Incorporating the DGO into the Regulations was considered beneficial as it consolidated the law on asbestos into one document and avoided the need for duty holders to refer to two separate statutory instruments.

However, having considered the public comment, the content covered by the DGO has been removed (i.e. it has been un-incorporated). The DGO was a transitional measure until such time as agreement could be reached with stakeholders on how best to regulate the removal of asbestos contaminated dust and debris. It is clear from public comment there is no such agreement. In the circumstances, it is not appropriate to enshrine the DGO in regulation. Accordingly, the DGO will be “rolled over”. Retaining the DGO arguably is also more consistent with the translation principle.

The un-incorporation of the DGO has resulted in some changes to the numbering of regulations in the Asbestos Part and the removal of all provisions related to asbestos-contaminated dust.

Objective of asbestos regulation

Comment

Unions, an industry body and others stated the regulations should contain an objective to ensure asbestos-free work environments along the lines of that found in the National Code of Practice.

WorkSafe response

Like the previous Asbestos Regulations, the new OHS Regulations aim to protect people against risk of asbestos-related disease resulting from exposure to airborne asbestos fibres. The OHS

Regulations require the removal of asbestos-containing material (ACM) that presents a risk to health, if it is reasonably practicable to remove the ACM. (If it is not reasonably practicable to remove the ACM, the risk must be controlled by enclosing or sealing the ACM). The Regulations also have requirements for the removal of asbestos prior to demolition, and removal of asbestos likely to be disturbed during refurbishment work. Thus if ACM in the workplace presents a risk, it must be removed and if removal is not reasonably practicable, the risk must be controlled. Over time this will lead to a reduction of asbestos in workplaces. In addition, the prohibitions on manufacture, supply, sale, use etc (imposed by Division 4 of the Asbestos Part) seek to prevent the reintroduction of asbestos into workplaces.

Definitions/terminology

Comment

Unions and individual respondents argued that the definition of "friable asbestos" should be amended to include dust which is already in the form of powder. They argued this will ensure alignment with the national, NSW and SA definitions.

WorkSafe response

As discussed above, the issue of coverage of asbestos dust is being dealt with through the re-making of the DGO. The definition of "friable asbestos" in the Regulations is a translation of the definition in the previous Asbestos Regulations.

Comment

Both unions and employers commented that the term "minor contamination" is vague and open to interpretation.

WorkSafe response

The development of guidance material on "minor contamination" has commenced.

Prohibitions

Comment

Employers and unions supported the coverage of asbestos encountered in quarrying in the general exclusions from the prohibitions under the Dangerous Goods Act 1985.

WorkSafe response

Asbestos encountered during non-asbestos mining is excluded from the prohibitions on supply, storage, transport, sale, use and re-use of asbestos, consistent with the *National Model Regulations for the Control of Workplace Hazardous Substances* which covers the national prohibitions on asbestos. Quarrying should also have this exclusion. Its omission in initial drafts has been rectified.

Comment

Two submissions believed the exclusion on non-asbestos mining should be removed. Mining operators who have geologists should be aware of material containing asbestos near their operations and this should be removed under supervision of an A class asbestos removalist.

WorkSafe response

As stated above, the exclusion on non-asbestos mining if asbestos is encountered has been inserted to ensure alignment with the national standard and with other jurisdictions. Given that asbestos is a naturally-occurring mineral, it is not possible to apply the national prohibitions during mining and quarrying activities.

Divisions 2 and 8 of the Asbestos Part apply to mining and quarrying operations. This ensures that measures are taken to control employees' risk to health where asbestos is encountered.

EPA also requires mining and quarrying operators to perform environmental assessments where asbestos deposits are known to exist and implement controls to prevent disturbance of those deposits.

Comment

Unions suggested the inclusion of a regulation to prohibit the importation of plant which contains prohibited substances - e.g. the importation of plant containing asbestos.

WorkSafe response

The prohibitions made under the *Dangerous Goods Act 1985* adopt the national prohibitions on manufacture, supply, sale, storage, transport and re-use of asbestos. These prohibitions, together with the Commonwealth prohibitions on import and export aim to prevent the reintroduction of asbestos into the community. A note has been included under Division 4 of the Asbestos Part alerting duty holders to the Commonwealth prohibitions.

Asbestos management plan

Comment

A union recommended that an Asbestos Management Plan be required as a means of achieving the ultimate removal of asbestos-containing material from the workplace.

WorkSafe response

The Asbestos Management Plan as described in the *ASCC Code of Practice for the Management and Control of Asbestos in the Workplace* is a tool that can be used to ensure that regulatory requirements relating to asbestos in the workplace are complied with. The Regulations are consistent with the general principle for developing an asbestos management plan as stated in the *ASCC Code*.

Demolition and refurbishment

Comment

An employer supported the separation of demolition and refurbishment into separate categories of works.

Unions and interested parties stated as any refurbishment involves a designer/architect, the designer duty under section 28 of the Act must be met. Consequently, the asbestos regulations must require all asbestos be removed prior to a refurbishment job, as is the case before demolition.

WorkSafe response

The separation was introduced in recognition of the practical difficulty in removing ACM prior to commencing refurbishment work and therefore in being able to meet the regulatory requirement. It recognises that refurbishment work may need to be completed in stages or that the ACM may not become accessible until refurbishment has commenced.

In practice, removal of asbestos prior to the commencement of refurbishment only applies to the removal of asbestos containing material that is impacted by the refurbishment. That is, it is not intended to extend to the removal of all *in situ* asbestos-containing material from the workplace.

Comment

Clarification was requested on what constitutes "refurbishment".

WorkSafe response

The regulations exclude minor or routine maintenance work and other work of a minor nature.

Limited removal of asbestos by unlicensed persons

Comment

A number of submissions expressed concern about provisions for the limited removal of asbestos-contaminated dust by unlicensed persons and suggested removal without a licence should not be permitted. Unlicensed persons, without training or protection for themselves and others, may be directed to clean up unaware that they are dealing with material containing asbestos.

Employer groups and employers specifically indicated their support for permitted limited removal by employers and self-employed persons and acknowledged the requirements within the Regulations to

ensure the removal work is carried out safely. It is inefficient to require all asbestos removal work to be undertaken by licensed asbestos removalists.

WorkSafe response

As noted above, current arrangements for the removal of unfixed or uninstalled asbestos (including asbestos-contaminated dust) are going to be maintained through the re-making of the DGO.

In relation to non-friable ACM, the Asbestos Part makes provision for limited removal by persons who do not hold a licence – this is a translation from the previous Asbestos Regulations. From the public comment submissions it is apparent that a significant number of people are making incorrect assumptions that removal by an “unlicensed” person equates to unregulated removal. This is not the case. The Asbestos Part contains a separate sub-division that applies to limited removal of non-friable asbestos. It specifies how unlicensed removals are to be conducted, and imposes training and other requirements on the person conducting the removal.

Comment

A number of respondents were concerned that limited removal of unfixed or installed asbestos by unlicensed persons represents a huge increase in unlicensed removal activity and a considerable departure from current industry practice which is for Class A licence holders to remove dust.

WorkSafe response

As noted above, the DGO is to be re-made and current arrangements for removal of unfixed or installed asbestos (including asbestos-contaminated dust) are therefore to be maintained.

All jurisdictions have provisions which permit a limited amount of asbestos removal by employers or self-employed persons.

Notification of asbestos removal work

Comment

An industry group supported the 24 hour notification for limited asbestos removal work permitted to be carried out by employers and self-employed persons. They noted this will reduce the shutdown time and area isolations.

WorkSafe response

Noted. The reduction in the notification period from 5 days to 24 hours enables licensed persons to conduct small removal jobs without significant delay.

Comment

An employer saw the notification process as an administrative task that adds no level of increased health and safety. They argued that money spent on administrative notifications could be better utilised in training and investment in more appropriate processes to eliminate asbestos completely.

WorkSafe response

Notification enables WorkSafe to carry out inspections of removal jobs. While WorkSafe places priority on inspecting “high risk” jobs, it needs to maintain its ability to inspect all types of removal jobs which involve an element of risk. Concerns regarding the notification of asbestos removal work can be considered through the process provided in regulation 4.3.97(6) which permits WorkSafe to vary the notification requirement by including a specific condition in a licence with respect to notification.

Hand drilling and cutting of asbestos

Comment

A number of unions and interested parties maintained hand cutting and drilling of materials with a high content of asbestos, e.g. electrical switchboards, is in conflict with both section 20 of the Act and the intent of the Asbestos Part of the Regulations and must not be permitted. Instead the materials should be removed.

WorkSafe response

Division 5 of the Asbestos Part requires the removal of asbestos where it presents a risk to health, including the removal of electrical switchboards in poor condition. However, there are situations where it is not considered practical or reasonable to require asbestos material in good condition to be removed, and it must be drilled or cut, such as for the installation of fire detectors on an AC ceiling; or hooks on vinyl tiles within a hospital kitchen.

Comment

PPE as a control measure when hand drilling and cutting must only be short-term measure until such time as a better, higher order, control measure can be implemented. Unions maintain that the use of PPE is basically the only control measure for this activity.

WorkSafe response

By prescribing hand drilling and cutting as an activity under Division 8 of the Asbestos Part, WorkSafe recognises that it is a common and expected work process and requires a high standard of safety when done. Permitting hand cutting or drilling of ACM is consistent with the National Code of Practice for the Management of Asbestos in Workplaces which includes guidance in appendices on drilling of ACM and working on electrical switchboards.

Other issues

Comment

Union, employer and interested parties expressed concern regarding the independence and competency of persons providing clearance certificates and carrying out audits. It was noted that WorkSafe has stated these will be dealt with in a Compliance Code.

WorkSafe response

WorkSafe is committed to the development of guidance material on these matters. Stakeholders will have an opportunity to comment on this guidance before it is finalised.

Comment

A community group argued soil that is known, or reasonably known, to have had asbestos material contained in it should be analysed and cleared before transport and selling takes place.

WorkSafe response

This provision, a translation of previous requirements, was strengthened to clarify that all persons involved in transport, sale, supply, storage, use and re-use of the soil have obligations to remove any visible asbestos-containing material. The intent is to create a process by which as much asbestos is removed from soil as is practically possible.

Comment

Unions also supported:

- *The notification period for removal work undertaken by licence holders for small scale removal has been reduced to 24 hours.*
- *Notification requirements have been streamlined.*
- *The definition of "Class A Licence" has been amended to allow for the removal of asbestos-contaminated dust*
- *A new regulation has been inserted to require that asbestos be properly contained, including decontamination of the outside of a container in which asbestos is being stored.*
- *Air monitoring is required where there is uncertainty as to whether the exposure standard is exceeded.*
- *Demolition and construction material that contains less than 0.001 per cent ACM and which is processed in accordance with an auditable process determined by the Authority has been excluded from the Asbestos Part.*

WorkSafe response

Noted.

Comment

An employer suggested that utility infrastructure, such as water mains where work is completed on a regular basis and a systemic process can achieve the required protection for employees, be exempt from requiring a licence to remove asbestos.

WorkSafe response

Employers and self-employed persons carrying out removal beyond that permitted under regulation 4.3.45 must be licensed.

Part 4.4 – Lead

Removal of risk assessment

Comment

There was concern about the removal of risk assessment from the regulation of lead.

WorkSafe response

The requirement for risk assessment in the previous Lead Regulations was not translated into the Regulations because it is not considered that risk assessment is necessary in all cases to achieve adequate control. (See discussion of this issue under the “Overarching Policy Issues and General Comments” heading).

Risk control

Comment

One employer organisation thought that the control measure of “substituting lead with a substance that is less hazardous” would lead to elimination of the risk rather than risk reduction. Accordingly they requested that consideration be given to rewording the risk control hierarchy.

WorkSafe response

Substitution with a substance that is less hazardous could be substitution with a substance that contains a lower lead content. In this case substitution would not result in the elimination of risk.

Biological monitoring

Unions supported the three-tier regime for biological monitoring included in the Regulations.

WorkSafe response

Support noted. As discussed in the RIS, adoption of the three-tier regime for blood lead level testing is consistent with the guiding principle to align the Regulations with National Standards where appropriate. This change has not effected who will need to be provided with biological monitoring, it only affects the frequency of testing for some employees. It ensures more frequent testing of high risk groups, for example, females of reproductive capacity.

