



Review of the model Work Health and Safety laws Final report

December 2018

Author

This report has been prepared by the independent reviewer, Marie Boland.

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Letter to Safe Work Australia

Dear Safe Work Australia Members,

I am pleased to provide you with my final report of the first national review of the model Work Health and Safety (WHS) laws (the Review). The Review has been undertaken at the request of ministers with responsibility for WHS matters (WHS ministers), who agreed that the content and operation of the model WHS laws would be reviewed every five years.

Throughout the Review, I remained acutely aware of the responsibility I held to maintain the integrity of the model WHS Act, model WHS Regulations and Codes of Practice (model Codes) and to retain respect for the significant work that went into developing the model WHS laws framework. Within this context, I would like to thank the original authors of the 2008 National Review into Model Occupational Health and Safety Laws (2008 National Review), Robin Stewart-Crompton, Stephanie Mayman and Barry Sherriff, for their generosity and support as I progressed the Review.

I initiated the Review by focusing on a series of questions relating to the model WHS laws:

- What currently works and why?
- Will it continue to work as work practices and environments evolve?
- What doesn't work and why?
- What could we do to make it work?

To answer these questions I spoke to a wide range of people, including business owners and workers, employer representatives and unions, regulators, WHS professionals and practitioners, and academics. I also sought opinions through a range of online discussion forums and through written submissions. I would like to thank everyone who participated in these consultations. Your views and experiences have been invaluable in helping me shape my analysis and formulate my recommendations.

Consistent with the Terms of Reference, I examined the three tiers of the legal framework that make up the laws: the model WHS Act, the model WHS Regulations and the model Codes. I did not examine the broad range of guidance material in detail and my recommendations reflect this focus.

The model WHS laws are largely operating as intended. The three-tier framework is effective and widely supported and there is a view that it is sufficiently flexible to accommodate the evolving nature of work and changing work relationships. However, this flexibility remains to be tested in some areas.

My recommendations reflect the need to revisit how the model WHS Regulations support the object of the model WHS Act (particularly in relation to the priority industries identified in the *Australian Work Health and Safety Strategy 2012–22*) and to continuously assess new ways of working, new industries and new technologies to ensure there are no gaps in the application of the model WHS law framework.

Support for the harmonisation objective remains strong. However, consistency of application and enforcement of the laws was a recurring theme throughout the consultation process. The enforcement of the model WHS laws across enacting jurisdictions is guided by the National Compliance and Enforcement Policy (NCEP). I am recommending that the NCEP be revised to provide

decision-making frameworks relevant to the key functions and powers of the regulator and inspectors under the model WHS laws.

Complexity was a word which came up again and again throughout the Review, particularly in small business meetings. The basic objective of the model WHS laws is a simple one—to secure the safety of workers. Many of my recommendations are intended to assist in providing clarity to duty holders and to help them answer the question: ‘what do I need to do?’. This question is particularly relevant to situations where there are multiple duty holders, and my recommendations include providing clear, practical guidance to persons conducting a business or undertaking (PCBUs) who hold concurrent duties under the model WHS laws.

Consultation with workers is a requirement of the model WHS framework. Where the health and safety representative (HSR) framework is embraced, it is working well. I have made recommendations to support the consultation and representation objects of the model WHS laws, including streamlining the HSR election process for small business and providing HSRs choice in their training provider.

Workplace injuries and deaths ruin lives and shatter families. It is critical that the community is confident that the model WHS laws enable justice to be administered fairly and appropriately. I have made a series of recommendations dealing with penalty levels, sentencing guidelines, prohibiting access to insurance for payment of fines and the introduction of a new industrial manslaughter offence.

Overall, I am making 34 recommendations. Many are technical, relating to inspectors’ powers, or relating to specific regulations such as amusement devices and asbestos registers. Others suggest areas for further analysis—for example, the incident notification provisions. Some anticipate long-term projects—for example, initiating an industry-focused review of the model WHS Regulations and model Codes. Others warrant immediate consideration—for example, the making of model WHS Regulations dealing with psychological health.

I have had to weigh differing and often opposing views when considering some recommendations, with PCBU and worker representatives often advocating alternative paths. In these situations, I have considered carefully all of the opposing views and ultimately adopted recommendations that I believe will enhance safety outcomes and strengthen the harmonisation objective.

It will be important to review the model WHS laws again when the key new concepts contained in the model WHS Act have further evolved and as more case law emerges over the coming years.

I would like to acknowledge the support and assistance I received from Safe Work Australia Members, the Reference Group for the Review and the Safe Work Australia Agency. I particularly thank the secretariat team from the Agency for providing the most efficient and professional support.



Marie Boland
December 2018

Executive summary

Over the last year I have had the privilege of consulting with businesses, workers, unions, employer associations, industry associations, health and safety representatives (HSRs), legal practitioners, academics, government agencies, non-government agencies and regulators in undertaking the first five-year review of the model WHS laws.

