Consultation Paper

Civil dispute resolution for breaches of WHS duties

Submission to Attorney General, South Australia

NOVEMBER 2023

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INTRODUCTION

Ai Group is a member of Safe Work Australia and its sub-group Strategic Issues Group – Work Health and Safety (SIG-WHS), which had oversight of the development of the Model Work Health and Safety (WHS) Laws and continues to undertake work to further enhance the WHS laws.

A review of the Model WHS Laws was undertaken in 2018 and most of the recommendations of that review have now been incorporated into the Model laws, with most jurisdictions adopting or intending to adopt those changes.

Ai Group is committed to supporting the integrity of the harmonised approach to WHS law across Australia. Hence, we are always reluctant to support any changes in individual jurisdictions that move away from the harmonised model.

However, we will always treat any proposal for change with an open mind, in the context of improving WHS outcomes for businesses and workers.

The report of The Independent Review of SafeWork SA, dated 16 December 2022 (the Review) noted concerns raised by stakeholders about the operation of section 231 which allows an affected party to ask SafeWork SA to consider a prosecution. This resulted in the recommendation under consideration (Chapter 8.1, commencing on page 42). The commentary included the following:

> *Employee associations' submissions were adamant that s 231 is not working.*
>
> *… no perceived consequences or action if the request [under s 231] is not met.*
>
> *Submissions noted that where requests are made investigations are not being completed in a timely manner, and therefore the process is frustrated.*

> *Employee associations argued strongly that this level of prosecution is inadequate to create a realistic perception amongst duty holders that there is a consequence for serious breaches of the WHS Act.*

Ultimately, Recommendation 39 stated:

> *The Government should commence consultation with employer organisations to amend the WHS Act to extend the existing civil penalty provisions to cover the primary duty at s 19 and the offences in Part 2 Division 5 of the WHS Act, and that standing for bringing applications in civil penalty provisions be extended to workers, families of injured workers, and employee associations.*

Ai Group sees this as the main focus of the consultation paper. Therefore, we will address this issue first, and then progress to a discussion of the proposals related to the WHS entry permit dispute resolution process.

APPROACHES TO ENFORCING THE PRIMARY DUTY UNDER WHS LAWS

Ai Group has a long-held position that the WHS regulator (or an appropriate specialised prosecutorial body) should be the only entity to have the power to initiate actions for breaches under the WHS laws.

Section 231 of the WHS Act enables a person to make a written request to the regulator that a prosecution be brought in relation to what they reasonably consider to be a Category 1 or Category 2 offence. Both of these offences involve "a risk of death or serious injury or illness", with the Category 1 offence carrying an additional component of reckless conduct. This provision ensures that the regulator can be held accountable if a prosecution for a serious breach has not been commenced.

We note the comments in The Review that some stakeholders do not believe that section 231 is working. We also note the observation (p.44) that:

> *Every external party who submitted or spoke to the review expressed concern about the visibility of SafeWork SA … everyone wanted SafeWork SA to be better resourced, to be more active and more confident in doing its work.*

It is Ai Group's view that the best response to any lack of enforcement would be to increase the resources available to SafeWork SA and to ensure that the responses to s 231 requests are effectively managed and appropriately communicated.

Later in our submission we also highlight that additional resources would need to be available in order for SafeWork SA to monitor the civil dispute resolution process to ensure that they intervene appropriately and can respond to requests to intervene.

Ai Group strongly opposes the proposal which has been presented as “civil dispute resolution”, but is in effect a process to enable persons other than the regulator to initiate civil actions, with penalties, that are better addressed as prosecutions by the regulator.

However, in the event that the government does decide to pursue this policy position, we wish to highlight the practical difficulties that we envisage with the operation of the approach.

CIVIL PENALTIES WILL NOT IMPROVE SAFETY OUTCOMES

It is our view that linking a civil penalty to a civil dispute resolution process has major flaws. There are a number of other ways that a dispute could be resolved, including involving an inspector. In our view, the civil dispute resolution process will only be commenced by a party if they wish to proceed all the way to a civil penalty order. This will not result in genuine attempts to resolve the issue via the dispute resolution process.