Notification of blood lead level testing results

Comment

Unions noted that the Lead Regulations and the proposed OHS Regulations deviate from the National Standard by not requiring employers to notify WorkSafe every six months of the results of blood lead level testing. They do not support the continuation of this deviation and argue that the collection of blood lead level testing results enables WorkSafe to be proactive and to check compliance with biological monitoring requirements.

WorkSafe response

Submitting all blood lead level results to WorkSafe is unnecessarily onerous. The current notifications adequately raise any important issues and risks under the regulations to the attention of WorkSafe. Employers are required to notify the Authority of any lead-risk jobs they identify in the workplace and to notify the Authority when they remove an employee from a lead risk job. Employers are also required to keep records of blood lead level results at the workplace and WorkSafe inspectors can inspect those records if necessary.

Notification of all blood lead results also shifts the responsibility to WorkSafe to monitor exposures in the workplace. This is the responsibility of the employer.

Health surveillance before first starting lead risk job

Comment

An employer organisation noted that the regulation states that the employer must arrange for health surveillance while the previous Lead Regulations required that the employer must provide for health surveillance. It was argued that as an employer cannot force an employee to participate there should be a note under the regulation that provides information about what an employer should do if an employee refuses to undertake a blood test.

WorkSafe response

The wording changes are consistent with contemporary drafting practices. The subject matter proposed above for a note is not suitable for a regulatory note.

The employer's duty is to arrange for the biological monitoring but there is no obligation on an employee to participate. If an employee refuses to undergo blood lead testing, the onus is on the employer to ensure the health and safety of the employee. This may mean that the employer needs to introduce further controls so that the work is not a lead-risk job or assigning the employee to other work that does not involve a lead-risk job. However, there are provisions within the Lead Part that should facilitate employee cooperation. For example, the Regulations stipulate that applicants for employment in a lead process must be provided with information about the health risks and toxic effects associated with lead exposure and the need for, and content of, medical examinations and biological monitoring. Employees must also be provided with information, instruction and training with respect to nature of the hazard. WorkSafe believes that employees who fully understand the health effects associated with lead exposure and the role of biological monitoring are more likely to cooperate with arrangements made for such monitoring.

Independent contractors

Comment

One submission noted that regulations 4.4.20(3) and 4.4.23(2) specifically included independent contractors but did not think that this occurred anywhere else in the Regulations. They suggested that regulations 4.4.20(3) and 4.4.23(2) be replaced with notes to cross reference to regulation 1.1.8.

WorkSafe response

The health surveillance duties owed to independent contractors under the previous Lead Regulations have been translated. There are similar provisions to regulations 4.4.20(3) and 4.4.23(2) in the Asbestos Part and the Mines Part. These provisions need to be retained as they establish where a duty to provide health surveillance is owed to independent contractors and their employees. (See also the discussion on independent contractors under the "Chapters 1 & 2 – Preliminary, Preliminary, General Duties and Issue Resolution" heading.)

Other issues

Comment

One submission believed that if there is uncertainty about possible exposure levels, a job must be deemed a lead-risk job until proven otherwise. They were also concerned that the trigger for atmospheric monitoring is vague.

WorkSafe response

Employers are required to ensure that atmospheric monitoring of the airborne concentration of lead is carried out where there is uncertainty (based on reasonable grounds) as to whether the exposure standard is being or may be exceeded; or if monitoring is necessary to determine whether there is a risk to health. This duty is consistent with the atmospheric monitoring duty under the Hazardous Substances Part. The "uncertainty based on reasonable grounds" test is an objective one.

The Lead Part does address the situation where there is uncertainty as to whether a lead process has a lead-risk job. An employer must treat the process as a lead-risk job, until it is established otherwise.

Part 5.1 – Construction

General Comments

Comment

A number of employer groups in the domestic sector held divergent views on the applicability of the Construction Part to that sector

WorkSafe response

While it is acknowledged that domestic sites are different from large construction sites, it is WorkSafe's view that many of the risks are similar and the domestic housing sector is no safer than other construction sectors. The nature of construction work is that structures and personnel change on a daily basis, and with these changes, different hazards and risks emerge. The Construction Part sets out requirements for all construction workplaces, however, the compliance effort required would differ between a significant residential project and a large commercial construction site. In addition, a \$250 000 cost threshold applying to the requirement to produce a health and safety coordination plan (see below) would exclude 88 percent of housing construction.

(Further responses below and in the comment on the RIS address other concerns received in relation to the domestic sector, such as costs and training requirements.)

Comment

WorkSafe is simply building on an old system of regulation, well and truly outdated, not relevant to what happens on the ground, and administratively a nightmare for all but the biggest companies.

WorkSafe response

The Construction Part is consistent with the *National Standard for Construction Work* which was declared in April 2005 and its implementation meets Victorian Government commitments to adopt WRMC endorsed National Standards.

Comment

An employer stated these regulations are based on commercial site crossovers into domestic construction and are not possible to absorb in a practical or cost effective manner.

Another respondent noted the case for regulatory control is predicated more on the characteristics of and statistics within the civil and building construction industry. The construction "brush" also takes in the water utilities sector, even though many have demonstrated their commitment to OHS by gaining certification against AS/NZS 4801.

WorkSafe response

WorkSafe analysed the characteristics and statistics of construction work as a whole – the data used is not broken down into sub-sectors. It is important to note that the focus of the Construction Part of the Regulations is risks related to the type of work, not where the work is undertaken.

WorkSafe commends the water utilities sector's commitment to OHS and its demonstration of this commitment through gaining certification against AS/NZS 4801. Compliance with this standard, however, cannot be taken to mean compliance with the duties of the Construction Part of the Regulations, as these duties are specific and relate to particular risks arising from the type of work being undertaken.

WorkSafe acknowledges that many duty holders in the construction industry already prepare a variety of health and safety documentation. It is likely that some of this documentation may meet the new requirements. As long as a health and safety coordination plan includes each of the items required in regulation 5.1.17 and is accessible to anyone doing construction work at the site and employee/employer health and safety representatives, duty holders have flexibility in the way the information is presented. This is in recognition that compliance will look different for different tasks and workplaces.

Comment

One submission predicted the new proposal will simply see widespread non compliance, which will lead to the current situation in Queensland where builders are being fined out of existence for a system that makes nothing safer and they had absolutely no say in. Generally all regulations are vague and non specific leading to non compliance due to nobody being able to understand or interpret them adequately. These regulations will require companies to employ consultants in the field to enable compliance.

WorkSafe response

Many of the regulations are performance based, because WorkSafe believes this strikes an appropriate balance between adding specificity to duties under the Act and allowing duty holders flexibility as to how they will comply. It is preferable that regulations set out duties that can endure the passage of time, and more detailed information is included in guidance material, which can be updated more readily when need be.

WorkSafe does not believe these requirements will require the use of consultants to enable compliance. Given that the Construction Part of the Regulations contains new provisions; this part will not take effect until July 2008, allowing extra time for employers to become familiar with the requirements. During the 12-month transition period, WorkSafe will work with the industry to implement the new regulations and produce guidance material to assist compliance.

Definitions

Comment

There is a need to define "competent person". There is a need to define "classes of persons" who conduct work on hazardous construction sites without actually carrying out construction work.

WorkSafe response

The meaning of "competent person" will vary considerably, depending on the duties imposed, the type of workplace and consequent level of technical expertise required. This makes it difficult to prescribe in a regulation without restricting the flexibility of workplaces to manage health and safety best suited to their needs.

The "classes of persons" referred to are visitors and delivery personnel to workplaces where construction work is undertaken and under the Regulations they would not be able to go onsite without a person who has undertaken induction training accompanying them at all times. Although these visitors are not required to undertake induction training and register to perform construction work, they must be accompanied at all times by someone who has completed induction training. These exclusions are consistent with the *National Standard for Construction Work*.

Harmonisation

Comment

Employers held divergent views on the introduction of the Construction Part. Some held the view that it is unnecessary and that harmonised codes and guidance material can readily achieve national consistency.

One submission cited a number of examples of the Regulations that already exist in codes and guidance material or are not compatible with domestic sector:

- *If there is a risk of a person falling more than 2 metres from the Prevention of Falls in Housing Construction Code of Practice;*
- *On or near energised electrical installations or services from the guide, Framework for Undertaking Work Near Overhead and Underground Assets;*
- *At workplaces where there is any movement of powered mobile plant - this is covered in the Code of Practice for Plant.*

WorkSafe response

The Construction Part of the Regulations addresses an existing national agreement that is designed to assure national consistency and will meet Victorian Government commitments. Victoria is committed through WRMC to the goal of national regulatory consistency by implementing priority

National Standards. WorkSafe believes the appropriate way to do this is to include a construction part in the Regulations.

The examples cited above provide information about how to comply with existing regulatory requirements.

Comment

An employer organisation stated duties are largely prescriptive and rely on administrative controls, and are unlikely to be effective.

WorkSafe response

The Construction Part does impose some absolute duties, for example, the duties to prepare safe work method statements (SWMS) and health and safety coordination plans, and the associated duties to review and revise and keep records of documents. Even these duties, however, are tempered by the thresholds at which they are triggered. The duties largely set performance requirements for meeting the duty, and allow flexibility in meeting these requirements. For example, the duty to prepare a SWMS specifies when a SWMS must be prepared and what must be included in the document, but it does not prescribe how much information has to be included, or in what format. WorkSafe will be preparing a broad range of practical guidance material that will assist and support employers in meeting the new obligations. WorkSafe believes this strikes an appropriate balance between adding specificity to duties under the Act and allowing duty holders flexibility as to how they will comply.

Hierarchy of risk control

Comment

An industry group opposed the inclusion of a specific hierarchy of control for construction.

Another submission proposed a new subsection: "Where there is a dispute between any party over the risk identified by the employer in accordance with regulation 5.1.7(1), work shall not proceed until agreement has been reached in accordance with the applicable dispute resolution procedures." The identification of risks and the degree of risk is a subjective criterion which is dependant on experience, practical knowledge, ideology and economic factors.

WorkSafe response

Inclusion of a hierarchy of control in the Construction Part of the Regulations is consistent with both the *National Standard for Construction Work* and the other parts of the consolidated Regulations.

Section 20 of the Act sets out what is required of a person on whom the Regulations impose a duty to ensure health and safety. Risks to health and safety must be eliminated so far as is reasonably practicable or similarly reduced. If an issue concerning health or safety arises at a workplace, the issue must be resolved in accordance with relevant agreed procedures or if none exists the Issue Resolution Part of the Regulations would apply.

The proposal that "work shall not proceed until agreement has been reached" would be inconsistent with the Issue Resolution Part and would go beyond the duties anticipated by the National Standard, however, the employer's duty to eliminate risk, so far as is reasonably practicable, applies. Also (see note under section 70 of the Act), if an issue is not resolved within a reasonable time, any of the parties attempting to resolve it may ask WorkSafe to arrange for an inspector to attend at the workplace to enquire into the issue.

Scope of Construction Part

Comment

Employers were concerned that the definition of "construction work" is ambiguous and/or open to misinterpretation in its application. Concern was raised that the definition is too broad, for example, that it will capture work such as cleaning or changing a light bulb under maintenance.

WorkSafe response

WorkSafe has clarified the definition of "construction work" to ensure routine or minor maintenance work on fixed plant, manufacturing and mining activities, and minor repairs or maintenance by a "home handy man" are not captured.

Construction work at mines

Comment

It was put that construction regulations should apply to any construction work performed on a mine. This does not include work that is performed for the purpose of exploration or preparation of the mine. Hazards and risks associated with construction work on a mine are consistent with those involved in construction work generally.

WorkSafe response

The regulations have been clarified to ensure that the Construction Part does not apply to mining and exploration activities. The Construction Part is intended to apply to construction work wherever it occurs but not to "the exploration for, extraction of, minerals or stone". This amendment responds to concerns raised in public comment and aligns more closely with the National Standard. Specific OHS duties also apply to mining and these are in the Mines Part of the Regulations.

Comment

In August 2003 the DPI and WorkSafe reached agreement over jurisdiction to regulate occupational health and safety of construction sites at a mine. The Memorandum of Understanding (MOU) giving WorkSafe jurisdiction over construction work at mines has been operating successfully for 3 years. A union submitted that the regulations should give effect to the MOU.