Consistent with the Terms of Reference (at Appendix B), I have examined the content and operation of the model WHS laws and identified where I consider that amendments are needed and further analysis is necessary. I have at all times focused on the object of the model WHS Act (s 3 of the model WHS Act) as I examined each of the three tiers of the laws, assessing whether they are operating as intended, creating unintended consequences or failing to deal with current work arrangements or working conditions. I paid particular attention to those provisions which were new to most jurisdictions following the enactment of the laws. These included key elements of the duties framework; the compliance and enforcement provisions; and the consultation, representation, participation and issue resolution provisions. I considered carefully the provisions dealing with prosecution and legal proceedings to ensure that they continue to act as a deterrent where breaches of the model WHS laws are proven. Critically, I also assessed the extent to which the model WHS Regulations, model Codes and National Compliance and Enforcement Policy (NCEP) work together to support the object of the model WHS Act.

It is clear to me from the feedback received during this Review that the model WHS laws are, for the most part, working as intended, but they are still settling.

The harmonisation of WHS laws across the country is an ambitious objective. It has largely been achieved and remains strongly supported. Most of those consulted over the last year urged the Government of Victoria and Government of Western Australia to adopt the model WHS laws as a matter of urgency and other jurisdictions to minimise variations to the model wherever possible. If the harmonisation objective is to be sustained into the future, it is critical that all jurisdictions commit to it.

'Consistency', 'complexity' and 'clarity' are the three words that came up again and again during conversations and in written submissions. Many of my recommendations have been drafted to enhance consistent application and enforcement of the model WHS laws across jurisdictions, to remove complexity where possible and to provide a clear pathway for duty holders through the three tiers of the model WHS Act, model WHS Regulations and model Codes. The issue of 'consequence' also featured prominently during the Review, and I have also made recommendations relevant to penalties and legal proceedings where there is a breach of the model WHS laws.

My report contains 34 recommendations. The report is divided into seven chapters:

- **Chapter 1:** Legislative framework
- **Chapter 2:** Duties of care
- **Chapter 3:** Consultation, representation and participation
- **Chapter 4:** Compliance and enforcement
- **Chapter 5:** National Compliance and Enforcement Policy
- **Chapter 6:** Prosecutions and legal proceedings, and
- **Chapter 7:** Model Work Health and Safety Regulations.

Each chapter starts with a brief outline of the current arrangements, then presents views offered during the public consultation and finally my discussion and recommendations. Summaries of research outcomes, case law and other material which I considered as part of the Review are presented in the appendices.

An outline of the key issues arising in each chapter and my recommendations in response is provided below. A full list of recommendations is provided separately.

Chapter 1: Legislative framework

There is overwhelming support for the three-tiered framework of the model WHS laws, which comprise the model WHS Act, model WHS Regulations and the model Codes. However, many businesses find it difficult to navigate their way through these three tiers and to identify those aspects which specifically apply to them. Many small businesses are unclear about how to assess risks and hazards in their workplace and what actions they should take to fulfil their WHS obligations.

To add clarity and reduce complexity, I recommend a comprehensive review of the model WHS Regulations and model Codes. This should be done with a view to ensuring they appropriately support the object of the model WHS Act, reinforce the new concepts introduced in the model WHS Act, and promote practical safety outcomes in the seven *Australian Work Health and Safety Strategy 2012–22* (Australian Strategy) priority industries.

I found that the express reference to psychological health in the model WHS Act was overwhelmingly accepted, but there was a consistent view amongst those consulted that psychological health is neglected in the second and third tiers of the model WHS laws (that is, the model WHS Regulations and model Codes). To address this, I recommend the development of additional regulations on how to identify psychosocial risks in the workplace and the appropriate control measures to manage those risks.

Regulatory boundaries between public safety and WHS are increasingly uncertain. I found that there is no legislative solution to 'scope creep' that does not entail changing key definitions and other central tenets of the model WHS Act. Until there is greater clarity from the case law, WHS regulatory scope will need to be determined on a case-by-case basis.

With the evolution of work and workplaces, workplace risks and hazards continue to change. The 2008 National Review into Model Occupational Health and Safety Laws (2008 National Review) anticipated that the ability to make regulations and/or codes would provide the model WHS law framework with the flexibility to deal with new hazards and working arrangements as they arose. I recommend that Safe Work Australia develop criteria to continuously assess new and emerging business models, industries and hazards to identify if there is a need for legislative change, new model WHS Regulations or model Codes.

Chapter 2: Duties of care

The duties framework is generally understood, settling in people's understanding and working well. Initial concerns with the introduction of the 'person conducting a business or undertaking' (PCBU) concept have been largely unfounded, and there is a general view that key definitions are sufficiently flexible to encompass changing work arrangements, emerging industries and new business models.

While I note that the scope of the model WHS laws and their ability to deal with the future of work need to be monitored over the coming years, I recommend some relatively minor changes to clarify the circumstances where a person can be both a worker and a PCBU.