This is particularly the case where the SAET will not have a power of arbitration, relying on conciliation or mediation to resolve the dispute. We are not suggesting that arbitration should be a feature of this process, agreeing with the reasons put forward in the consultation paper. But highlight this as a key factor as to why we do not think the approach will work.

If the matter remains unresolved the SAET will have the power to determine the “narrow question of whether there has been a contravention of a health and safety duty under the WHS Act and whether a civil penalty should be imposed”.

The most problematic part of this process is that it enables a dispute over an alleged serious health and safety contravention to remain unresolved, as there are no enforcement tools that can be utilised to seek compliance.

Presumably, if the issue remains unresolved and a civil penalty is applied due to the SAET determining that there was a contravention, it will be up to the initiating party to seek involvement of an inspector to determine what further action is required to achieve compliance.

Hence, an issue that could have been addressed by an inspector has remained unresolved for a period of time, and then still needs an inspector to resolve the underlying issue.

CONTEXT – CIVIL DISPUTE RESOLUTION FOR BREACHES OF WHS DUTIES

Current use of "civil" penalties and actions in the WHS Act

Part 7 – Workplace entry by WHS permit holders

Civil penalties

Part 7 of the Act establishes a range of breaches that attract a civil penalty. These relate to:

- obligations placed on WHS entry permit holders (Division 4); and
- prohibitions on certain behaviours by either a permit holder, a PCBU or an individual in the workplace (Division 7).

In most cases the penalties are $10 000 for an individual and $50 000 for a body corporate.

Part 13 of the Act makes it very clear, at s 260, that proceedings for a contravention of a WHS civil penalty provision may only be brought by the regulator or an inspector. The penalties are referred to as a civil penalty to clearly delineate that, unlike other provisions in the OHS Act, the offence is not viewed to be criminal in nature.

To emphasise, although these penalties are civil penalties, they do not relate to a civil action as it would generally be understood. Civil actions by individuals are usually about seeking some form of redress such as compensation.

Revocation of a WHS entry permit

Section 138 of the Act enables a range of parties to apply to the authorising authority, the South Australian Employment Tribunal (SAET), for a permit to be revoked. Whilst this may result in various actions to cancel or restrict a WHS entry permit, it could not be seen to meet the description of being a civil action. There are no financial penalties involved.

Disputes

Section 141 of the Act enables a person to seek the assistance of an inspector, if a dispute arises about the exercise or purported exercise of a WHS entry permit holder. Section 142 enables the authorising authority (SAET) to deal with a dispute and take action in relation to WHS entry permits if it sees fit. A civil penalty applies only if the permit holder subsequently contravenes the order of the SAET.

Once again, this does not fit the usual description of taking civil action, as the penalties relate to the failure to comply with an order of the SAET, and do not go to the issue of whether there was a breach of the law by a duty holder.

Part 6 – Discriminatory, coercive and misleading conduct

Part 6 of the Act creates a series of offences related to discrimination, coercion and misleading conduct. All carry maximum penalties of $100 000 for a body corporate and $50 000 for an individual. Division 2 allows for compensation or reinstatement/employment orders to be made if a person is convicted or found guilty of an offence.

In addition, each offence has a note that states: *"Civil proceedings may be brought … in relation to [the conduct engaged] in for a prohibited reason"*

An eligible person (a person affected by the contravention or a person authorised as a representative) may apply to the SAET for an order under section 112.

In these circumstances, the SAET can make the following orders:

- injunction
- order compensation
- direct reinstatement, re-employment or employment
- any other order that the SAET considers appropriate

This is the only section of the Act Ai Group believes can be properly assessed as being a civil action, as it creates a right for an individual to receive compensation and/or employment.

Conclusion in relation to Civil dispute resolution for breaches of WHS duties

Considering the above description of "civil penalties" and "civil actions" it is Ai Group's view that the proposal would not "expand civil penalties to breaches of health and safety issue", as stated in the consultation paper. In effect, the proposal is introducing a separate pathway for disputes related to health and safety duties; a pathway that would be entered into by those initiating the action with a view to achieve a penalty, rather than to resolve an issue.

