

## **Safe Work Australia: Submission on Draft Report of the Productivity Commission: Regulation of Australian Agriculture July 2016**

### **1. Introduction**

This paper responds to some key issues raised in the Productivity Commission's Draft Report Regulation of Australian Agriculture (the Draft Report).

As well as some general introductory remarks, this paper addresses the following sections of the Draft Report:

- Labelling of agricultural veterinary chemicals (Section 6.2)
- Access to overseas workers (Section 10.2)
- Work Health and Safety (Section 10.4)

### **2. General remarks**

As discussed in the Safe Work Australia's submission to the Issues Paper, agriculture is one of the most dangerous industries in which to work, with agricultural workers having the highest fatality rate and highest rate of serious workers' compensation claims in Australia.

Safe Work Australia has undertaken considerable research into perceptions and attitudes in Australia to the risks of serious injury and death. Research undertaken in the agriculture industry, including the findings from a 2006 study undertaken by the Australian Safety and Compensation Council (ASCC) and reported in [\*Beyond common sense: A report on the barriers to adopting safety in the Agriculture Industry\*](#) suggest that many farmers do not believe they are personally under threat of an accident or injury despite the high fatality and injury rate of farmers and farm workers.

The health and safety regulation of the agriculture industry is commensurate with the level of risk in the industry. There are clear economic and social benefits for Australia in improving the safety of agricultural workers (both employees and self-employed) through regulation and consistent and proportional compliance and enforcement activities as well as through other initiatives such as those identified under the [\*Australian Work Health and Safety Strategy 2012-2022\*](#).

### **3. Labelling of agricultural and veterinary (agvet) chemicals under work health and safety regulations (pp. 255–257 of the Draft Report)**

Safe Work Australia Members, representatives from Croplife Australia, Animal Medicines Australia (AMA), the Australian Pesticides and Veterinary Medicines Authority (APVMA), and the Department of Agriculture and Water Resources (DAWR) met on 17 August 2016 to discuss issues raised by stakeholders in the agricultural sector related to the labelling of agvet chemicals.

To inform the discussion, the external review report commissioned by DAWR, referred to in the Draft Report, was provided to all meeting participants along with submissions from AMA and Croplife Australia. Safe Work Australia Members heard from APVMA, DAWR, Croplife Australia and the AMA before discussing ways to achieve the intended policy

outcome of providing sufficient hazard information to workers handling agvet chemical products to ensure worker health and safety.

Safe Work Australia Members are now considering options including re-instating the exemption which existed under the previous state and territory occupational health and safety legislation for:

- Prescription Animal Remedies, and
- veterinary chemicals which are Controlled Drugs.

This is on the basis that there are already significant controls on use of these chemicals.

In relation to other agvet chemicals, Safe Work Australia will work with the APVMA and DAWR to determine how best to achieve the policy outcome.

#### **4. Overseas Workers (Section 10.2, pp. 382-397 of the Draft Report)**

While not addressed in Safe Work Australia's submission to the Issues Paper, and not the subject of any findings or recommendations of the Draft Report, issues related to the employment of overseas workers are mentioned in the Draft Report and there are concerns around their work health and safety (WHS) which merit consideration.

In December 2015, Safe Work Australia Members discussed the WHS risks related to migrant workers (including those on temporary working visas) and considered that some migrant workers may have a higher WHS risk than Australian-born workers due to a number of factors including:

- poor English language skills, poor understanding of rights at work, job insecurity (making job security a priority over health and safety), as well as personal characteristics such as country of origin, length of time in Australia, level of education and previous work experience.

'At risk' migrant workers include those with temporary or permanent migration or humanitarian visas, or accompanying primary visa holders.

Following that discussion, Safe Work Australia now has a work program to address and reduce those risks by:

- developing targeted information for workers about WHS, and task-based guidance on the most high-risk tasks
- improving the integration of government information sources
- working with national community organisations which support migrants to disseminate WHS information widely, and
- supporting employers to understand their role and to improve communication with migrant workers in their business, including by developing workplace resources for employers.

The first component of that program – a plain language information sheet on workplace health and safety – has been published on the Safe Work Australia website (<http://www.safeworkaustralia.gov.au/sites/swa/whs-information/working-safely-in-australia/pages/default> and <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/working-safely-in-australia-information-sheet>). It is available in English and an additional 11 languages.