The principles that apply to duties (ss 13–17 of the model WHS Act) are widely accepted, but many PCBUs find them difficult to apply in practice. The principle that more than one person can have a duty (s 16 of the model WHS Act) was seen as being particularly problematic. Confusion is increased when the s 16 principle is combined with the duty of multiple duty holders to consult, co-operate and co-ordinate (s 46 of the model WHS Act). This is an area where the laws are not operating as intended. I recommend the development of a new model Code providing practical guidance for PCBUs on how to meet the obligations associated with the principles in the model WHS Act and their s 46 duty to consult, co-operate and co-ordinate.

The establishment of officers' duties is one of the key successes of the model WHS laws, although more information is needed to demonstrate how regulators enforce the due diligence provisions (see my discussion in chapter 5, 'National Compliance and Enforcement Policy').

Chapter 3: Consultation, representation and participation

While it is clearly required by the model WHS laws, genuine consultation with workers is not always occurring. There is a clear need for more practical information to be added to the existing model Codes and guidance, and I recommend that they include further information on how health and safety committees (HSCs) operate and on the issue resolution processes. I also recommend the model Code of Practice: *Work health and safety consultation, co-operation and co-ordination* be updated with practical examples of how meaningful consultation can be undertaken in traditional and non-traditional settings.

The HSR framework is having mixed results. Where these provisions are embraced by all parties in the workplace, the framework works well. For small businesses, it can be impractical. I recommend an alternative approach to the formation of work groups in small businesses to facilitate the increasing use of HSRs as the preferred consultation mechanism in workplaces.

The ability of HSRs to seek the assistance of 'any person' has been questioned by a recent court decision. The potential effect on the operation of the model WHS Act is that a union official entering a workplace as an assistant to an HSR will require an entry permit under the *Fair Work Act 2009* (Cth) (Fair Work Act). In my view, the rights of an HSR to bring in a person with appropriate experience and knowledge to assist them should not be restricted if that person is also a union official. I recommend work is undertaken to investigate how to best provide for a union official to access a workplace to provide assistance to an HSR without the need to hold an entry permit under the Fair Work Act or another industrial law.

I have also recommended that HSRs should be entitled to choose their own course of training where that training is approved by the regulator. However, they will need to agree timing and costs of training with the PCBU. If a dispute arises about time off for attendance, payment of fees or costs of the training, either the PCBU or HSR can request that an inspector attend to decide the issue.

Within the context of issue resolution, I found that inspectors were often hindered in their ability to reach a resolution, as they lack the power to definitively decide an issue. To address this,

I recommend the inclusion of a provision which enables certain outstanding disputes to be resolved after 48 hours through referral to the relevant court or tribunal.

I note that the original consideration of the notice requirements for union right of entry for WHS purposes included a table which highlighted that no notice was required for union right of entry across all of the pre model WHS laws which provided that right. This is why the original model WHS Act did not contain a 24-hour notice requirement in the context of a suspected breach. I consider that the original rationale of the 2008 National Review remains valid. Given no jurisdiction has enacted the 24-hour notice period for s 117 since the 2014 Council of Australian Governments (COAG) review of the model work health and safety laws (2014 COAG Review), it would appear that this is also the general view across those jurisdictions which have enacted the model WHS laws. I am therefore recommending that the model WHS Act should be amended to return s 117 to its original wording. This will restore consistency and harmonisation to this important part of the model WHS laws.

Chapter 4: Compliance and enforcement

Ensuring compliance with the model WHS legislation through consistent enforcement across all jurisdictions is crucial to the effective operation of the model WHS laws and to achieving its object.

There are some gaps in WHS regulator powers that create uncertainty over the application of the model WHS laws. To improve clarity and consistency I have made recommendations on the issuing and serving of notices and the cross-border sharing of information between regulators.

I did not find evidence of a significant gap in the range of enforcement tools available to the inspectorate in the model WHS laws. Many of the issues raised were technical or were linked to the fact that the laws are still settling and regulators are continuing to test and refine their compliance and enforcement strategies.

The incident notification provisions are not working as intended. The existing provisions generate significant confusion and do not adequately capture the initial intent of the laws. I recommend these provisions are reviewed; that they provide for a notification trigger for psychological injuries; and that they capture incidents, injuries and illnesses associated with new work practices, industries and work arrangements.

Chapter 5: National Compliance and Enforcement Policy

One of the strongest messages coming out of this Review is that regulators are not consistently implementing the model WHS laws within or across jurisdictions.

The desired outcome of consistency of regulatory approach intended by the development and adoption of the NCEP has not been achieved.

I recommend a comprehensive review of the NCEP to support consistent regulatory approaches. I also consider that an NCEP which provides more detail about the decision-making approaches of regulators relevant to their key functions and powers could assist not just those who have duties under the model WHS laws but also inspectors and educators.

Chapter 6: Prosecutions and legal proceedings

It is critical that the public have confidence that the model WHS laws enable justice to be administered fairly and appropriately.

The effectiveness and sufficiency of the existing penalty regime is an area that attracted widespread comment, and divergent views, through the Review process. Given it is six years since the original penalties were determined, I recommend that they are adjusted to reflect increases in consumer price index (CPI) and in the value of penalty units in participating jurisdictions since 2011. I also recommend that penalty levels be reviewed as part of future reviews of the model WHS laws.