Review of the Model WHS Laws – Alternative dispute resolution

In 2018 the Independent Review of the Model WHS Laws included recommendation 13 which was presented as a solution to delays in issues being resolved in workplaces.

The recommendation related specifically to section 82, which outlines processes in workplaces for issue resolution and section 89, which relates to cessation of unsafe work. It stated that amendments should be made to provide for:

a. *disputes under ss 82 and 89 of the model WHS Act to be referred to the relevant court or tribunal in a jurisdiction if the dispute remains unresolved 48 hours after an inspector is requested to assist with resolving disputes under the default or agreed procedures and with cease work disputes*

b. *PCBU, a worker, a HSR affected by the dispute or any unresolved issue they wish to be heard*

c. *The ability for a court or tribunal to exercise any of its powers (including arbitration, conciliation or dismissing a matter) to settle the dispute*

appeal rights form decisions of the court or tribunal to apply in the normal way.

Safe Work Australia publishes a report on their webpage which updates progress of implementation of the recommendations of the Review. In relation to recommendation 13, the report states:

> *At their 7 April 2022 meeting, SWA Members agreed to maintain the status quo on the basis that the current provisions and jurisdictional processes are working as intended. The Chair wrote to WHS Ministers on 2 May 2022 advising of this outcome.*

Whilst not pursued by SWA Members, it is noteworthy that sections 82 and 89 are both about referrals to an inspector to resolve issues that could not be resolved at the workplace. The recommendation applied to situations where an inspector was unable to assist the resolution. There was no consideration of this process leading to any form of penalty for a breach of the WHS laws. Nor was it designed to bypass an inspector.

We do note that Queensland has introduced a process for resolving some disputes, via a new Division 7A, in in Part 5 of their Act. However, it has a narrow application, with health and safety issues being taken to the Queensland Industrial Relations only after the issue resolution process has been followed. There are no penalties associated with this provision, as it is about genuinely resolving the issue, rather than as a pathway to punishment.

We have included this information to provide context and illustrate that the matter of unresolved issues was considered in the Review, with the majority of SWA Members not supporting alternative dispute resolution pathways.

THE PROPOSAL

As indicated in our introduction, it is Ai Group's view that there would be a number of practical barriers to adopting this proposal, and some likely unintended consequences. We address these in the following section of the submission.

Current penalty provisions within WHS laws relate to a breach of a WHS duty, and are not used to achieve compliance

WHS prosecutions are undertaken to punish the offender and for general deterrence. Other tools are utilised by the regulator, via inspectors, to achieve compliance.

When initiating a prosecution, a WHS regulator would, in most cases, have also exercised a range of other powers at the time of investigating the incident. The main tools utilised to achieve compliance are:

- prohibition notices that cause an activity to cease until the risks are controlled so far as is reasonably practicable; or
- improvement notices which require the duty holder to rectify a breach within a particular timeframe.

An employer may make an "internal review" application if they do not believe that it is reasonably practicable to comply with the requirements of the notices.

Failing to comply with these notices can lead to significant penalties if a duty holder is prosecuted for that failure.

Any employer who had not remedied a breach prior to responding to a prosecution would find this detrimental in relation to the penalty that would be applied if found to be guilty.

A prosecution is about imposing criminal penalties for breaches of WHS laws. It is not about achieving compliance. In most cases the breach will be addressed well before a prosecution is heard.

The proposed approach would most likely result in a breach continuing to exist whilst the SAET processes were being pursued. This is not an appropriate approach for WHS risks, particularly ones that are of a serious nature.

It could be argued that an elected health and safety representative (HSR) could also issue a provisional improvement notice or direct cessation of unsafe work to control the risk whilst the SAET process was underway.

However, if an HSR exercises these powers, the duty holder must either comply, or seek the assistance of an inspector (as outlined above).

If the employer seeks the assistance of an inspector, the inspector would then exercise their powers to resolve the dispute; if the employer complies there is no dispute; if the employer does not seek the assistance of an inspector and does not comply, they would be guilty of an offence and subject to prosecution by the regulator.