WorkSafe response

The MOU sets out the operational interface between WorkSafe and DPI in respect of their respective legislative responsibilities and the role of each agency. The Regulations do not need to incorporate the MOU as the transfer of responsibilities for OHS on mines is coming under the responsibility of WorkSafe from 1 January 2008 and the current MOU will be redundant from that date. The success of the operation of the MOU as indicated by the union submission supports the proposal to not regulate the MOU. The Construction Part does not come into effect until 6 months after the transfer of responsibilities for safety at mines to WorkSafe, by which time the MOU will have lapsed and become redundant.

Amenities and first aid

Comment

One submission expressed great concern that WorkSafe has moved away from the National Standard in relation to the "general health and safety provisions" in section 8 of the National Standard. Of particular concern was the lack of provisions for lighting and electricity supply.

Another stated it was necessary to include a regulation which requires the provision of amenities. It was argued that all other state jurisdictions have regulated the provision of amenities in workplaces. It was also argued that one of the guiding principles in the development of the proposed regulations was alignment with National Standards and national harmonization.

Insert a new division regulating provision of First Aid at Construction Sites. Construction sites present major hazards and risks to workers. Fatalities occur on construction sites all too frequently. The provision of this equipment is crucial to ensuring the provision of basic OHS standards on site.

WorkSafe response

WorkSafe does not believe that writing Part 8 of the National Standard into the Regulations would add a great deal to the general duties under the Act. More fulsome and expansive advice can be provided in guidance material, including advice that can be tailored to specific sets of circumstances, for example, separate advice for smaller domestic construction projects such as housing, and separate advice for larger commercial construction projects. Specific compliance advice in relation to electrical safety, amenities and first aid could also be included.

Definition “high risk construction work”

Comment

There were a number of concerns in relation to the definition of “high risk construction work”, both in the extensiveness of the activities covered by it and the onerous obligations associated with it. What is meant by work “near” energised electrical services? There is movement of powered mobile plant in almost all workplaces, including for example in the loading areas and service areas of high rise office buildings. What is meant by “artificial extremes of temperature”, particularly when applied to retail or office premises?

This has effectively turned any facility which digs a hole >1.5m depth into a construction site with all associated duties. It is not appropriate to make operating manufacturing facilities construction facilities just because they dig a hole.

WorkSafe response

The definition of “high risk construction work” exists to trigger the duty to prepare a SWMS. It does not trigger any other obligations within the Construction Part. The definition of “high risk construction work” is broad; however, it is important to note that a safe work method statement (SWMS) will not always be required for construction work that falls loosely within the definition of “high risk construction work”.

Consistent with the intent of the National Standard, a SWMS is only required if work is identified to be “high risk” construction work *and* it presents a risk to the health and safety of any person arising from that work. It is also important to note that the formulation of this duty will allow sufficient flexibility, as it is performance based – whilst it specifies minimum requirements for a SWMS, it does not dictate how much detail needs to go into the document. WorkSafe acknowledges there will be circumstances where a short, simple document will be sufficient to fulfil the requirement, and at other times more detail will be required where a task is more complex. WorkSafe also supports the use of generic SWMS, where circumstances are sufficiently similar for this to be appropriate. The focus of the duty is to assess risk and determine appropriate control measures for high risk work, and document this process.

Safe Work Method Statements (SWMS)

Submissions on SWMS came from a variety of employer organisations, unions and individuals.

Comment

Some companies have a variety of safety documentation e.g. Standard Operating Procedures (SOP), Risk Assessments and Job Safety Analyses (JSAs). Depending on individual cases a current SOP may meet the requirements of a SWMS under the regulations. Will it be necessary to rename SOPs as SWMS?

Changing terminology from “JSA” to “SWMS” will require many employers to adjust documentation considerably. Some generic management systems promoted and integral to accreditation schemes have always used JSAs. In most cases SWMS or Safety Instruction is created after a JSA to help with the control mechanisms.

SWMS requirement needs clarification. Requirement appears to be what is currently called “JSA”. Are SWMS the same thing as JSA?

Is WorkSafe looking for a particular format for SWMS? Could WorkSafe include an example SWMS template in the regulations?

Will generic SWMS be acceptable?

WorkSafe response

Many duty holders in the construction industry already prepare a variety of health and safety documentation. It is likely that some of this documentation may meet the new requirements. As long as duty holders meet all the requirements of the duty for preparing SWMS and they control the risk to health and safety, they would not have to re-name an existing document in order to comply. However

the intent of the regulation is also important, so any document used to meet the duty would need to serve the intended purpose.

Format of the required documents is not prescribed. It would not be appropriate to include a template in the regulations because WorkSafe wants to allow duty holders flexibility in complying and acknowledges that compliance will look different for different tasks and workplaces. Templates or examples are more appropriate in guidance, where multiple examples can be given to illustrate what may be appropriate for different tasks. WorkSafe intends to prepare guidance material in consultation with stakeholders to support the new construction regulations. This will include practical tools such as an example of a SWMS template.

WorkSafe supports the use of generic SWMS, where circumstances are sufficiently similar for this to be appropriate.

As noted above, SWMS must only be prepared for high risk construction work *if there is a risk to the health and safety of any person*. Some of the types of work prescribed to be high risk construction work may not always constitute a risk. A SWMS may not be required for high risk work in every single instance.

Comment

Employers believed rewording is advisable in this subsection to make it absolutely clear that work related to the SWMS only ceases. Work on the same site not related or not affected by the non compliance should not be required to cease.

A union suggested inserting provisions:

- *to require employers whose employees are undertaking high risk work to consult with the health and safety representative or any person affected by the work.*
- *that if any person affected by the work believes there is non-compliance with the SWMS, that work must stop immediately, or as soon as it is safe to do so, and not resume until the SWMS is complied with, or reviewed and revised*
- *that any person affected by the work may call in the assistance of any person if they believe there is non-compliance*

WorkSafe response

The provision as drafted is consistent with the National Standard, however this has been amended for clarity.

The first point is covered by existing consultation requirements and would be an unnecessary duplication to include. The second point would broaden the duty beyond what is intended by the National Standard. The third point goes beyond section 70 of the Act, which applies to persons assisting HSRs, not in the absence of an HSR.

Comment

Concern raised that meeting this duty will require additional training and supervision that is unfeasible in the domestic sector.

WorkSafe response

WorkSafe believes the formulation of this duty will allow sufficient flexibility, as it is performance based – whilst it specifies minimum requirements for a SWMS, it does not dictate how much detail needs to go into the document. WorkSafe acknowledges there will be circumstances where a short, simple document will be sufficient, and at other times more detail will be required where a task is more complex. WorkSafe also supports the use of generic SWMS, where circumstances are sufficiently similar for this to be appropriate. The focus of the duty is to assess risk and determine appropriate control measures for high risk work, and document this process.

This duty is not qualified by “so far as is reasonably practicable”, however it is important to note that a safe work method statement may not be required for high risk work in every single instance. A SWMS is only required if work is identified to be “high risk” construction work *and* it presents a risk to the health and safety of any person arising from that work.

This duty is placed on each employer, for their own employees. Each employer, whether that is the builder, sub-contractor, etc, will be required to prepare SWMS for activities to be undertaken by their own employees. Each employer will also have the responsibility to maintain their own SWMS and ensure work is done in accordance with a SWMS. This means that the builder will not be required to supervise every single activity where a SWMS is required, as it has been suggested by some submissions.

It should also be noted that SWMS are very similar in format and intent to the existing "Job Safety Analysis" process for which templates are already available and being used. WorkSafe will work with all sectors of the industry to produce templates and example SWMS. The construction duties do not come into effect until 1 July 2008, giving additional time to allow industry (including housing) to prepare for these new duties.

Comment

Control measures must be assessed and implemented as adequate not just "described". Should read: "sufficiently assesses and describes measures." Needs to be abundantly clear as to what is required. Wording should be "describes the steps in which the risk control measures are to be implemented".

WorkSafe response

The comments relate to the definition of a SWMS. This definition must be read in conjunction with the substantive duties required of employers, which state clearly that the employer must ensure that the work is performed in accordance with the SMWS. This means that the control measures that have been described must be implemented.

Comment

A union proposed a new subsection requiring that upon request, an employer must provide a copy of the SWMS to a Health and Safety representative, or any person affected by the performance of work or any person called into assist a person/s affected, an employer must provide a copy of the high risk method statement to that person.

WorkSafe response

The current wording of the Regulations is consistent with the intent of the National Standard which envisages the SWMS being prepared in relation to "high risk construction work" and being kept up-to-date. It is implicit that an employee should have access to the document in the requirement that an employer must ensure that work is performed in accordance with the SWMS. Consultation must occur on the SWMS under section 35 of the Act. Section 69(1) of the Act also requires the employer to provide the HSR with access to information.

Review of risk control measures

Comment

One submission suggested inserting a provision stating that where there is no elected Occupational Health and Safety Representative, any person for any reason, who may be affected by the risk, may request a review of the risk control measure, and any person making a request for review of risk control measures may call in the assistance of any person with sufficient knowledge (section 70 of the Act) where necessary, to assist in the making of the request and or review of risk control measure.

WorkSafe response

This proposal extends beyond section 70 of the Act which applies to persons assisting HSRs, not in the absence of an HSR. These amendments also go beyond the duties envisaged by the National Standard.

However, sub-regulation 5.1.8(c) is a broad provision which could trigger a review "if, for any other reason, the risk control measures do not adequately control the risk..." or sub-regulation 5.1.8(b) provides for a review if new or additional information ... becomes available to the employer." An employee could provide such information and if a dispute arose the response above would apply. Also, employers are required to consult, according to the requirements in Act and Regulations.

Health and safety coordination plan

Submissions on threshold were received from a variety of employer groups, health and safety professionals and individual employers.

Comment

- *Threshold of \$250,000 too low.*
- *Too difficult for domestic sector – nowhere to store documentation, too difficult to ensure every tradesperson has access to the plan.*
- *Suggest exempting class 1, 2, and 10 buildings, or raise threshold to \$3 million, with the effect of excluding all housing construction.*

WorkSafe response

WorkSafe considers that a threshold for a construction project of \$250,000 is consistent with the intent of the *National Standard for Construction Work*, that is, to exempt the smallest construction sites, where coordination problems are not a significant issue.

WorkSafe considers that this threshold strikes an appropriate balance between the imposition of reasonable OHS duties, and ensuring equal levels of OHS protection for workers on smaller projects, such as housing, in comparison to other sectors of the construction industry. The threshold is also proposed in the context of a significantly reduced duty in comparison to the duty contained in the National Standard.

A broad exemption for categories of building or using a threshold of \$3 million from this duty would extend to large volume builders, not just small operators. Wholly exempting the domestic sector in this way could potentially create a “two tier” approach to managing safety.

Building Commission data indicates that, on 2006 figures, only 11.5% of Victorian housing construction projects for which a building permit is required will meet or exceed the \$250,000 threshold. This means that Principal Contractors will not be required to prepare health and safety coordination plans for 88.5% of these housing construction projects.

Comment

The most mystifying piece of legislation is to be found under 5.1.13, which calls up section 11 of the Building and Construction Industry Security of Payments Act 2002. This clause is designed to generally describe the contractual arrangements of two distinct parties regarding a single contract and is inappropriate to define the value of a project that may have a multiplicity of contracts and parties contributing to the project value. It will be questionable whether such information is going to be freely made available to all of the parties.

The concept of a project value is difficult for various parties to determine and is inappropriate to define the dimensions of a construction project for the purposes of managing OHS. The more practicable method of defining a project is to determine the number of persons that will work on the project and the construction period.

WorkSafe response

WorkSafe has chosen to value a construction project in the same way a construction contract is valued under section 11 of the *Building and Construction Industry Security of Payments Act 2002* (the Building Act). Threshold based on number of persons does not take into account part time work, work undertaken by persons attending the workplace for a short period to undertake specific tasks, and does not recognise the fluidity of the way work is undertaken in the construction industry. A dollar threshold is more workable – the value of a construction project is a matter of fact and a dollar threshold gives certainty about when the duty arises.