## **5. Work Health and Safety (Section 10.4, pp. 400–407 of the Draft Report)**

The purpose of WHS regulation is to reduce the serious economic and social impact of work-related incidents on individuals, businesses and the Australian community. Overall, WHS laws in Australia aim to protect the health, safety and welfare of all workers at work and of other people who might be affected by work.

The Draft Report identifies concerns raised by farm businesses and their representatives about WHS regulation, including:

- the level of prescription of the WHS Regulations
- the complexity of the WHS Regulations
- penalties for non-compliance are so severe that in some cases they act as a disincentive for farm businesses to employ staff, and
- the responsibility of WHS falling disproportionately on employers.

### The level of prescription of the WHS Regulations

The model WHS laws are based on what is known as ‘Robens style’ legislation. This style of legislation is performance-based and underpinned by a principles-based Act which is supported by prescriptive Regulations and Codes of Practice relating to specific, high risk activities and industries. The aim of this style of legislation is to make employers and workers more accountable for health and safety, and allow flexibility in how risks are managed while providing protection for workers in high risk activities and industries. However, finding the right balance between risk management and prescription can be difficult.

Some businesses prefer to be provided clear instructions on exactly what they need to do to keep their workers safe and comply with WHS laws. Others have the resources to develop sophisticated systems for managing risks and prefer to have the flexibility to determine the best methods of keeping their workers safe.

The Draft Report (pp. 403-404) includes a criticism from Cotton Australia on the level of prescription in the WHS Regulations using the example of the requirement for licences for forklift drivers.

*And they, for example, said that while licenses for forklift drivers in high risk environments such as warehouses may be justified, employers should not need to ensure forklift drivers on a farm attain licenses when operators of other machines like a front-end loader do not need one.*

The WHS Regulations require operators of certain types of plant, regardless of the type of workplace, to hold a licence for which they need to meet certain competency

standards. Decisions on which items of plant or type of work require a licence are based on evidence of the frequency and severity of injuries involving the plant or work and the potential for catastrophic injury to occur. For example, in 2014 SafeWork NSW reported that, in New South Wales alone, 1360 workers had been injured in the two years to July 2014 and eight had been killed in the previous three years as a result of forklift incidents.

### The complexity of the WHS Regulations

There has been debate about whether the model WHS laws, in particular the model WHS Regulations, are too long and overly complex. GrainGrowers is cited in the Draft Report (p. 404) as referring to the need for farmers to be familiar with the model WHS laws and all its associated material and refers to the 23 Codes of Practices, 46 pieces of Guidance Material and 29 fact/information sheets.

This burden may be perceived rather than actual. In general, less than 100 pages of the model WHS Regulations will apply to most businesses, as a significant portion of the model WHS Regulations only applies to a specific industry or type of work. For example, Part 7.2 – Lead, Chapter 8 – Asbestos and Chapter 9 – Major Hazard Facilities make up nearly a third of the pages of the model WHS Regulations, but are estimated to only apply to 0.2 per cent of all Australian businesses.

While there are currently 23 model Codes of Practice, not all of them will apply to all businesses. For example, it is unlikely that most farmers will need to be familiar with the model Codes of Practice on How to Safely Remove Asbestos, Preventing falls in construction, Construction work, Demolition work, Abrasive Blasting, Spray Painting and Powder Coating, Safe design of structures and others.

Other supporting documents, such as guides and fact sheets developed by Safe Work Australia, play an integral part in providing guidance on how provisions of the model WHS laws apply, but again not all of those supporting materials will be relevant to all businesses.

### Severity of the penalties for non-compliance

The model WHS Act and the model WHS Regulations prescribe maximum penalties for contraventions of certain provisions of the Act and Regulations.

Maximum penalties are, as the title suggests, maximums. As noted in the 'Decision Regulation Impact Statement for a Model Occupational Health and Safety Act' (2009), maximum penalties are almost never levied. As stated in the Explanatory Memorandum to the model WHS Bill the maximum penalties reflect the level of seriousness of the offences and have been set at levels high enough to cover the most egregious examples of offence.