The proposal to introduce a civil dispute process, connected to civil penalties seriously disrupts the carefully designed process that involves rectifying WHS breaches first, and then considering whether a prosecution is appropriate at a later stage.

All possible workplace solutions must be exercised before any further dispute resolution process is initiated

Employers are required to have an agreed issue resolution procedure or adopt the "default procedure" prescribed in regulations (section 81). The procedure requires the parties to attempt to resolve the issue and allows for a representative of a party to an issue to enter the workplace for the purpose of attending discussions to resolve the issue.

As outlined earlier, any party to the issue may ask the regulator to appoint an inspector to attend the workplace to assist in resolving the issue (section 82).

It is the view of Ai Group that, if a civil dispute system is to be introduced, there needs to be an amendment to section 82 of the Act to make involvement of an inspector mandatory, prior to taking the issue to the SAET. This is proposed to ensure that any serious issues are addressed in a timely manner, as they should not remain in place whilst a civil dispute process is listed and then completed.

This would then be reflected in the diagram on page 9 of the proposal, with step 1 modified to say "a party must ask SafeWork SA to appoint an inspector …"

Serious risk is not a stand alone term utilised in the Act

The proposal states that the scope of dispute proceedings would be limited to circumstances where a party reasonably believes that a contravention involves a **serious risk** to the health and safety of a person.

The Act defines when specific powers can be exercised by inspectors and HSRs.

- An inspector's improvement notice (s.191) and an HSRs provisional improvement notice (s.90) only need to meet the criteria of "contravening a provision".

- An inspector's prohibition notice (s.195) and an HSRs cessation of work direction (s.85) refer to a "serious risk to the health or safety of a person", but also includes reference to "emanating from an immediate or imminent exposure to a hazard". Both criteria must be met for these actions to be taken.

Ai Group agrees that a civil dispute process should not be utilised for breaches of the Act that are not serious, as this could result in a significant amount of the SAETs resources being utilised to address relatively minor WHS issues.

However, we do not believe that the current reference to a serious risk is accurate.

On page 16 the paper proposes that the ability to initiate the civil dispute processes would be "consistent with the threshold for a prohibition notice" … but then states "the contravention involves a "serious risk" to the health and safety of a person".

This description does not accurately reflect the requirements for a prohibition notice which, as outlined above must also meet the criteria that the risk is "emanating from an immediate or imminent exposure to a hazard".

It is Ai Group's view that it would be highly inappropriate to commence a civil dispute resolution process for a risk where an inspector would decide to issue a prohibition notice that requires the activity to cease immediately. Particularly, if such action could commence without an inspector being involved to assess the level of risk and determine if a prohibition notice is warranted.

It may be more appropriate to connect the eligibility to the definitions used in the Category 1 and Category 2 offences, which involve a "risk of death or serious injury or illness". There could also be a specific exclusion from scope if the risk is at a level that involves "immediate or imminent exposure to a hazard or risk", to ensure that these issues are dealt with more appropriately by an inspector.

Opportunities for SafeWork SA to intervene must be included

The issue of double jeopardy and the role of SafeWork SA in civil penalty cases is addressed on page 21, as summarised below:

- Civil penalty proceedings will be stayed if criminal proceedings are commenced.
- Civil penalties can not be ordered if there has been a criminal conviction.
- SafeWork SA will be informed of any civil penalty proceedings and may intervene.
- They will have the same capacity to apply for the case to be dismissed if it is frivolous, vexatious, or an abuse of process.

However, two other situations must also be addressed

- The ability of SafeWork SA to seek that penalty proceedings be stayed if they are still investigating the circumstances with a view to prosecute.
- The commencement of criminal proceeding after a civil penalty has been ordered.

We note the following statement included on page 21 of the consultation paper:

> *… it is expected that SafeWork SA may seek to intervene when proceedings raise issues of interpretation concerning the WHS Act, regulations, and codes of practice, or raise an issue of general importance concerning work health and safety.*

As outlined above, Ai Group believes that it is very important that SafeWork SA can intervened in the civil dispute resolution process.