Referring to the Building Act in regulation 5.1.13 means that in Victoria all will be using the same method to value the cost, thus making for equitable treatment. Section 11 of the Building Act sets out the steps for evaluating the cost. The construction project is to be valued as agreed by the terms of the contract or arrangement or, where this is not an express term, as specified in section 11 by considering, amongst other things, the total cost of goods and materials to become part of the structure, and of labour and services.

Principal contractors

Comment

A number of respondents were unclear about the difference between the employer and principal contractor duty holders. Consider the Principal Contractor to be the employer by virtue of section 21 of the Act, and believe the inclusion of provisions regarding independent contractors would cause overlap of duties.

WorkSafe response

The Principal Contractor is the owner, unless the owner appoints a Principal Contractor and gives that Principal Contractor sufficient authority to manage and control the workplace to the extent they can discharge the Principal Contractor duties. If domestic premises become a workplace due to construction work being carried out, and the owner appoints someone to manage or control that workplace, then that person would be deemed to be the Principal Contractor for the purposes of the duties on the Principal Contractor.

The Principal Contractor is not the same as the employer, and does not have the same duties as the employer. The duties expected of the Principal Contractor are clearly defined in the Regulations, and are limited to duties in relation to preparing health and safety coordination plans and posting signage.

The Principal Contractor is a duty holder under section 26 of the Act - persons who manage or control a workplace. The duties that can be placed on persons under section 26 are not the same as the duties that can be placed on an employer under section 21, however in some cases a Principal Contractor may also be an employer and owe duties under section 21 to their employees. These duties are not overlapping – they are complementary.

Comment

One submission opposed the requirement for signage to be posted as it creates a prosecutable offence if not complied with, even though signs can be stolen without the Principal Contractor knowing about it.

WorkSafe response

WorkSafe considers provision of this information not to be onerous and to be of sufficient importance to warrant a reference in the Regulations, as it is a safety coordination issue. If this information is already provided under the Building Regulations, the duty would be met. Fulfilment of the duty to comply and secure signage in a reasonable manner would likely be supported by evidence such as witnesses, notes in a diary, and / or an obvious indication of where a sign has been placed and removed from if stolen. The duty would include replacing and maintaining the sign if stolen, but if the duty holder has complied with the initial duty, WorkSafe would be unlikely to prosecute while it was being replaced, consistent with its constructive compliance policy.

Comment

One submission proposed an addition for regulation 5.1.18, health and safety coordination plans for inspection, to include a person assisting in a dispute in relation to any occupational health and safety issue on site. Access to that safety plan is necessary to be able to properly assist those persons concerned. Frequently employers are reluctant to provide access to such documents which at best hinders and at worst prevents the resolution of such a dispute.

WorkSafe response

Regulation 5.1.18 does not limit the persons to whom the health and safety co-ordination plan must be made available but states that the plan must be available for inspection throughout the course of the construction by persons *including* those listed.

Site-specific training

Comment

A number of employers and industry groups opposed site specific training in the domestic sector as it is too onerous; it is not required under National Standard; it is not necessary for residential site; and will cause delays to work and increase in costs.

WorkSafe response

The *National Standard for Construction Work* requires "that a person in control of a construction project must ensure that any information, instruction and training related to the hazards, risks and controls identified... are (sic) provided to those engaged to undertake the construction work" (clause 7.23) and "must not direct or allow another person, including a self-employed person, to carry out construction work unless... the other person has undertaken occupational health and safety induction training." (clause 7.40). Further a person engaged to do construction work must not undertake the work until training has been completed (clause 7.41). The National Standard anticipates that the training required may include general OHS training, work activity based training and site-specific training.

Importantly, the Act (section 21(2)(e)), sets out an overarching requirement to provide information, instruction and training as is necessary to allow an employee to perform work safely. The duty is subject to "reasonably practicable" as the Regulation is made under section 158(1)(a), which allows Regulations to be made with respect to the way in which the general duties under section 21 are carried out. WorkSafe expects section 21(2)(e) training would include some training that relates to the particular workplace at which the construction work is to be performed.

The duty to provide site specific training in the Construction Part is a performance based regulation, and it does not specify that training must take place by way of a face to face meeting. WorkSafe has acknowledged that construction projects vary widely in size and duration. Site specific training will need therefore to be tailored both in content and duration to the full range of the needs of these projects. As with SWMS there are likely to be ways for many industry sectors to streamline site specific training – volume builders are the obvious example. There is considerable guidance in the draft National Code on site specific training and WorkSafe has recommended that guidance material based on this be developed as one of the highest priorities.

Induction training and induction training cards

Comment

Employers argue that mutual recognition has already been achieved – no need for regulation. Cross border work only a small part of the overall industry – should not drive a need for regulated induction training. WorkSafe should not pre-empt draft National Code of Practice for Induction Training.

WorkSafe response

WorkSafe considers that a construction induction training scheme is the most effective way to ensure adequate general OHS awareness within such a high risk industry.

Mutual recognition is an important aspect of the inclusion of construction induction training in the regulatory package. WorkSafe is in continued discussion with its counterparts in other states to work towards the goal of harmonisation, in particular with NSW. Agreement has been reached with NSW and QLD, to mutually recognise Victoria's construction induction training courses, but this has been on the basis that each state can assure the integrity of its course and courses are nationally consistent. The proposal to regulate training in Victoria has been critical in providing these assurances and the agreement to mutual recognition would not have been achieved without it.

The *National Standard for Construction Work* requires OHS induction training for all construction workers and this has been finalised. The draft *National Code of Practice for General Induction Training* will set out the detail of how this should be undertaken and was declared at the last ASCC meeting on 16 May 2007. The regulations have been formulated with sufficient flexibility to enable assurance of the integrity of the course and the ability to adopt a national training module when it is finalised.

Comment

A union believes that the regulations should reflect the current system such that WorkSafe only recognises RTOs that are recognised by Foundation for Safety Victoria (FSV).

WorkSafe response

WorkSafe acknowledges that FSV's early work on construction induction training was instrumental in establishing induction training as part of the construction industry OHS landscape. The proposed scheme has been designed to maintain the best features of that work.

Under a regulated regime that relies on the vocational education and training sector, there is no basis for imposing additional restrictions limiting which RTOs can deliver training. Regulating that only FSV RTOs can deliver the training would constitute a restriction of competition under the government's *Guidelines for the Application of the Competition Test to New Legislative Proposals*.

Opening up the delivery of induction training will have the additional advantage of helping to address induction training waiting lists, which anecdotal evidence indicates have long been a problem.

Comment

Some sought clarification as to whether those who hold an existing red card would need to obtain a new construction induction card issued under the Regulations.

WorkSafe response

The Regulations permit persons who have completed an FSV training course and hold a "red card" on or before 30 June 2008 to continue to work in the sector. Both construction induction cards (i.e. registrations) issued under the Regulations and red cards issued under the current voluntary scheme are valid for life (subject to the holder continuing to work in the industry). Transfer from red cards to the new construction induction cards is optional. The new requirement to be registered primarily affects persons entering the industry or those who have worked in the industry but not obtained a red card on before 30 June 2008.

The Regulations provide for WorkSafe to begin issuing the new construction induction cards from 1 January 2008 – these can be issued in respect of evidence of completion of either the "red card course" or the new course during the transitional period of 1 January 2008 to 30 June 2008.

Comment

A submission noted the course is designed by its very nature to be an introduction, orientation, or initiation. It is inconceivable that workers are able to achieve proficiency in the plethora of topics and sub topics covered within a 6 hour time frame. The proposed regulations import a competency based standard that is below the current Victorian Standard. In Victoria the nominal hours for Basic OHS competency is forty hours. This means that the proposed regulation will significantly lower the minimum competency requirement for OHS in this state. Whilst parties have agreed to the importance of mutual recognition this should not be at the bequest of workers safety in Victoria.

WorkSafe response

To be nationally consistent, and to meet the requirements for mutual recognition, it is necessary for Victoria's regulated scheme to require that nationally consistent accredited training be delivered by RTOs. Under the Australian Quality Training Framework (AQTF), the format of such training is competency based.

Achieving competency in a basic induction training course does not mean a person would be proficient in every aspect of OHS, nor is this the expectation. The attainment of competency in this context means that at the end of the course, the person will be able to demonstrate the required knowledge, as evidenced by passing an appropriate form of assessment.

WorkSafe does not believe that regulating for an accredited, competency based, basic induction training course will threaten the standard in Victoria for broader OHS training. The basic induction course is not comparable to the 40 hour basic OHS competency and is not intended as a substitute or replacement.

Comment

The regulations propose the Office of Training and Tertiary Education be responsible for auditing – this is a systems based approach using the Australian Quality Training Framework. The auditing would only occur when that organisation is required to perform the general audit. One submission

contended that the integrity of the current course will not be maintained in the regulations, resulting in a lower standard of training and potential for workers to be at risk.

WorkSafe response

WorkSafe is currently working with the Victorian Qualification and Registration Authority and the Office of Training and Technical Education to establish a memorandum of understanding regarding the administration of RTOs, the registration of units of competence and which RTOs will be able to deliver them in order to ensure that all proposed training and assessment requirements meet any nationally agreed standards and the requirements of the regulations.

Comment

A submission noted that WorkSafe does not propose to indicate on the red card provided to an individual who has applied and met the necessary criteria, a card which clearly states the provider from whom the individual obtained the certificate of attainment. The current system is transparent and ensures that only individuals who have attained the appropriate level of training under the auspices of the FSV system perform work. The proposed system will not facilitate proper authentication and verification as currently is the practice.

WorkSafe response

Given that WorkSafe is taking over responsibility for issuing cards, WorkSafe will ensure that a person who applies for registration will not receive an induction card unless they provide evidence in the form of a statement of attainment from an appropriate RTO. This removes the need to identify the RTO on the induction card – WorkSafe will ensure proper authentication and verification that a person has attained the appropriate level of training occurs before a card is issued.

Comment

A union opposed persons temporarily at the workplace to deliver plant, supplies or materials being exempt from requirement to undertake construction induction training. States that "temporary" is not defined by the regulations.

This should be deleted as these people are at equal risk if not more than those there more frequently. They are more unfamiliar with site specifics and don't often get inducted onto a site. People who are new arrivals to an industry or site are at a higher risk of injury. Furthermore, a delivery driver is not under any direct supervision from their employer.

WorkSafe response

Excluding delivery of plant and materials is consistent with the *National Standard for Construction Work*.

Requirement for visitors to be accompanied on construction sites

Comment -

The proposed regulations require all visitors who have not had specific induction training be accompanied at all times by a person who has received construction induction training. This is not practicable in a public hospital environment. During redevelopment of hospital facilities visitors, patients, hospital staff, visiting medical staff and others are constantly in and out. An employer considers it is not possible to have all visitors escorted and not practicable to have all visitors, patients, hospital staff and visiting medical staff trained by a construction RTO.

WorkSafe response

WorkSafe does not consider it appropriate that hospital visitors, patients, hospital staff and other persons should be able to enter a construction site unaccompanied. It is not considered unduly onerous to require these people to be accompanied at all times whilst moving through a construction site. When redevelopment of hospital facilities is occurring, the entire hospital would not be a construction site, therefore it would be reasonable to expect that visitors, patients and hospital staff could be isolated from areas of the hospital where construction work is being undertaken.

Induction training – grace period

Comment -

An industry association views the requirement for those engaged in construction work to complete induction training prior to commencing work is unworkable and that the 14 day grace period during which time a Construction Induction Card may be obtained while the worker continues to work under direct supervision is insufficient.

WorkSafe response

WorkSafe has increased the period within which persons can work under direct supervision before completing induction training from 14 to 28 days.

Comment

It is essential that a temporary exemption is applied to enable a person to commence work on a construction site, without first obtaining the induction card. However, an employer group is concerned about the manner in which these exemptions will apply, particularly as they can only be granted once in a 2 year period. Consider the example of a person who obtains temporary short-term employment in the industry; they are granted an exemption from Division 3 of the Regulations and apply to undertake training (at the employer's expense). Before the training occurs, the employment ceases, and the worker does not attend training. This worker will be excluded from working in the industry for two years unless they are prepared to pay for their own training and certification. This scenario does not apply in relation to licensing of high risk work and should not apply in the construction industry.