A maximum penalty will also only apply in cases where a contravention of the model WHS Act or the model WHS Regulations is prosecuted. Jurisdictions that have implemented the model WHS laws have also provided for the laws to be enforced through infringement notices. The penalties due under an infringement notice are likely to be significantly less than the maximum penalties that could be imposed by a court. For example, s 243 of the *Work Health and Safety Act 2011* (NSW) provides that the amount of penalty prescribed for an infringement notice cannot exceed 20% of the maximum amount of penalty that could be imposed for the offence by a court.

## National Compliance and Enforcement policy

Concern was also expressed about different rules in different jurisdictions despite model WHS laws being introduced (Consolidated Pastoral Company, sub 71). The WHS regulators recognised the potential for this to occur. As a result, they developed the [National Compliance and Enforcement Policy](#) to complement the model WHS laws. It sets out the approach WHS regulators will take with regard to compliance and enforcement under WHS laws, noting that the Commonwealth, states and territories retain responsibility for regulating and enforcing work health and safety laws in their jurisdiction.

WHS regulators seek to use an effective mix of positive motivators, compliance monitoring, and deterrents to encourage and secure the highest possible levels of compliance with WHS laws. This includes providing education and guidance, undertaking workplace inspections and audits, issuing infringement notices, and pursuing court sanctioned injunctions and criminal penalties.

## Contention that the responsibility of WHS falls disproportionately on employers

An example of the concerns expressed in the Draft Report is at Box 10.7 on page 406, which refers to a case study interview with a co-owner of a large vegetable processing business, where the co-owner:

*told the (Productivity) Commission that the enforcement of WHS regulations in Australia has evolved to place far too much responsibility on employers, and not enough on employees and visitors to the facility. As a result, he and the other co-owners of the business had concerns that a major WHS incident could unexpectedly cost them \$100,000 or more, and threaten the financial viability of the business. He said “it doesn’t matter what we do, it’s never enough”.*

The co-owner refers to the enforcement of WHS Regulations. Decisions about enforcement are a matter for WHS regulators and prosecutors. Safe Work Australia is not in a position to comment on enforcement decisions. However, Safe Work Australia can comment on how the model WHS laws work.

This quote suggests that there is a perception in the industry that the model WHS Act and the model WHS Regulations require that a person conducting a business or undertaking (PCBU) eliminate work health and safety risks. This is not the case. The fact that a WHS incident occurs does not mean that a PCBU has necessarily contravened their duty, provided they did what was reasonably practicable to eliminate or minimise the risk of an incident occurring.

Part 2 of the model WHS Act establishes duties to ensure health and safety. Section 17 of the model WHS Act sets out what is meant by ensuring health and safety. In this context, s 17 states that a duty imposed on a person to ensure health and safety requires the person:

- a) to eliminate risks to health and safety, so far as is reasonably practicable, and
- b) if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable.

Section 17 of the model WHS Act makes clear that, if it is not reasonably practicable for a duty holder to eliminate a risk to health and safety, they can still satisfy their duty if they minimise the risk so far as is reasonably practicable.

A definition of reasonably practicable is contained in s 18 of the model WHS Act. Importantly, in determining what is reasonably practicable, after taking into account all other factors, a duty holder can weigh the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk. This factor is relevant to the concerns expressed by the farm businesses regarding compliance costs with work health and safety laws.

The model Code of Practice on How to Manage Work Health and Safety Risks also provides practical guidance that will assist farm businesses to comply with duties and obligations under the model WHS Act and the model WHS Regulations. This model Code of Practice and other guidance materials can be found on Safe Work Australia's website.

### Contention that the responsibility of WHS should be shared between employers and workers

Both the co-owner and a cotton farm manager are quoted in Box 10.7 of the Draft Report as saying that WHS should be a shared responsibility between employers and employees.

Work health and safety is a shared responsibility. It is not just a PCBU that owes work health and safety duties. Under s 28 of the model WHS Act, all workers also owe a health and safety duty. Section 28 of the model WHS Act states that, while at work, a worker must:

- take reasonable care for his or her own health and safety; and
- (a) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons; and
- (b) comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act; and
- (c) co-operate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.

The co-owner and the manager are also quoted in Box 10.7 as saying that their employees are often best placed to manage work health and safety risks. The fact that workers are often well placed to manage work health and safety risks is recognised by s 47 of the model WHS Act, which requires PCBUs to consult workers about WHS matters. However, a PCBU cannot transfer their duties and obligations to their workers (s 14 of the model WHS Act).