Under the model WHS Act, legal proceedings can only be brought by a WHS regulator or an inspector acting with the written authorisation of the WHS regulator or the Director of Public Prosecutions (DPP). There is provision for a person to request the regulator bring a prosecution for a Category 1 or Category 2 offence within a 12-month window. I recommend removing this 12-month deadline and adding a provision requiring regulators to provide regular updates on the investigation after the three-month notice is issued until a decision is made on whether a prosecution will be brought.

I am recommending a new offence of industrial manslaughter be included in the model WHS laws. The growing public debate about including an offence of industrial manslaughter in the model WHS laws was reflected in consultations for this Review. I consider that this new offence is required to address increasing community concerns that there should be a separate industrial manslaughter offence where there is a gross deviation from a reasonable standard of care that leads to a workplace death. It is also required to address the limitations of the criminal law when dealing with breaches of WHS duties. More broadly, the ACT and Queensland have already introduced industrial manslaughter provisions, with other jurisdictions considering it, and so this new offence also aims to enhance and maintain harmonisation of the WHS laws.

I am also recommending amendments to include that a duty holder commits a Category 1 offence if the duty holder is grossly negligent in exposing an individual to a risk of serious harm or death.

The model WHS Act provides a range of sentencing options if a court convicts a person of an offence against the model WHS laws. Sentences handed down since the introduction of the model WHS laws have varied, in part due to variations in the criminal law frameworks across jurisdictions. Consistency in sentencing outcomes is crucial to meeting the object of the model WHS Act and to facilitate a consistent national approach to WHS. I recommend the development of sentencing guidelines, with input from those with appropriate expertise in this complex area.

Insurance policies which cover the fines of those found guilty of breaching the model WHS Act have the potential to reduce compliance with the laws and undermine community confidence. I recommend that persons or organisations that are required to pay penalties under the model WHS laws be unable to recover that cost through insurance or indemnification.

Chapter 7: Model Work Health and Safety Regulations

My final chapter examines the technical and other issues raised during the Review in relation to the model WHS Regulations. Notwithstanding Recommendation 1 to review the model WHS Regulations

and model Codes, I have identified some specific issues within the content of the model WHS Regulations that warrant earlier attention.

To make the general risk management obligation and process clearer within the model WHS laws, I recommend moving the concepts underpinning the hierarchy of control measures (reg 36 of the model WHS Regulations) from the model WHS Regulations to the model WHS Act. Small businesses in particular are calling out to be 'told what to do' to meet their WHS obligations. The hierarchy of control provides practical steps for duty holders, and its inclusion in the model WHS Act will help to address existing confusion and uncertainty.

In the wake of the Dreamworld tragedy and a tragic fatality at the 2014 Royal Adelaide Show, I consider that extra controls on amusement devices are needed. The Dreamworld inquest is ongoing as I finalise this report, and I do not want to inadvertently cut across the Queensland Coroner's recommendations. However, I am recommending improved recording of amusement device infringements and operator training.

Safe Work Method Statements (SWMS) for high-risk construction work drew considerable negative feedback during the Review, and it is clear that SWMS are not operating as intended. This is primarily because people are misunderstanding the requirements of these regulations rather than as a result of an unintended consequence or an ambiguity arising from the regulations themselves. I recommend a SWMS template be added to the model WHS Regulations and the development of an intuitive, interactive tool to assist people to complete fit-for-purpose SWMS.

Reliance on Standards in the model WHS Regulations also drew negative feedback, and I support reconsideration of their use in the laws. I recommend reviewing the references to Standards in the model WHS Regulations with a view to their removal and replacement with the relevant obligations prescribed in the model WHS Regulations. I also recommend making it clear that compliance with Standards is not mandatory unless specifically stated.

Industry and regulator confidence in the value of the White Card continues to diminish, due in part to concerns about the duration and quality of training, poor assessment practices and concerns about the identity of the card holder. To alleviate some of the concerns raised regarding assurance that training has been completed by the relevant White Card holder, I recommend that photographic ID is required on White Cards consistent with high-risk work licences. The issues around quality of training are outside the scope of this Review; however, I note that there are significant issues which I have highlighted separately to Safe Work Australia.

The regulation of Major Hazard Facilities (MHF) is inconsistently applied and there are many duplications. There are a range of issues at play here and no readily available solution. I recommend the regulation of MHF be reviewed, with a focus on administrative or technical amendments to ensure the intended policy objectives are met.

In relation to high-risk work licensing, I recommend a re-examination of the licence classes for cranes to ensure that they remain relevant to contemporary work practices and equipment.

To address gaps in the regulation of asbestos identification and removal, I recommend improving the quality of asbestos registers and reviewing the existing requirements for what constitutes a 'competent person' for asbestos-related work.

Recommendations

Chapter 1: Legislative framework

Recommendation 1: Review the model WHS Regulations and model Codes

Review the model WHS Regulations and model Codes against agreed criteria on the purpose and content of the second and third tiers of the model WHS laws as they relate to the seven Australian Strategy priority industries.

Recommendation 2: Make regulations dealing with psychological health

Amend the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.