WorkSafe response

The temporary exemption is provided as a "once off" grace period to ensure that it is not abused in such cases of short term employment. If such a provision was not limited, this would enable people to go from short term contract to short term contract without ever having completed a course of construction induction training. The employer's responsibility is to meet the cost of the training, and the employee's responsibility is to meet the requirement for registration. The regulation has been amended to clarify this.

Notification of construction excavation

Comment

Regulation 5.1.27 requires that an employer must notify the Authority of the intention to excavate at least 3 days prior to commencing work. Where work is performed within a controlled environment, such as in a MHF or depot, notification is not the most effective manner in which to manage high-risk work. One submission proposed that where a site can demonstrate suitable management procedures to control this activity that an exemption to this notification is provided in the Regulations. In addition, a blanket exemption should be included with all MHF licences.

WorkSafe response

It should be noted that the requirement to notify only applies in certain circumstances – duty holders need to refer to the definition of construction work, definition of construction excavation, and application provisions of the construction excavation notification division.

There is no justification provided for the blanket exemption from the notification requirements for major hazard facilities. The suggestion that sites that can "demonstrate suitable management procedures to control" risks arising from excavations is noted, however all sites are required to control risks associated with excavation, regardless of notification and the purpose of notification is to signal that this is a very high risk activity and enable WorkSafe to target inspections.

Part 5.2 – Major Hazard Facilities

Terminology

Comment

An individual respondent suggested that the reference to “serious incident” in the objective provision concerning MHFs be replaced with the term “major incident”. It was argued that the main objective of MHF regulations has always been to prevent major incidents which are unique to MHFs.

WorkSafe response

The use of “serious incident” has been maintained in the objective [regulation 1.1.1(a)(ii)] as it is a general encapsulation of the objective for MHFs and mines rather than specifically for either.

Review of Safety Case

Comment

An employer stated strong support for the Regulations making provision for the Safety Case to contain a summary of the documentation prepared under regulations 5.2.6 and 5.2.7. However the employer questioned the logic of a requiring a Safety Case to be reviewed and revised if a Property Protection Assessment is revised. Similarly the logic of linking the Property Protection Assessment to the operator's duty to review under regulation 5.2.12(2)(e) was queried. It was proposed that the relevant provisions (regulations 5.2.17(1)(c) and 5.2.12(2)(e)) be removed.

WorkSafe response

The National Standard does not isolate a safety report (Safety Case) from adjacent land use (Property Protection Assessment). The National Standard is clear that a review of a safety report take account of changes to adjacent land use. The Regulations give effect to the intent of the National Standard by ensuring that in any review of either the Safety Case or the Property Protection Assessment, the impact of any change is taken into account. If there is a change to the circumstances that formed part of the Property Protection Assessment it is appropriate that the Safety Case and risk controls are reviewed to determine if they are impacted by the change. The separation of the Safety Case and the Property Protection Assessment in the Regulations is necessary because the power to regulate the latter is drawn from the *Dangerous Goods Act 1985*. If all the provisions of the National Standard were fully covered by the OHS Act, the property protection part would be an integral component of the Safety Case.

Authority may require information

Comment

An employer sought clarification on the nature of the information that can be required under regulation 5.2.4. It was queried whether the information includes information that must be created; why the requirement is unique to MHFs; and whether the regulation is required given the powers of inspectors to require information.

WorkSafe response

The regulation is specific to information the Authority requires for the purposes of the MHF Part including information on the safety management system, the safety case and emergency plan. The Authority is required to be satisfied as to compliance in order to be able to issue a licence under Part 6 of the Regulations. The regulation does not preclude the operator from creating information in order to meet a request from the Authority for information. The inspector power referred to is directed at the production of documents. The information requirement is specific to MHFs because of the technically detailed and significant licensing review process that requires the Authority to be satisfied of the operator's compliance in order to grant a licence. It should be noted the regulation requires the Authority to set out its information request in writing, is qualified to ensure the request is reasonable in regard to the requirement for compliance and is limited to purposes under the Part.

Transitional provisions

Comment

Two submissions proposed another transitional provision be included for MHFs. Concern was raised about the potential for adverse impacts on MHFs operators for whom a licence decision will be made under the new Regulations when the Safety Report was prepared under the previous Regulations.

WorkSafe response

A regulation has been included in the transitional provisions for MHFs (regulation 8.1.8) to cover the situation where an application for a licence, lodged under the previous Regulations but not determined, will be taken to be an application under Part 6.1 of the new Regulations.

Schedule 12 (Additional matters to be included in Safety Case)

Comment

An employer sought clarification of the intent of the inclusion of item 1.5 in Schedule 12. The employer expected that WorkSafe would only be interested in proposed changes that would impact on the risk profile rather than changes with no impact. It was proposed that item 1.5 be removed.

WorkSafe response

Item 1.5 of Schedule 12 is there to ensure transparency of decision-making by the MHF operator when determining that proposed changes at the facility will not require new risk control measures. (This item is a translation from the previous MHF Regulations.) The purpose of the Safety Case is to reveal the operator's capability to operate the MHF and how decisions on risk control are made when circumstances change is important to WorkSafe's evaluation of the Safety Case and the operator's capability to operate safely.

(See also comment under "Chapter 6 – Licensing and Registration" below for further comments made in relation to MHF licences and registration requirements.)

Part 5.3 – Mines

Scope

Comment

A submission supported the DPI proposal to broaden the scope of the Mines Part to include quarries. It was argued that this would ensure consistency with all other jurisdictions where mines and quarries are regulated together.

WorkSafe response

The proposal to include quarries in the Mines Part was not adopted because it was outside the scope of the current regulatory review.

Comment

An industry body commented that regulations governing mine operations are no longer in one place, therefore some operators may be required to use different sections of the consolidated Regulations.

WorkSafe response

Some provisions of the previous Mines Regulations have been relocated and merged with other similar provisions during the consolidation process. The substantive provisions relating specifically to mines have been retained in the Mines Part of the Regulations.

Comment

A union suggested an amendment to definition of “mine” and “mining hazard” to exclude construction work from a mine or from a mining hazard.

WorkSafe response

It is not necessary to exclude application of the mining part to construction work where that work is at a mine. The Construction Part applies to genuine construction work occurring above ground at a mine and does not apply to any mining and exploration activities.

Alcohol and drugs

Comment

Unions commented regarding drug and alcohol testing in mining – further consultation and clarification on the duty of employees is needed. Outstanding issues include medical privacy, consumption of prescription drugs (particularly with employment related injuries), and mandatory testing.

WorkSafe response

DPI has prepared draft Guidelines for drugs, alcohol and fatigue to support the regulation. The Guidelines will be issued by DPI shortly.

Privacy of medical records is assured by the Regulations. Employers are required to keep all such information confidential (regulation 2.1.4) and WorkSafe is subject to information disclosure controls (section 10 of the Act and section 243 of the *Accident Compensation Act 1985*). The Regulations allow prescription drugs to be used in the mine when their use has been specifically prescribed by a registered medical practitioner and authorises their use at the mine.

The Regulations do not mandate medical testing on employees. But it is expected the employee will cooperate with the employer in respect of any medical surveillance or testing that may be required to ensure the employee's safety (section 25 of the Act). If the medical testing cannot be carried out, the employer must take all practicable steps to ensure the employee is not exposed to risk. Such steps may involve assigning the employee to other work.

Comment

It was noted in one submission the draft regulations refer to employer's obligation to protect persons from risks from alcohol and drug consumption. It was proposed that there is a need for a specific duty

for employees to co-operate with their employer and also clarification of employee duty under section 25(1)(c) of the Act.

It was also noted that draft regulation 5.3.13 places obligation on an employer in relation to worker fatigue and proposed that employees should be required to notify employer of fatigue circumstances.

WorkSafe response

The duties on employees in section 25 of the Act apply to measures taken by the employer to control risks associated with alcohol consumption or drugs usage. Those same duties would also cover matters relating to controlling fatigue.

Health surveillance reports

Comment

An industry body stated that monitoring of employee health should be amended in order to provide consistency between regulations 2.1.4(2) and 5.3.15(2).

WorkSafe Response

Regulation 5.3.15(2) has been amended to clarify that the duty on the operator is to obtain a copy of the health surveillance report and ensure that a copy is provided to the employee on the same day. The draft provision concerning the release of the report to other persons has been removed as this matter is addressed by regulation 2.1.4(2).

Chapter 6 – Licensing and Registration

There was general acknowledgement of an improvement in consistency and alignment of licensing. Other comments indicated difficulty navigating for specific needs.

Format and useability

Comment

A variety of submissions commented that this part was confusing, fragmented and unworkable, and lacks continuity for reader. It was proposed that all additional requirements to the general administrative ones should be located under the relevant licence.

WorkSafe response

Some changes have been made to wording and structure to improve useability. However, separate subdivisions for each licence type have not been adopted as it would reintroduce duplication. The Licence Part, has been structured in line with the licensing process, i.e. application – general and then additional provisions, which relate to further requirements of a specific type of licence; other provisions – general and additional provisions; amendment; renewal; and suspension and cancellation. Ease of navigation should improve with familiarity of this structure. Advice on the licensing processes will be available on the WorkSafe website from July 2007.

Applications

Comment

An industry association regarded the cost to employers of the licence test, the limit of 5 years, the photograph for proof of identity, the time for the applicant to sit the test and make the actual application will be done on the employer's time and could add up to a significant loss of productivity. There is very little doubt that even the cost of the licence will have to be paid for by the employer.

Understanding that part of this project was to eradicate "red tape" it is disappointing that any cost savings that may be made may well be off set by increased compliance costs in this area alone.

WorkSafe response

The benefits of operating a nationally recognised scheme offset some of the costs of maintaining the scheme. The RIS discusses the attribution of costs between licence holders and their employers and takes account of those costs. The cost of a renewal of a HRW licence has been kept below cost recovery and is generally lower than the cost of a comparable licence in other States. WorkSafe acknowledges that the introduction of licensing renewal introduces costs but believes those costs are necessary to secure the viability of a nationally recognised licensing scheme for high risk work.

Fees

Comment

One respondent considered the costs of carcinogen and MHF licences are duplicated.

WorkSafe response

Regulation 6.1.17 sets out the fee for a carcinogens licence and regulation 6.1.38 sets out the fee for a renewal of a carcinogens licence. Likewise, regulation 6.1.23 sets out the licence fee for MHFs and regulation 6.1.40 the MHF licence renewal fee.

Comment

Currently a single fee per card is charged if say two or more classes are assessed and applied for concurrently. \$60.00 per each class creates a significant cost impost. It was suggested that a fee per application be considered.

WorkSafe response

The fee for a new or additional class under HRW is to be applied for each "class of work", not per application. The reason is to ensure equity for everyone applying for new competencies.

Renewal will be charged as a one off fee of \$45 per application (or licence holder), not a fee per class. This is because renewal is administrative and about updating personal details and the photo.

Applying for an HRW licence based on a previously held Certificate of Competency will only incur the \$45 renewal fee.

Matters to be considered when assessing a licence application for MHF

Comment

Clarity was requested on ambiguity or conflict specifically about operating an MHF and what "matters arising under any relevant OHS legislation" means, e.g. do they cover results of the Authority's annual inspections, information provided by other agencies (e.g. EPA) etc. What OHS legislation is considered to be relevant and how will this be determined? Asked for guidance notes on what will be considered.

WorkSafe response

WorkSafe must be satisfied an applicant can carry out the activities authorised by the licence in a safe and competent way and will comply with the terms and conditions of the licence. It is incumbent on WorkSafe to consider matters relevant to the application, including record of performance. It was agreed with stakeholders that a broad provision on an applicant's record of performance was important to provide flexibility, e.g. in some circumstances the issue of one notice may be significant, while in another, a number of notices may not have such an impact because of the subject matter.

WorkSafe has MOUs with other Regulatory bodies, such as the EPA and the MFB and may consider information they provide on the performance of a site if relevant to the MHF application.

Stakeholders also agreed that WorkSafe would consider performance pertaining to previous licences in other states, including prosecutions.

Specific "Guidance Notes" in this area are not considered necessary. Apart from being a very small sector, once an application /notification is made a case officer is allocated. Case officers work very closely with the workplace and can provide such information.