However, as this process is being proposed to overcome the lack of resources within SafeWork SA to initiate prosecutions, it is unclear how the organisation would have the resources to monitor the details of all civil dispute resolution processes and intervene appropriately.

Further, as the process will apply only to serious risks that would otherwise result in a prohibition notice, it is Ai Group's view that most disputes will "raise issues of interpretation concerning the WHS Act, regulations, and codes of practice"

Exclusion of some disputes

On page 17 it is proposed that the SAET may dismiss a civil dispute process for bullying or discrimination "where there is a more appropriate forum for that dispute to be dealt with".

Ai Group agrees that, if the dispute is about an individual case with a person seeking some form of personal redress, it would be more appropriate to be heard in another jurisdiction.

However, in recent years, significant effort has been put into elevating the understanding of bullying and discrimination (especially sexual harassment) as "real" work health and safety issues. It would be counterproductive to create a blanket exclusion for these types of disputes which might be about systemic issues in the workplace that need to be addressed.

Any exclusionary provision must specifically delineate between individuals seeking redress and issues that demonstrate an organisational breach at a systemic issue. It may be that it is appropriate to address the circumstances of the bullying or harassment in multiple jurisdictions, as a WHS breach and as a process for redress in another jurisdiction.

It may be argued that these nuances would be understood by the SAET. However, it is important that they are also understood by any party that is likely to initiate a dispute and the general employer population more broadly.

Maximum penalties

The discussion on page 18 of the consultation paper compares the proposed civil penalties to the penalties under a Category 1 offence. It is more appropriate to compare them to a Category 2 offence. Both offences involve a "risk of death or serious injury or illness." However a Category 1 offence carries the extra level of culpability associated with "reckless conduct".

A category 2 offence has maximum penalties of

- $1 500 000 for a body corporate; and .
- $300 000 for an individual operating as a business or undertaking (an unincorporated sole trader or a member of a partnership)

There is no term of imprisonment for a Category 2 offence.

Whilst not supporting the proposal for civil penalties, Ai Group believes that the proposed penalties, of $10 000 for an individual and $100 000 for a body corporate, would be appropriate. Larger penalties may lead to PCBUs capitulating on issues that do not have a strong basis, purely to avoid the uncertainty of significant fines.

Larger penalties would also taint the system by taking the focus away from achieving health and safety outcomes to resolving other issues whatever they may be, purely to avoid the uncertainty of fines and costs. We urge a consideration of additional financial penalties for those who seek to utilise health and safety claims as a means to achieve other outcomes.

DISPUTES ABOUT RIGHT OF ENTRY

As outlined in the consultation paper, there is currently a pathway that allows for a dispute related to WHS right of entry to be escalated to the SAET by a range of parties. The role of the SAET in this process (established by s. 142 of the Act) arises because the Tribunal is the *authorising authority* for the issuing of WHS entry permits.

Section 143 already establishes that contravening an order of the authorising authority carries penalties of $10 000 for an individual and $50 000 for contravention of an order of the SAET. It appears that the main changes proposed are:

- That a party other than the SAET could apply for the SAET to impose a civil penalty, that already exists and could already be imposed by the SAET; and
- Allowing a court to impose a civil penalty on the employee organisation that employs the permit holder.

It is our view that these amendments could be made as stand alone changes, irrespective of decisions made about other proposals in this paper.

The additional proposal to allow the SAET to make a declaration that an employee organisation has a "significant history" of breaching its right of entry obligations is only being proposed to prohibit those organisations from initiating civil penalty actions against a PCBU. If the proposal to introduce the right of persons other than the regulator to initiate actions for breaches of WHS duties is not pursued, this amendment would be unnecessary.

If the civil disputes process is introduced, this final power will be important. However, it should be expanded to also stop further actions by employee organisations with a "significant history" of bringing frivolous or vexatious applications before the SAET.