Recommendation 3: Continuously assess new industries, hazards and working arrangements

Safe Work Australia develop criteria to continuously assess new and emerging business models, industries and hazards to identify if there is a need for legislative change, new model WHS Regulations or model Codes.

Chapter 2: Duties of care

Recommendation 4: Clarify that a person can be both a worker and a PCBU

Amend s 5(4) of the model WHS Act to make clear that a person can be both a worker and a PCBU, depending on the circumstances.

Recommendation 5: Develop a new model Code on the principles that apply to duties

Develop a model Code to provide practical guidance on how PCBUs can meet the obligations associated with the principles contained in ss 13–17 (the Principles), including examples of:

- the application of the Principles to labour hire, outsourcing, franchising, gig economy and other modern working arrangements, and
- processes for PCBUs to work co-operatively and cohesively to discharge their duties (in the context of the duty to consult, co-operate and co-ordinate with other duty holders—s 46 of the model WHS Act).

Chapter 3: Consultation, representation and participation

Recommendation 6: Provide practical examples of how to consult with workers

Update the model Code of Practice: *Work health and safety consultation, co-operation and co-ordination* to include practical examples of how meaningful consultation with workers can occur in a range of traditional and non-traditional settings.

Recommendation 7a: New arrangements for HSRs and work groups in small businesses

Amend the model WHS Act to provide that, where the operations of a business or undertaking ordinarily involves 15 workers or fewer and an HSR is requested as per the requirements of the model WHS laws, the PCBU will only be required to form one work group for all workers represented by one HSR and a deputy HSR unless otherwise agreed between the workers and the PCBU.

Recommendation 7b: Work group is negotiated with proposed workers

Amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group.

Recommendation 8: Workplace entry of union officials when providing assistance to an HSR

Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the Fair Work Act or another industrial law, taking into account the interaction between Commonwealth, state and territory laws.

Recommendation 9: Inspectors to deal with safety issue when cancelling a PIN

Amend the model WHS Act to provide that, if an inspector cancels a PIN for technical reasons under s 102 of the model WHS Act, the safety issue which led to the issuing of the PIN must be dealt with by the inspector under s 82 of the model WHS Act.

Recommendation 10: HSR choice of training provider

Amend the model WHS Act to make it clear that for the purposes of s 72:

- the HSR is entitled to choose the course of training, and
- if the PCBU and HSR cannot reach agreement on time off for attendance or the reasonable costs of the training course that has been chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter.

Recommendation 11: Provide examples of HSC constitutions, agendas and minutes

Update the model Codes and guidance with examples of HSC constitutions, agendas and minutes.

Recommendation 12: Update guidance on issue resolution process and participants

Update the *Worker representation and participation guide* to include:

- practical examples of how the issue resolution process works, and
- a list of the various representatives entitled to be parties in relation to the issues under s 80 of the model WHS Act as well as ways of selecting a representative and informing the other parties of their involvement.

Recommendation 13: Resolving outstanding disputes after 48 hours

Amend the model WHS Act 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. a PCBU, a worker, an HSR affected by the dispute or any party to the dispute to notify the court or tribunal of the 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, and
- d. appeal rights from decisions of the court or tribunal to apply in the normal way.

Recommendation 14: Clarify court powers for cases of discriminatory or coercive conduct

Amend the model WHS Act to make it clear that courts have the power to issue declaratory orders in proceedings for discriminatory or coercive conduct.

Recommendation 15: Remove 24-hour notice period for entry permit holders

Amend the model WHS Act to retain previous wording in s 117.

Chapter 4: Compliance and enforcement

Recommendation 16: Align the process for the issuing and service of notices under the model WHS Act to provide clarity and consistency

Amend the model WHS Act to align the service of notices provisions under s 155 and s 171 with those in s 209 of the model WHS Act dealing with improvement, compliance and non-disturbance notices.

Recommendation 17: Provide the ability for inspectors to require production of documents and answers to questions for 30 days after the day they or another inspector enter a workplace

Amend the model WHS Act to provide that, instead of being limited to the inspector who enters (or has entered) a workplace, the powers to require production of documents and answers to questions can be exercised by any inspector within 30 days following an inspector's entry to that workplace.

Recommendation 18: Clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the model WHS laws outside of their jurisdiction

Amend the model WHS Act to clarify that the regulator's power to obtain information under s 155 has extraterritorial application.

Recommendation 19: Enable cross-border information sharing between regulators

Amend the model WHS Act to include a specific power enabling regulators to share information between jurisdictions in situations where it would aid them in performing their functions in accordance with the model WHS laws.

Recommendation 20: Review incident notification provisions

Review incident notification provisions in the model WHS Act to ensure they meet the intention outlined in the 2008 National Review, that they provide for a notification trigger for psychological injuries and that they capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements.

Chapter 5: National Compliance and Enforcement Policy

Recommendation 21: Review the National Compliance and Enforcement Policy (NCEP)

Review the NCEP to include supporting decision-making frameworks relevant to the key functions and powers of the regulator to promote a nationally consistent approach to compliance and enforcement.