Comment

A couple of submissions saw the drafting as allowing the Authority the opportunity to unnecessarily extend the time to make a decision on an MHF licence and to avoid the invocation of additional time limits on notifying applicants and extending the decision past the expiry date of the licence (renewal applications must be submitted 6 months prior to expiry).

Recommended a further regulation or note to say what happens if the Authority does not meet required timelines. Recommended the addition to these Regulations that the extensions cannot be extended past the expiry date of the license to reduce the conflict between the two Regulations.

WorkSafe response

A six month timeframe for major hazard facilities is because of the complexities in assessing these applications. Up to a further six months is available if WorkSafe seeks further information from the applicant. The time frames were stipulated to avoid the scenario of the decision-making process being extended indefinitely and to ensure the process is more transparent and WorkSafe more accountable. WorkSafe's duty and commitment is to complete the process within the given time. However, a failure by WorkSafe to comply with time limits would give the applicant grounds to go to the Victorian Civil and Administrative Tribunal (VCAT).

If WorkSafe gives notice to the licence holder that it intends to refuse to renew the licence, regulation 6.1.33(5) provides for a continuation of the licence, even if its expiry date passes, to allow for the process of review of the decision (if the licence holder applies for it).

Other provisions concerning licences

Comments

There is a penalty if a person who holds any class of licence does not keep the evidence of licence document available for inspection on request under the Act. An industry body sought some flexibility with respect to this regulation.

WorkSafe response

Licence holders are required to keep a copy of the evidence of their licence document where any work authorised by the licence is being carried out and produce the document on request of an inspector.

Comment

Further clarity was requested in relation to the similarities between section 100 of the Act (giving an inspector the power to require production of documents) and regulation 6.1.27 and the penalties attached to non-production of documentation. Can the licence holder be penalised twice under the Act and under the Regulations?

WorkSafe response

Section 100(2) of the Act and regulation 6.1.27 impose different requirements. Regulation 6.1.27 requires a licence holder to have his, her or its evidence of licence document available for inspection on request under the Act. Section 100(2) requires the licence holder to produce the evidence of licence document if asked to do so. Thus if an inspector enters a place and asks a licence holder to produce his, her or its evidence of licence document, if the licence holder does not have the document available for inspection, the failure to produce the document is only an offence against regulation 6.1.27. If the licence holder has the document at the place, but refuses to produce it, then it is only an offence against section 100(2).

Comment

What is "evidence of a licence document" and where does the licence holder need to keep the evidence of the licence document?

WorkSafe response

"Evidence of licence document" is defined in regulation 1.1.5 as the document issued to licence holders under regulation 6.1.7. Evidence of a licence document is the notice or card provided to the duty holder by the Authority as evidence that a licence has been granted. It details the name of the licence holder; the date of effect of the licence; the date the licence expires; any terms and conditions; and an identifying number. HRW licence documents will also include a photograph of the licence holder; date of birth; provision for the signature; and class(es) of work authorised. A HRW licence holder would keep the evidence of licence document on their person, while others would be kept in an accessible place where the authorised work is done.

Renewal of licences

Comment

A few questioned if the requirements of regulation 6.1.35(2)(a) constitute sufficient evidence of competence to re-accredit every 5 years. Suggestion made on how to assess competency before renewal.

Requested that guidance notes be provided on what the business liability is for the veracity of such a declaration.

WorkSafe response

The renewal process does not mean that a holder of a licence for high risk work must undergo reassessment of competencies every five years, but must declare at renewal that the competencies have been maintained. Renewal is a new requirement that arises from adopting the revised National Standard – the *National Standard for Licensing Persons for Performing High Risk Work*. (See also discussion of on the introduction of renewable licences under the "Part 3.6 – High Risk Work (HRW)" heading.)

Assessing competency during the licence renewal process was considered during the development of the National Standard, but was not supported nationally due to insufficient evidence of the need and the recurring costs involved in assessment. To ensure national consistency and maintain recognition of licences across jurisdictions, competency assessment will not be required for licence renewal, but a declaration that the applicant has maintained competency is a requirement.

Comment

Concern was expressed in a submission that a licence must be renewed by reason only that it was paid. Suggested a wording change and reference to the appeal provision as in regulation 6.1.34.

WorkSafe response

A licence is renewed if all of the information required is supplied and the payment is made. The information required includes a declaration that the competency has been maintained; a photograph of the applicant; and proof of identity. If any of these requirements are not met, WorkSafe must not renew the licence. There are also provisions to suspend or cancel licences in Division 5 of Part 6.1.

Comment

One group questioned why plant registration requires renewal after 3 years. Recommend a renewal period of 5 years as many of these vessels are in service for between 5 and 10 years or more.

WorkSafe response

The period for a plant registration has been increased to 5 years. This will reduce regulatory burden on business and provide consistency with the term of licences for high risk work.

Comment

A number of submissions opposed paying for renewable licences and registrations.

WorkSafe response

WorkSafe is obliged to follow recommendations by the Department of Treasury and Finance for fee setting, which is full cost recovery unless there are explicit policy reasons not to do so. The fee for renewal of a HRW licence has been set below cost recovery to facilitate uptake of the new scheme.

Review of decisions

Comment

It was suggested in a couple of submissions that information about what a "process review" is be included in the note after regulation 6.1.34(1) directing people to relevant sections for appeal provisions.

WorkSafe response

The note after regulation 6.1.34(1) includes a reference to where a process review is defined.

Comment

These "reviewable decisions" are in addition to those established under the Act, and appear to have a different focus for review, i.e. under the Act the merit of the decision is considered, whereas under the Regulations it appears that only the process can be considered, and different levels of outcomes. Having two different types of reviewable decisions causes unnecessary confusion.

Recommend that the reviewable decisions under 6.3 be treated in the same manner as reviewable decisions under Part 10 of the Act. Alternatively, the reviews under Part 6.3 should be given a different name in order to remove confusion.

WorkSafe response

Section 158(1)(d) of the Act gives the power to make regulations to prescribe (whether or not by reference to Part 10) the circumstances and way in which a decision may be reviewed. The specific reviewable decisions in these regulations are not found in Part 10. A process review in the first instance is appropriate. It involves a determination of whether the decision was made in accordance with the Act and the Regulations. It doesn't consider the merits of the decision. It is a mandatory step prior to an applicant lodging an appeal with VCAT and affords WorkSafe an opportunity to correct any administrative errors in decision making prior to an applicant proceeding to VCAT.

Part 7.2 - Exemptions

A number of proposals for exemptions or exclusions from particular requirements are also discussed in other sections of this paper.

Proposal for exclusion from incident notification requirements

Comment

One submission proposed that hospitals be exempted from the notification requirements under Part 5 of the Act in relation to clinical interventions, i.e. medical treatment of patients. It was noted that the Act provides for regulations to exclude a kind of incident from the application of the notification requirements of the Act.

WorkSafe response

The exclusion proposed in the submission would apply only to incidents involving patients in public hospitals or private hospitals that treat public patients (and are listed in Schedule 4 of the Health Services Act 1988). However, any potential flow-on for other parts of the health services industry that provide clinical care would also have to be considered. The proposed exclusion is outside the scope of the current regulatory review.

Proposal for exemption power to extend to the Noise Part

Comment

A large emergency services employer argued for an exemption provision from the Noise Part in Part 7.2 because there will be circumstances where the application of the Noise Part will be unreasonably onerous and impracticable and the Regulations do not provide for flexibility in meeting the requirements.

WorkSafe response

An "exemption power" from the Noise Part has been included in Part 7.2 - Exemptions. Any class of employer may make submission for such an exemption and it will be considered on its merits. WorkSafe must be satisfied that, in granting an exemption, the duty holder provides at least an equivalent level of protection for affected employees. WorkSafe can also impose conditions on an exemption to ensure effective risk controls.

Proposal for general exemption power

Comment

There was a proposal for a general exemption power to cover unexpected circumstances.

WorkSafe response

Exemption powers within the regulations, including the new one above, are broad enough to address unexpected circumstances.

4. Specific comment on the EPS Regulations

General

Comment

The changes to the proposed Equipment (Public Safety) (General) Regulations 1995 (EPS Regulations), including the consolidation with the Equipment (Public Safety) (Incident Notification) Regulations 1997, were supported by unions and an industry association.

WorkSafe response

Noted.

Removal of risk assessment

Comment

Union's comments regarding the removal of risk assessment from the consolidated OHS Regulations applied equally to the EPS Regulations. They did not support the removal of risk assessment.

WorkSafe response

Noted. See the "Overarching Policy Issues and General Comments" section for a response to this issue.

Definitions

Comment

One submission proposed that the term "designer" be defined to clarify obligations.

WorkSafe response

Regulation 105(2) establishes that a reference in the EPS Regulations to "designer" in relation to prescribed equipment is a reference to a person who designs that prescribed equipment. The term "person who designs" is used in the *Equipment (Public Safety) Act 1994* (EPS Act) and not defined there. The terms "design" or "person who designs" have not been defined in the Regulations as it may inadvertently narrow their meanings. The ordinary dictionary meaning of "design" will apply.

Comment

There is no definition of "a person who is in charge of prescribed equipment at an equipment site".

WorkSafe response

The term is used in the EPS Act and not defined there. It has not been defined in the EPS Regulations as it may inadvertently narrow its meaning. Regulation 106 sets out which equipment is "prescribed equipment" for the purposes of the Act and the Regulations.

Provision of information to the manufacturer

Comment

An industry association proposed that the designer provide information about the competency of the operator with due regard to the various Civil Construction Training Package units being offered in Victoria.

WorkSafe response

Regulation 308(1)(d) requires the designer to provide the manufacturer with information (if relevant) relating to the systems of work and competency of operators that are necessary for the safe use of the prescribed equipment. The term "competency" in this instance means the broader skill bases required by an operator when operating the equipment. It is not intended that the designer should be required to identify individual training units when identifying the competency required for operating the prescribed equipment. Given the range of equipment that is prescribed equipment under the Regulations, the duty needs to be framed in broad terms.

Exclusion from design notifications

Comment

An industry association suggested change to notification of prescribed equipment design to exclude AALS-AMBSC⁶ registered miniature boilers, and miniature railway and hobby structures of the member organisations of AALS. It was argued that the Miniature Boiler Codes, Parts 1 and 2, have become the model standards for equivalent hobby organisations in other countries. It was also argued that the codes have been developed and refined progressively, are respected throughout the Australian model engineering hobby for all applications (stationary, marine, miniature railway, miniature traction engines), and are rigorously adhered to and applied by all member organisations.

WorkSafe response

In order to exempt designs that have been registered with the Australian Association of Live Steamers Limited (AALS) WorkSafe must be satisfied that the codes and systems put in place by AALS meet the requirements under the Regulations and the EPS Act.

The codes that have been developed by the AALS would need to be reviewed through the National Plant Standard review group led by ASCC. It would be inappropriate and nationally inconsistent for WorkSafe to exempt from registration plant covered by the AALS at this time.

Incident notification – notice of dangerous occurrences

Comment

There was comment that there is no mention of “near miss” in regulation 903. It was contended that the regulation indicates actual dangerous occurrences but is not clear about what is to be done in the case of a near miss when there is no actual incident.

WorkSafe response

The EPS Regulations provide sufficient scope to accommodate the concept of “near-miss”. Regulation 903 states that a person in charge of prescribed equipment must notify the Authority immediately after becoming aware of an incident involving the equipment which “exposed a person in the immediate vicinity of the equipment to an immediate risk to that person’s health or safety” through the incidents prescribed. It is not necessary that the incident resulted in an injury, only that there was an immediate risk to a person’s health or safety.

⁶ AALS-AMBSC is the Australian Association of Live Steamers – Australian Miniature Boiler Safety Committee

5. Specific comment on RIS assumptions, methodology and cost estimates

Compliance rates

Comment

One respondent queried whether compliance rates would increase under the new regulations as forecast in the RIS.

Response

The estimate of the increase in compliance used in the RIS was based on the advice of WorkSafe that a consolidated regulation will make compliance simpler as there is only one law dealing with an issue, although the RIS consultants also considered the NSW RIS. The estimates in that document could be interpreted as implying an increase in compliance following the consolidation of a number of the NSW OHS regulations. Ultimately, however, this was considered to be specific to NSW, and was a 'derived' rather than explicit estimate. Given these factors, and reflecting the fact that WorkSafe was thought to have a better understanding of the existing and proposed regulatory environment in Victoria, the RIS based its estimate of the likely increase in compliance on WorkSafe's advice. It should be noted that advice was obtained from a range of technical experts within WorkSafe; reference was also made to in-house survey data.