ADDITIONAL ISSUES THAT NEED TO BE ADDRESSED IF A CIVIL DISPUTE REGIME, WITH PENALTIES, IS INTRODUCED

Hearing the dispute

Section 230 of the Act establishes the jurisdiction for hearing prosecutions for various offences under the Act. Section 230(4) allows for some indictable offences to be made on complaint and taken to be a summary offence. The South Australian Employment Court is conferred with the jurisdiction to try a charge for a summary offence or a minor indictable offence.

However, 230(6) specifies that this does not apply to breaches that are classed as Category 1, 2 or 3 offences. 230(7) specifies that:

> *Committal proceedings for an indictable offence must be conducted by a magistrate who is a member of the South Australia Employment Court.*

Prosecution guidelines published by Safe Work SA state that:

> *Prosecutions for work health and safety laws are heard in the Magistrates Court (Industrial Offences Jurisdiction). In the case of the more serious offences, prosecutions may be finalised in the District Court.*

Considering the approach to prosecutions, Ai Group is concerned that the responsibility for determining civil penalties for a WHS breach could be heard in the SAET. Particularly, because these will be issues that will relate to contraventions that result in a "serious risk", however that is finally determined.

Therefore, it is our view that if the SAET is given this jurisdiction, it should be legislated that the proceedings must be overseen by "a magistrate who is a member of the South Australian Employment Court".

Whilst the penalties are significantly lower than those applying to criminal prosecutions, the knowledge and skills required to determine whether there has been a serious contravention of the Act are the same.

Resources and timeframes

Prior to implementing any new civil dispute resolution process, it will be essential to analyse the resources, capabilities and potential timeframes associated with this process.

Ai Group has utilised the 2022-23 Annual Report of the SAET, available here, to try to identify the current time taken for applications to be resolved. Table 1.5 of the Report provides data on applications for Reviewable Decisions under the Return to Work Act (RTW Act).

Timeframes are broken down into chunks representing: 0-3 months; 3-6 months; 6-9 months; 9-12 months; 12+ months. The data does not show whether the applications are resolved near the start of each timeframe or almost at the end of that timeframe.

There was only one category of decision where 100% of applications were resolved in the 0-3 months category (employer's duty to provide work, and there was only one application of that type in the twelve month period). Hence, we are concerned about the capacity of the SAET to take on further workload without more resources.

If further resources would be necessary to ensure timely response to the civil dispute proceedings involving serious risk, it is our view that it would be more beneficial to provide additional resources to SafeWork SA.

Recipient of the Penalty

It must be very clear in the legislation that any penalty applied as part of the civil dispute process is payable in the same way as the current civil penalties that arise from a SafeWork SA prosecution, and not to the party that commenced the action.

The issue of costs

The issue of costs would need to be addressed in the legislation. We would propose adopting the words of the Fair Work Act (FWA) in relation to:

- Each person bearing their own costs, with provisions to allow for costs to be ordered, if:
    - The application is made vexatiously, or without reasonable cause; or
    - The application had no reasonable prospect of success.

    (Section 611 of the FWA)
- Costs orders against lawyers and paid agents in specific circumstances

    (Sections 376, 401, 789 of the FWA)
- Costs orders against parties if costs are incurred due to unreasonable acts or omissions of a party.

    (Section 400A of the FWA)

This will help to minimise the risk of the process being utilised inappropriately, for example during enterprise bargaining processes.

Risk of abuse

The reality of WHS is that it can be used as an industrial weapon. The proposed process creates an opportunity for employee associations to initiate an action against an employer without any opportunity for the employer to seek the objective opinion of an inspector.

In order to minimise the risk of abuse of the process by using it as an industrial weapon, a range of safeguards should be in place:

- The ability for an employee association to lose their right to initiate civil dispute proceedings if they have a significant history of vexatious or frivolous applications.
- The ability for an individual of an employee organisation to have their rights of entry permit removed and to be barred from having a permit for a minimum of five years
- A right for the employer to seek the assistance of an inspector, or the regulator, to separately address the issue through a site visit and decision as to whether it is appropriate to issue a notice. With the outcome of that involvement being considered in the dispute resolution process.
- SafeWork SA should be given the power to take over a matter, for enforcement or investigation, at which point the civil action would cease.