Chapter 6: Prosecutions and legal proceedings

Recommendation 22: Increase penalty levels

- Amend the penalty levels in the model WHS Act to reflect increases in consumer price index and in the value of penalty units in participating jurisdictions since 2011, and
- Review the increased penalty levels as part of future reviews of the model WHS Act and model WHS Regulations to ensure they remain effective and appropriate.

Recommendation 23a: Enhance Category 1 offence

Amend s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is grossly negligent in exposing an individual to a risk of serious harm or death.

Recommendation 23b: Industrial manslaughter

Amend the model WHS Act to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and include the following:

- The offence can be committed by a PCBU and an officer as defined under s 4 of the model WHS Act.
- The conduct engaged in on behalf of a body corporate is taken to be conduct engaged in by the body corporate.
- A body corporate's conduct includes the conduct of the body corporate when viewed as a whole by aggregating the conduct of its employees, agents or officers.
- The offence covers the death of an individual to whom a duty is owed.

Safe Work Australia should work with legal experts to draft the offence and include consideration of recommendations to increase penalty levels (Recommendation 22) and develop sentencing guidelines (Recommendation 25).

Recommendation 24: Improve WHS regulator accountability for investigation progress

Amend the model WHS Act to remove the 12-month deadline for a request under s 231 that the regulator bring a prosecution in response to a Category 1 or Category 2 offence and to ensure ongoing accountability to the person who made the request until a decision is made on whether a prosecution will be brought.

Recommendation 25: Consistent approach to sentencing

Safe Work Australia work with relevant experts to develop sentencing guidelines to achieve the policy intention of Recommendation 68 of the 2008 National Review. As part of this process, any unintended consequences due to the interaction of local jurisdictional criminal procedure and sentencing legislation should also be considered. (I note that the work required by Recommendation 22 ('Increase penalty levels'), Recommendation 23a ('Enhance Category 1 offence') and Recommendation 23b ('Industrial manslaughter') could be combined with the work required by this recommendation).

Recommendation 26: Prohibit insurance for WHS fines

Amend the model WHS Act to make it an offence to:

- enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the model WHS Act
- provide insurance or a grant of indemnity for liability for a monetary penalty under the model WHS Act, and
- take the benefit of such insurance or such an indemnity.

Chapter 7: Model Work Health and Safety Regulations

Recommendation 27: Clarify the risk management process in the model WHS Act

Amend the model WHS Act to clarify the risk management process by including a hierarchy of controls (consistent with reg 36) and making any corresponding amendments necessary to the model WHS Regulations.

Recommendation 28: Improved recording of amusement device infringements and operator training

Amend reg 242 of the model WHS Regulations to ensure that details of statutory notices issued by any WHS regulator and evidence of operator training and instruction are included in the device's log book.

Recommendation 29a: Add a SWMS template to the WHS Regulations

Amend the model WHS Regulations to prescribe a SWMS template.

Recommendation 29b: Develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS

Safe Work Australia develop an intuitive, interactive tool to assist in the effective and efficient completion of fit-for-purpose SWMS.

Recommendation 30: Photographic ID on White Cards

Amend the model WHS Regulations to require photographic ID on White Cards consistent with high-risk work licences.

Recommendation 31a: Consider removing references to Standards in model WHS Regulations

Review the references to Standards in the model WHS laws with a view to their removal and replacement with the relevant obligations prescribed within the model WHS Regulations.

Recommendation 31b: Compliance with Standards not mandatory unless specified

Amend reg 15 of the model WHS Regulations ('Reference to Standards') to make it clear that compliance with Standards is not mandatory under the model WHS laws unless this is specifically stated.

Recommendation 32: Review MHF Regulations

Review the model WHS Regulations dealing with MHF, with a focus on administrative or technical amendments to ensure they meet the intended policy objective.

Recommendation 33: Review crane licence classes

Review the high-risk work licence classes for cranes to ensure that they remain relevant to contemporary work practices and equipment.

Recommendation 34a: Improving the quality of asbestos registers

Amend the model WHS Regulations to require that asbestos registers are created by a competent person and update the model Codes to provide more information on the development of asbestos registers.

Recommendation 34b: Competent persons in relation to asbestos

Review existing requirements for competent persons, including consideration of amendments to the model WHS Regulations to provide specific competencies for asbestos-related tasks or requirements for further guidance on the skills and experience required for all asbestos-related tasks.

Introduction

The model WHS laws provide the framework for a harmonised approach to the regulation of WHS in adopting jurisdictions. They include a model WHS Act, model WHS Regulations and 24 model Codes. They are supported by the NCEP.

The model WHS laws were developed in 2009–2011 following a comprehensive and independent 2008 National Review.¹ The model WHS laws were implemented by the Commonwealth, the Australian Capital Territory (ACT), New South Wales, the Northern Territory and Queensland on 1 January 2012 and by South Australia and Tasmania on 1 January 2013. Victoria and Western Australia are yet to implement the model. However, the Government of Western Australia has been consulting throughout 2018 on the drafting of a new WHS Bill based on the model WHS Act.