Avoidable fatalities

Comment

An industry group raised concern about the use of fatality rates to measure the benefits of the proposed Regulations, in particular, use of a 14 year old WorkSafe paper to make the assumption that 97% of work related deaths are preventable, due to pre-existing unsafe practices when combined with human error. They believed this does not consider recent workplace safety improvements.

WorkSafe response

The purpose of the RIS is to assess the forward impact of the proposed Regulations and in this context it is correct to state that the RIS does not look at the most recent safety improvements. However, to estimate the number of preventable deaths and injuries, the RIS drew on both WorkSafe internal analysis of claims data and published research, to establish assumptions that could then be applied to the most recent injury claims and death data. The assumption that 97% of injuries and deaths could be prevented by using appropriate control measures was taken from what was considered to be the best available published research. The RIS also tested alternative assumptions on the percentage of injuries deaths and that are avoidable (94% and 100%) in the sensitivity analysis. The sensitivity analysis revealed that small changes to this assumption did not significantly impact on the final results.

Injury claims cost

Comment

One submission by an individual stated that the RIS assumes a benefit of \$39,754 per injury claim avoided and argued that this is a significant (26%) overstatement as the estimate is only for the minority plant-related claims.

WorkSafe response

The use of \$39,754 per injury claim cost assumption was the most recent (and comprehensive) cost estimate available. It was based using the "fully developed" cost of claims for non-fatal injuries and diseases in 2002–03 (the most recent year for which reliable data is available) and expressed in 2004–05 dollars. Fully developed claims costs are a combination of payments to date plus an estimate of outstanding claims costs (future costs as calculated by the Authority's statistical case estimate model). The fully developed cost of claims in more recent years is less accurate, as many claims are still being processed, thereby leading to a potential underestimation of the true cost.

Indirect to direct cost ratio

Comment

One submission by an individual questioned the validity of the indirect to direct cost ratio used in the RIS analysis. It was noted that the Industry Commission used an indirect to direct cost ratio of 3:1, but the RIS preferred a 4:1 indirect to direct cost ratio. The individual claimed that the RIS Technical Appendix conceals the Industry Commission's indirect to direct injury cost ratio estimate of 1.9:1 for Victoria.

WorkSafe response

The Industry Commission quoted a range of estimates for the indirect-to-direct cost ratio, from 1.9 to 7.4. The Industry Commission estimate of a ratio of 1.9:1 for Victoria was not used, as it was based on compensation data from the previous Workers' Compensation regime. The Industry Commission itself notes that due to significant changes in workers' compensation benefits since 1992–93, the ratio of direct to indirect costs in each State will have changed. The RIS therefore used the National average, as estimated by the Industry Commission (3:1), but given that it excluded a range of other indirect cost elements, a higher ratio of 4:1 was adopted. As recognised in the RIS, this was found to be a crucial assumption when tested in the sensitivity analysis. The value of injuries estimated using an indirect-to-direct cost ratio of 4:1 is not unreasonable when compared with the estimates of other studies. The RIS estimates annual injury costs (direct plus indirect costs) to equate to around \$6.7 billion per annum. This is similar to the National Health and Safety Commission (2004) estimate of \$6 billion per annum in 2000-01.⁷

Cancer fatalities

Comment

One submission by an individual stated that use of estimates of Nurminen and Karjalainen (of work related deaths) resulted in a significant proportion of tobacco-related deaths being redefined into a new "work related" category to provide cost-benefit justification for the proposed Regulations. The individual questioned why the analysis was not subjected to sensitivity evaluation.

WorkSafe response

The submission correctly states that a sensitivity analysis was not conducted on fatality numbers. However, sensitivity analysis of alternative fatality assumptions showed that small changes to the number of workplace fatalities appear to have little bearing on the cost benefit results. The present value of future avoidable deaths and injuries was found to range between \$56.1 billion and \$69.5 billion over the next ten years, and the benefit cost ratio of the proposed Regulations was found to range between 3.91 and 4.84 — that is, the benefits of the proposed Regulations still exceed costs by between 4 and 5 times under alternative fatality assumptions. This is because the majority of the OHS "problems" to be addressed by the Regulations (approximately 80 per cent) are associated with workplace injuries, rather than deaths.

Costing of HSR consultation requirements

Comment

A number of submissions by employer and industry groups believed that the proposed new regulation clarifying HSR involvement in workplace consultation would result in additional costs to employers and that these costs should have been included in the RIS. It was argued that the regulations will impose a significant time burden and additional costs on employers as they will need to provide information in advance and hold meetings with HSRs. Some submissions claimed that the consultation requirement would double the cost of consulting.

WorkSafe response

The duty to involve HSRs in consultation (in those workplaces where HSRs exist) is an existing duty created by section 36(2) of the Act. The regulation clarifies how to discharge this existing duty, it is consistent with the overarching objectives of the Act and does not undermine the flexibility offered by the consultation provisions in the Act. As such, it is not expected to impose any new obligation and

⁷ National Health and Safety Commission (2004) The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community.

therefore was not costed in the RIS. The RIS only considered additional costs associated with 'new' compliance, where those costs related specifically to the Regulations, and not "new" compliance related to the Act. The additional cost that industry is concerned about is the "new" cost of complying with the Act and therefore is not something that should be included in the RIS.

Indexing of construction threshold

Comment

A number of submissions suggested the proposed Regulations should include a provision for indexation of the proposed \$250,000 threshold for preparation of health and safety coordination plans.

WorkSafe response

The modelling of health and safety coordination plan costs is based on real values, and therefore, indexation of the threshold is implicitly included in the modelling. The RIS modelling assumes growth of 1 per cent per annum of projects exceeding the threshold (that is, the number of projects where a plan is required will grow in real terms by 1 per cent). Even if the number of projects requiring a plan were to grow in line with the inflation rate, the resulting increase in the cost estimates would not alter the break even ratio and would not change the RIS conclusions.

Impact of construction duties on housing affordability

Comment

A number of submissions claim the cost impact of the new Construction Part will be significantly higher than the estimates in the RIS and it will contribute to the lack of affordability of housing. They argued that the cost impact of this new regime will be enormous and will send smaller builders out of business.

WorkSafe response

Allen Consulting did not find concrete evidence to support the suggestion that the proposed duties will affect housing affordability. WorkSafe notes that the RIS cost estimates are considerably lower than the industry estimates (see below for details in relation to specific duties). In WorkSafe's opinion, this is due to some employer groups misunderstanding the nature/scope of the new obligations, assuming that the Regulations will be enforced with a heavy hand, and not taking into account costs which businesses are *already* incurring to make their workplaces safer. WorkSafe is engaging with employer groups and key large domestic builders to develop guidance to support the regulation and to demonstrate that compliance will not be as costly as feared.

Cost of health and safety coordination plans

Comment -

A number of submissions suggested the cost of preparing health and safety coordination plans would be higher than estimated in the RIS. One submission argued that it would cost \$1,705 to produce a Plan (equating to \$170 per job if spread over 10 projects) and in total, they estimated the costs to be \$250.3 million over ten years. Another estimated that it will cost between \$1,000 and \$2,500 to prepare a Plan. Another submission argued that it would take at least 4 to 12 hours to prepare the Plan, depending on the type of contract and the need to provide the plan to the client prior to commencement, which should be encouraged. The latter respondent noted that some experienced contractors may already be providing a version of the document being mandated however they believed the time taken and the cost should be recognised.

WorkSafe response

Health and safety coordination plans will only be required for work above the threshold of \$250,000. WorkSafe estimates that 88.5% of residential construction, for which building permits are required, would fall below this threshold and not be subject to the requirement. The expectation is that the majority of the work necessary for the preparation of the plans is already being performed by construction businesses that undertake high value work (as was indicated at the construction RIS employer focus group). On this basis, the RIS used an estimate of 60 minutes to collate site documents that already exist.

The appropriateness of industry estimates for use in the RIS requires verification. For example, one industry group estimates a total cost of \$1,705 to prepare a plan – the equivalent of 4 working days, which seems excessive time to collate existing material. It is uncertain whether this estimate includes the preparation time of existing documents that would make up the plan. The calculation also does not appear to take into account discounting, whereas the \$1.9 million figure in the RIS represents a *discounted value* over 10 years. The RIS estimate is also based on an expected level of attribution of the cost relevant for the Regulations, as opposed to including all costs, which may be due to other reasons (e.g. general requirements under the Act, commercial reasons, employee relations, training, etc).

Cost of Safe Work Method Statements

Comment

A number of submissions suggested the cost of preparing Safe Work Method Statements would be higher than the RIS estimates. One submission argued that the RIS fails to account for salary on-costs, costs of training someone to develop the SWMS, significant down time involved in the consultation process in developing the SWMS as is required by the OHS Act, costs of reviewing SWMS to ensure these are kept up to date and relevant. The submission estimate for the cost of preparing a SWMS is \$976 and the total cost of this requirement will be \$300.9 million over ten years (as opposed to the RIS estimates of \$3.5 million).

Another submission estimated the cost of preparing a SWMS is \$500 and \$1,500, and \$200 to \$1,000 to review the SWMS for each job. However, it is noted that the latter cost is difficult to quantify due to the indeterminable requirement to review the SWMS. Another submission believed that the RIS has not taken into account the cost associated with the need to change training and generic documentation.

WorkSafe response

The RIS estimates were obtained from WorkSafe inspectors and feedback from RIS employer focus groups. Some cost estimates were based on data obtained from NSW Workcover. The RIS states that it would take a typical site about two hours to prepare an initial SWMS, but given the repetitive nature of work and increasing access to generic safety documents, preparation should decrease over time. Industry estimates do not appear to account for the reduction of costs over time due to the repetitive nature of SWMS. One total cost calculation does not appear to take into account discounting over ten years, compliance rates (which are explicitly considered in the RIS), nor does it take into account attribution rates. The \$3.5 million figure is expressed as a *discounted value* over 10 years and based on an expected level of attribution of the cost relevant for the Regulations, as opposed to including all costs, which may be due to other reasons (e.g. requirements under the Act, commercial reasons, employee relations, training, etc).

Cost of construction induction training

Comment

An employer body raised concerns about the costing of construction induction training, stating that 8 hours is a more appropriate estimate of employee training time (as opposed to the RIS estimate of 5 hours), due to worker travel to and from the training venue. They claimed the RIS neglected the cost of training new workers. They estimated the total cost of construction induction training is \$226 million, compared with the RIS estimate of \$4.8 million in training costs plus \$4 million in Red Card registration fees.

WorkSafe response

The RIS assumption of five hours per affected employee to undertake construction induction training is based on RIS employer focus group information and NSW WorkCover estimates. The RIS modelling does take into account the training costs of new workers over time, and model explicitly counts training costs arising from the growth of the construction workforce (1 per cent per annum) and changes in the workforce (10 per cent of the workforce turnover per annum is assumed). The \$4.8 million figure in the RIS is expressed as a discounted value over 10 years and is based on an expected level of attribution of the cost relevant for the Regulations, as opposed to including all costs which may be due to other reasons (e.g. requirements under the Act, commercial reasons, employee relations, etc). If an estimate of 8 hours per employee were to be adopted as per the suggestion, then

the total increase to the estimated training costs would still not alter the break even ratio and would not change the cost benefit conclusions.

Cost of site-specific training

Comment

Some submissions raised the cost of site-specific training. One submission believed it will cost \$562 million to conduct site-specific training based on an assumption of \$4,328 per site. Another submission argued that this aspect had not been costed in the RIS and that site specific training will add "several thousands of dollars to the cost of each house". Their estimate for site-specific training was between \$5,000 and \$30,000 for each site.