Section 244(1) of the model WHS Act states that, for the purposes of the Act, any conduct engaged in on behalf of a body corporate by an employee agent or officer of the body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is conduct also engaged in by the body

corporate. The general rule in s 244 of the model WHS Act is that an employee's conduct is generally but not always attributed to the PCBU.

Section 244(1) was applied in a recent case in NSW – *SafeWork NSW v Wollongong Glass P/L* [2016] NSWDC 58. In that case, because the employee was acting contrary to his training and his employer's safety procedures, the Court found that the employee was not acting within the actual or apparent scope of his or her employment. This meant that, contrary to the general rule, the employee's actions were not attributed to his employer.

In summary, workers clearly do share the responsibility to manage WHS but a PCBU cannot transfer their duty to their workers. A PCBU must do what is reasonably practicable to eliminate or, if that is not possible, to minimise, health and safety risks to workers. If a PCBU has done what is reasonably practicable, but an incident nevertheless occurs (e.g. because of gross negligence or disobedience by a worker) the PCBU may not have contravened their duty.

#### Contention that persons other than workers who visit a farm business should bear some responsibility for WHS

The co-owner is also quoted in Box 10.7 as saying that visitors to the facility do not bear enough responsibility for WHS. Like workers, visitors do share responsibility for WHS. Section 29 of the model WHS Act clearly imposes a duty on other persons at a workplace. It states that a person at a workplace must:

- a) take reasonable care for his or her own health and safety, and
- b) take reasonable care that his or her acts or omissions do not adversely affect the health and safety of other persons, and
- c) comply, so far as the person is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the PCBU to comply with this Act.

Both the PCBU and visitors to the premises must comply with their respective duties under the model WHS Act; a PCBU cannot transfer their duties and obligations to visitors (s 14 of the model WHS Act).

The general rule in s 244(1) of the model WHS Act does not apply to attribute conduct of a visitor to a body corporate PCBU.

A PCBU must do what is reasonably practicable to eliminate or, if that is not possible, to minimise, health and safety risks to other persons arising from work carried out as part of the PCBU's business or undertaking. If a PCBU has done what is reasonably practicable, but an incident nevertheless occurs (e.g. because of gross negligence or disobedience by a visitor), the PCBU may not have contravened their duty.

## **6. Upcoming reviews of model WHS laws**

The former COAG Workplace Relations Ministers' Council (WRMC) agreed in principle that, at a national level, the content and operation of model WHS laws and subordinate legislation should be reviewed five years after the commencement of the model WHS

Act. This review cycle was determined by the WRMC's response to the 2008 National Review into Model Occupational Health and Safety Laws ([Recommendation 232 refers](#)). Although a review provision was not included in the model WHS Act due to drafting protocols in some jurisdictions, the agreement to undertake a review stands.

As most jurisdictions passed and then enacted the model WHS Act on 1 January 2012, a review of the model WHS laws is due to commence on 1 January 2017.

### Interim reviews

On 2 May 2014, COAG asked Ministers with responsibility for WHS (WHS Ministers) to review the model WHS laws, with a particular focus on reducing regulatory burden. The Agency assisted Ministers with the review, and prepared the COAG Report *Improving the model Work Health and Safety laws*.

The 2014 process included a public consultation process which sought comments on areas of the model WHS Regulations that stakeholders:

- had concerns around
- considered to be more burdensome than beneficial
- considered unnecessarily prescriptive, or
- found difficult to comply with.

On 24 October 2014, the COAG Report and an accompanying Decision Regulation Impact Statement were considered by WHS Ministers. At this meeting, Ministers also agreed to examine the model WHS Regulations separately to the 2014 COAG process, and referred the review to Safe Work Australia for consideration. This review is currently being conducted by Safe Work Australia.

### Scheduled reviews

Although a review of the model WHS laws is due to commence on 1 January 2017, WHS Ministers are currently considering deferring the review of the model WHS laws until 2018 on the basis that:

- there are no fundamental issues with the laws as they stand
- the model WHS laws have not been in place for the full five years in some jurisdictions, so it is likely that there will be insufficient data and evidence available to fully examine the implementation of the model WHS laws, and
- amendments made to the model WHS laws in March 2016 have not yet been implemented within jurisdictions and their impact has not been realised.

The scope of the review will be determined by WHS Ministers closer to the commencement of the review.