This Review is the first national review of the model WHS laws since their development and implementation. Following the release of a discussion paper and the opening of a written submission process and series of online discussion forums in February 2018, I travelled across the country and met with WHS and other safety regulators, businesses, unions, industry organisations, HSRs, WHS and legal practitioners, researchers and community groups.

I examined previous jurisdictional reviews of the model WHS laws, case law, coroners' findings and Safe Work Australia and other jurisdictional research as well as the various reviews covering WHS matters, such as the Senate inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia (Senate inquiry into industrial deaths). I also reconsidered the recommendations from the 2008 National Review, which informed the development of the model WHS laws. The Review methodology is detailed at Appendix C.

In considering the merits of any calls for change, I was guided by whether proposals would optimise WHS outcomes, strengthen harmonisation and reflect collective views from those who are working with the model WHS laws on a day-to-day basis. Some of the recommendations and suggestions from those consulted were outside the scope of the Terms of Reference for the Review; therefore, I have not made specific recommendations on those issues.

¹ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: First report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2008; *National review into model occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009.

Chapter 1: Legislative framework

This chapter examines the model WHS law framework and focuses on a key element of the Terms of Reference for this Review: whether the model WHS laws are meeting the object of the model WHS Act by providing a balanced and nationally consistent framework to secure the health and safety of workers and workplaces. It is divided into two sections. The first section focuses on the effectiveness of the three-tiered structure of the model WHS laws. The second section investigates the scope and application of the model WHS Act.

Object of the model WHS Act (see s 3(1))

To provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces.

Review Terms of Reference

Whether the model WHS laws are operating as intended.

Whether the model WHS Regulations, model Codes of Practice and National Compliance and Enforcement Policy adequately support the object of the model WHS Act.

1.1. The three-tiered structure

Current arrangements

The model WHS laws were developed to harmonise the regulation of WHS across each Australian jurisdiction. The model WHS law framework comprises the model WHS Act, the model WHS Regulations and the 24 model Codes. This framework is intended to be broadly applicable to all organisations regardless of their size or industry. It is outcomes-based and allows organisations the flexibility to tailor their approach to safety to suit their circumstances.

The model WHS Act:

- establishes WHS duties requiring the elimination or minimisation of risks arising from work
- provides for worker consultation, representation and participation relating to WHS matters
- enables compliance with and enforcement of the model WHS laws through the regulator, and
- provides for the making of WHS Regulations and Codes to support the objectives of the model WHS Act.

The model WHS Regulations set out detailed requirements that must be applied to specific work activities and hazards to meet WHS duties. The model Codes provide practical information on how the requirements of the model WHS laws may be met.

Stakeholder responses—2018 Review of the model WHS laws

Harmonisation

Most of those consulted expressed a view about the model WHS law framework as it relates to the ultimate object of harmonisation of WHS laws across jurisdictions. Business representatives saw value in having a national approach to WHS, as it reduces costs and complexity for those with inter-jurisdictional operations. For example, the Australian Industry Group (Ai Group) said that having ‘a common language of WHS helps to send a consistent message about what needs to be done to enhance risk management and reduce the level of injury and fatality within Australia’.² The Small Business Commissioner in South Australia also commented that harmonisation creates a common language in a complex environment.³

There is, however, concern that harmonisation is being eroded. Several submissions, particularly those from employer representatives, noted that jurisdictions had varied the model on implementation and several have made subsequent amendments following enactment. This was seen as fragmenting the model WHS laws and undermining the value of the harmonised system.⁴

² Australian Industry Group (Ai Group) Submission, p 2.

³ SA Small Business Commissioner, Consultation, March 2018.

⁴ See submissions from the Civil Contractors Federation—Queensland, pp 6–7; Chemistry Australia, p 1; South Australian Wine Industry Association, p 5; Carolyn Davis, p 8; Housing Industry Association (HIA), p 4; and Master Electricians Australia, p 2.

The Ai Group made a comprehensive comment to this effect:

‘The initial adoption of the laws involved some necessary variations at jurisdictional level, as reflected by jurisdictional notes in the Model WHS Laws. These were designed predominantly to allow the Model to interact appropriately with other laws in each jurisdiction.

The unfortunate political reality was that other amendments were made when the laws proceeded through individual jurisdictional legislative processes. These amendments included, but are not limited to: union right to prosecute in NSW; a modified approach to union right of entry in SA; QLD maintaining work related electrical safety provisions in separate legislation; and some jurisdictions not adopting the mines chapter of the Regulations.