WorkSafe response

This requirement is not expected to create incremental costs to employers relative to current business practices. The Act imposes a duty on employers to provide information, instruction and training as is necessary to allow an employee to perform work safely. In most cases, it is expected this would include some site-specific training. The regulatory requirement is providing clarity that workers entering a construction site should be made aware of safety issues and procedures on that site. This could, for example, mean highlighting the existence of a large trench or the position of electrical powerlines. The RIS employer focus groups confirmed that site-specific training is already occurring on many construction sites. The concerns also appear to stem from a belief that site-specific training must be undertaken "face to face" by the builder. This is not the case – the duty rests with the employer, and the duty is performance-based, which allows flexibility in the delivery and detail that is required. (See also discussion of this issue under the "Part 5.1 – Construction" heading in this paper.)

Licensing renewals

Comment

Some submissions raised concerns with the cost of licensing. One industry group claimed that licensing costs, including the cost of the licence itself, will be passed on to employers, as the time testing and application processes will be done on the employer's time, and could result in a significant loss of productivity. One small operator in the building industry stated that licences appear to add extra costs to the running of small businesses and envisaged an increase of more than more than \$45 per year.

An employer group supported the proposal for renewable licences for HRW, and stated that the renewal of licences is acceptable because it allows for National Recognition of licences and that it will provide benefits to companies working across states.

WorkSafe response

The RIS assumes that 40 per cent of licensing costs are borne by employers, while the remaining cost is met by individuals who voluntarily obtain (and pay for) licences to further their job prospects. This assumption was based on responses from a sample of training providers. Although licensing costs borne by individuals/employees are not treated as a business cost, the RIS does take account of these costs in the estimate of employee costs, which form part of the broader cost benefit analysis.

WorkSafe notes and supports the above comment that consistency with the national licensing regime for HRW will also provide benefits.

Reduction in injuries and deaths

Comment

One submission by an individual raised concerns about the validity of using the 2 per cent per year reduction in injuries and deaths assumption to estimate benefits, and claimed that the probability that the proposed regulations would have no positive beneficial impact is not considered in the RIS.

Another submission noted that injury reductions will arise from a change in business ethos, and the greatest saving will be derived from an ethos of "do it right first time" The gains from process efficiencies from this mindset will far outweigh savings from simple loss control.

WorkSafe response

The RIS makes two assumptions about the reduction rate of injuries and deaths:

- Under the current regime, it was assumed that injuries and deaths decline at a rate of 2 per cent per annum relative to a scenario where there were no Regulations; and
- Under the proposed Regulations, it was assumed that, for 10 per cent of injuries and deaths, they would decline at a rate of 1 per cent per annum relative to the current regulatory regime.

The RIS assumption that the *current Regulations* have led to a 2 per cent per annum reduction in workplace injuries and deaths (relative to no regulations) was included for illustrative purposes. The RIS noted that it is difficult precisely calculate current levels of injuries and fatalities in the absence of the current regime, as benefits have already occurred and it is difficult to know for certain how many injuries and deaths have been avoided.

For the proposed Regulations, the RIS took a conservative assumption of a 1 per cent per annum reduction in injuries and deaths, and assumed that the proposed Regulations will have the greatest impact on 10 per cent of avoidable deaths and injuries. This effectively equates to a 0.1 per annum per cent reduction in total injuries and deaths.

The RIS did not consider the probability of the proposed Regulations having no injury and death reduction benefits — this was not considered to be realistic. However, recognising the uncertainty associated with a number of the model's assumptions, the RIS undertook sensitivity analysis using alternative injury reduction rate assumptions (0.5 per cent and 1.5 per cent). The net benefit of the proposed Regulations was still positive using these alternative assumptions.

Hazardous substances

Comment

Unions expressed support for expanding the scope of the Regulations to cover hazardous substances generated from non-hazardous sources, but were concerned that the proposed Regulations maintain a number of inconsistencies with the National Standard. They were concerned the RIS does not address the cost of Victoria retaining their current deviations from the National Standard. Full adoption of the National Standard should be considered as an alternative to the proposed Regulation.

WorkSafe response

WorkSafe and the RIS consultants gave priority to assessing "feasible" alternatives in areas where there was strong stakeholder representation either for change or retention of existing provisions. Extending the Regulations to include hazardous substances from non-hazardous materials and processes brings Victoria into line with the National Standard. The unions' comments regarding the adoption of the entire National Standard as an option would encompass "additional" elements (such as broader definitions and labelling requirements as per the National Standard), however this was not costed as it did not form part of the proposed Regulations nor was it agreed as a "feasible" alternative.

Keeping the current regime

Comment

One submission by a small operator in the building industry stated that no comparison appears to be made on keeping the regulations as they are at the moment as to the possible outcomes.

WorkSafe response

The benefits of the Regulations were compared against the current regime. Thus, if the current regime were retained, the estimated incremental benefits (injuries and fatalities avoided) of the proposed Regulations (\$242 million) and the incremental costs to businesses, employees and government (\$71 million) would not accrue.

Attachment A: Public Comment Data

Table 1: Copies of OHS & EPS Regulations provided to stakeholders & members of the public

	OHS Regs	EPS Regs	RIS	RIS Technical Appendix
Stakeholder pre-public comment bulk orders	889	594	889	69
Advisory Service hard copy requests	1456	1429	1474	1513
VWA website downloads	2466	546	1274	518
TOTAL	4811	2569	3637	2100

Table 2: Public Comment Information Sessions

Public comment presentations	No of presentations	No of attendees
WorkSafe public information sessions	11	443
Additional speaking requests	4	200
TOTAL	15	643

Table 3: Website Traffic (between 20 January 2007 & 28 February 2007)

	Total page impressions for the public comment period	% of total VWA website page impressions
Public comment page impressions	12,804	1.2%

Table 4: Calls received

Public comment phone numbers	Number of enquiries
Advisory Service (general)	464
CFP hotline (technical)	5
TOTAL phone enquiries	469

Table 5: Submissions received

Submissions	Number
Asbestos Dust proforma	887
AMWU Asbestos proforma	98
Consultation proforma	18
Issue Resolution proforma	17
Uniformity proforma	9
Workplace facilities & first aid proforma	17
Employer Consultation proforma	99
Air Conditioning (ACMA) proforma	9
Confidential submissions	2
Submissions from individuals	25
Submissions from employers, employer groups, unions and community groups	101
TOTAL submissions	1282

Notes:

- A number of the proforma submissions included additional comments by the respondent.
- A small number of the submissions received from employers were submitted by a particular area of the organisation, e.g., on behalf of the organisation by the OH&S Representative.

Attachment B: List of public comment submissions received

Submissions received from Employers, Employer Groups, Unions and Community Groups:

A.G Coombs Group
Acotrel Risk Management (two submissions)
Agar Cleaning Systems
Air Conditioning & Mechanical Contractors' Association of Victoria Limited
Alpine Furniture Pty Ltd
Association of Consulting Engineers Australia (ACEA)
Ausfork Pty Ltd
Australian Amusement Association Inc
Australian Association of Live Steamers
Australian Industry Group
Australian Institute of Occupational Hygienists Inc (AIOH)
Australian Manufactures Workers Union (AMWU)
Australian Manufacturing Workers Union (AMWU) Vehicle Division
Australian Nursing Federation (Vic Branch)
Australian Retailers Association
Australian Workers Union - Victorian Branch
Barro Group
Barwon Water
Bilfinger Berger Service
BlueScope Steel Limited
Box Hill Institute (two submissions)
Brockman Engineering Pty Ltd
Burbank Australia Pty Ltd
CDC Plumbing & Drainage
Cement Concrete & Aggregates Australia
Construction Forestry Mining Energy Union (CFMEU)
Chemoch Occupational Hygiene Services
Civil Contractors Federation
Clarendon Residential Group Victoria
Construction & Mining Equipment Industry Group (CMEIG VIC)
Coles Group Limited
Construction Material Processors Association Inc.(CMPA)
Control One Compliance Monitoring and Auditing
Country Fire Authority
Community and Public Sector Union (CPSU)
Dennis Family Homes
Department of Education Strategy Planning and Development
Department of Epidemiology & Preventive Medicine, Monash University Medical School
Department of Justice
Department of Sustainability & Environment
Des Caple & Associates Pty Ltd Occupation Health & Safety Consultants
ERGOSH Safety Management Services Pty Ltd
Electrical Trades Union (ETU)
ExxonMobil
First Access Accessmaster
Gippsland Asbestos Related Diseases Support Inc
Gippsland Audiology Services
Gippsland Trades & Labour Council Inc
Glenvill Pty Ltd
Global Safety & Lifecare Systems Pty Ltd
Godfrey Hirst Australia Pty Ltd

Housing Industry of Australia (HIA)
Huntsman Chemical Company Australia Pty Limited
Insurance Australia Group (IAG)
Jefferson Ford Pty Ltd
KIWI Operations Downunder Pty Ltd
La Trobe University School of Human Biosciences
Liquor, Hospitality & Miscellaneous Union (LHMU)
Master Builders Association of Victoria (MBAV)
Master Plumbers & Mechanical Services Association of Australia
Medical Science Association of Victoria (two submissions)
Melbourne University Department of Property & Campus Services
Metricon Homes Pty Ltd
Minerals Council of Australia
Moonee Valley City Council
National Registered Assessors Association
Plant Safety Solutions Pty Ltd
Plastics and Chemicals Industries Association
Plumbing Trades Employees Union (PTEU)
Property Council of Australia (Victorian Division)
R.J Nixon Builder
Recruitment and Consulting Services Association Ltd
Roseleigh Homes
Royal Australian Institute of Architects (RAIA)
Safety Institute of Australia (Inc) - Victoria Division
Slater & Gordon Lawyers Pty Ltd
Southern Health
Standards Australia
The Asbestos Diseases Society of Victoria Inc. (ADSVIC)
The Australian Meat Industry Employees Union (Victorian Branch)
The National Union of Workers (NUW)
The Victorian Automobile Chamber of Commerce (VACC)
Think Safety Systems Consultant Safety Practitioner Services Pty Ltd
Victorian Employers' Chamber of Commerce and Industry (VECCI)
Victoria Police
Victoria State Emergency Services
Victorian Association of Forest Industries (VAFI)
Victorian Farmers Federation (VFF)
Victorian Trades Hall Council (VTHC) (two submissions)
Victorian Volume Home Builders Safety Alliance (VVHBSA)
Victorian Water Industry OH&S Network
Vicwide Platforms and Safetyrails Pty Ltd
Vital Safety Pty Ltd
Wattyl Pty Ltd
Western Sheetmetal Insulation & Asbestos Removal Pty Ltd
Yallourn Mine
Zealmore Aust Pty Ltd

Submissions received from individuals:

Willie Anakai
Michael Beale
Alex Buckle
Andrew Carrick
Richard Cavell
P S Clark
Lowen Clarke
Brian Collingburn
Tim Cotsell
Lucia Craney
Lisa Cruickshank

Summary of Public Comment and WorkSafe's responses

Alan Duffett
Carole Goldsmith
Pamela Gunn
Theo Hermann
Alison Hunt - Sturman
Laurie Jackson
John Knowles
Kevin L'Huillier
John O'Meara
Jeff Phillips
Wendy Phillips
Joseph Sciusco
David Tomkins
Philip Will

Note:

- The 98 AMWU Asbestos proforma submissions were submitted representing meetings with a total of 5485 signatories.

Attachment C: List of main abbreviations used in summary

ACM	asbestos-containing material
AS/NZS	standard published jointly by or on behalf of Standards Australia and the Standards Council of New Zealand
ASCC	Australian Safety and Compensation Council (formerly the National Occupational Health and Safety Commission)
DGO	Dangerous Goods Order
DWG	designated work group
EPS	equipment public safety
ESO	emergency services organisation
FSV	Foundation for Safety Victoria
HRW	high risk work
HSR	health and safety representative
MHF	major hazard facility
MOU	Memorandum of Understanding
MSDS	material safety data sheet
NMR	National Model Regulations for the Control of Workplace Hazardous Substances
OHS	occupational health and safety
RIS	regulatory impact statement
RTO	registered training organisation
SWMS	safety work method statement
the Authority	Victorian WorkCover Authority
VCAT	Victorian Civil and Administrative Tribunal
VET	vocational education and training
WorkSafe	WorkSafe Victoria (the trading name of the Victorian WorkCover Authority)
WRMC	Workplace Relations Ministers' Council

Note: References to National Standard in this document mean the relevant National Standard declared by ASCC. For example, the reference to National Standard in relation to construction means the *National Standard for Construction Work*.