Appeal Processes

If a civil dispute process, with civil penalties is introduced, it must include appeal processes which enable a duty holder to challenge the penalties that have been applied.

About Australian Industry Group

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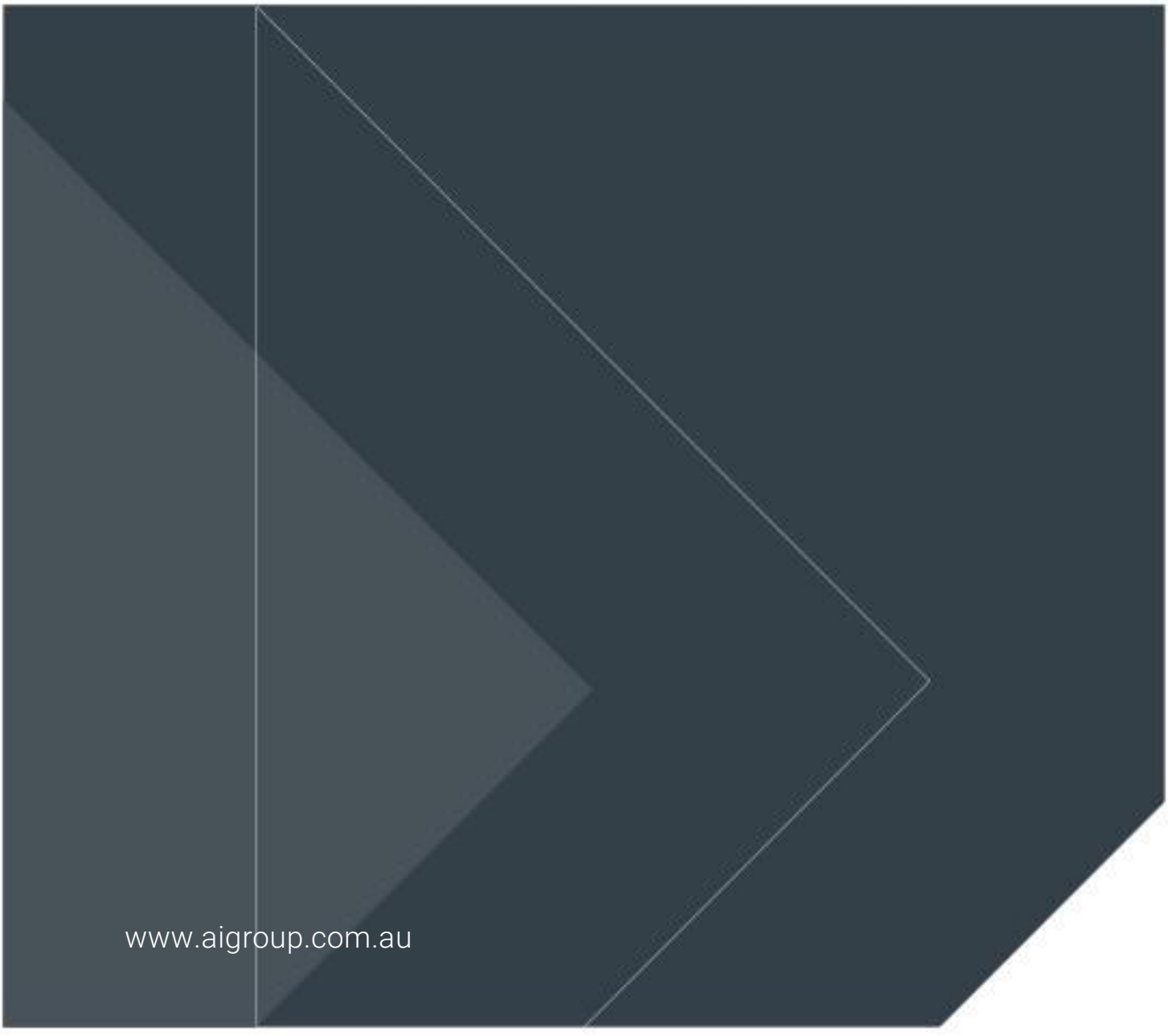

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