However, for many years, the integrity of the key parts of the legislation remained largely intact; obligations of duty holders; consultation provisions; and penalty regimes. However, the recent amendments to the QLD WHS Act have created a fissure which puts at risk the collaborative approach to maintaining a harmonised system, particularly in relation to the industrial manslaughter provisions.’⁵

The Safety Institute of Australia considered that the two most significant challenges in achieving long-term harmonisation are maintenance of the laws consistently across all states and territories and consistency in the application of the laws.⁶

Three-tiered framework

The three-tiered model WHS laws are based on the Robens model.⁷ This model recommends that duty holders be required to comply with general duties of care set out in a broad-based WHS statute, together with more detailed standards laid down in regulations, with codes of practice forming a ‘third tier’ of the WHS regulatory architecture. This has been the fundamental structure for regulating WHS for decades. The three-tiered framework was widely supported across stakeholder groups.⁸

There were criticisms of the length and complexity of the model WHS laws, with these criticisms generally directed towards the model WHS Regulations, Codes and guidance material. The Australian Federation of Employers and Industries noted that ‘when the guidance material is more complex than the Act and Regulations then there is a problem’.⁹ There was also feedback that some risks and hazards, such as psychological health, were not addressed in a consistent way through the model WHS Act, Regulations and Codes.

⁵ Ai Group Submission, p 2.

⁶ Safety Institute of Australia Submission, p 5.

⁷ A common term used to describe an approach to regulating WHS established under Lord Robens’ Report of the Committee on Safety and Health at Work (UK) in 1972. Key features of the Robens model include a unified and integrated system of general duties and self-regulation through greater consultation between workers and PCBU.

⁸ Exceptions were the Chamber of Minerals and Energy and the Minerals Council of Australia, which both called for a two-tiered approach comprising only the model WHS Act and the model WHS Regulations: Chamber of Minerals and Energy Submission, p 9; and Minerals Council of Australia Submission, p 5.

⁹ Australian Federation of Employers & Industries Submission, p 27. Also Seyfarth Shaw Australia, *Review of the work health and safety regulatory framework in the building and construction industry*, Department of Jobs and Small Business, Canberra, 2018, p 4.

Small business advocates perceive the model as having been designed to suit big business workplaces and as not reflecting their reality. The Australian Chamber of Commerce and Industry (Australian Chamber) said, 'small businesses cannot be treated like "little big business" in relation to WHS. They need help identifying and translating WHS regulation into their own context and then assistance in implementing it'.¹⁰ The Housing Industry Association (HIA) reinforced that 'one size doesn't fit all'.¹¹

A consistent message arising from the business forums across Australia was simple: 'just tell us what to do'. Businesses and industry representatives said they wanted more practical guidance about how to comply with their WHS obligations. Some called for Codes that specifically address their industry.¹² Others suggested regulators should focus on industry-specific as opposed to issue-specific guidance.¹³

Model WHS Regulations¹⁴

The Northern Territory Government noted that the length and structure of the model WHS Regulations can make it difficult for business to determine which regulations do and do not apply to their workplace and suggested that a full review of their structure and content should be carried out.¹⁵ This view was reflected in many of the submissions from business and industry groups.¹⁶ The Ai Group reflected on the process and principles underpinning the development of the model WHS Regulations and Codes, which meant they were largely a consolidation of pre-existing materials, leading to their length and complexity.¹⁷

The Australian Government report *Review of the work health and safety regulatory framework in the building and construction industry* noted that 'Stakeholders who provided specific feedback on the WHS Regulations raised concerns about: the level of prescription unnecessarily limiting flexibility in compliance; regulations repeating requirements in Part 3.1 of the WHS Regulations; difficulties in interpreting the WHS Regulations; and challenges with complying with the WHS Regulations'.¹⁸

¹⁰ Australian Chamber of Commerce and Industry (Australian Chamber) Submission, p 12.

¹¹ HIA Submission, p 5.

¹² See, for example, HIA Submission, p 5; NSW Nurses & Midwives Association Submission, pp 4–5.

¹³ Cement, Concrete & Aggregates Australia Submission, p 1.

¹⁴ Note that this discussion relates to the model WHS Regulations within the broader context of the legislative framework. For a more detailed discussion of specific regulations, see chapter 7.

¹⁵ See the Northern Territory Government Submission, p 3. In particular, this submission stated the duties in Chapter 8 of the model WHS Regulations dealing with asbestos are not set out in an intuitive manner and also noted that Chapter 9, dealing with Major Hazard Facilities, covers 11 per cent of the entire package but applies to only nine facilities in that territory.

¹⁶ See, for example, Master Builders Australia Submission, p 43.

¹⁷ Ai Group Submission, p 7.

¹⁸ Seyfarth Shaw Australia, *Review of the work health and safety regulatory framework in the building and construction industry*, Department of Jobs and Small Business, Canberra, 2018, p 23.

There was strong support for industry-based regulations¹⁹ that are outcome focused.²⁰ An example provided of an industry where regulations were considered necessary is health care work.²¹

Model Codes of Practice

Many of the issues and concerns raised in relation to the WHS Regulations were also reflected in comments on the model Codes. Many called for the model Codes to be simplified and rationalised.²² There were also calls for new model Codes to be developed for specific industries and hazards.²³ Comcare suggested that the best way to be responsive to emerging risks and industries was through the development of a Code or guidance material and suggested there is 'benefit in maintaining and adhering to an agreed set of criteria to assist in making consistent and objective decisions about when a document should be developed as a code or guidance'.²⁴

The *Review of the work health and safety regulatory framework in the building and construction industry* report noted that 'feedback received from stakeholders about Codes of Practice was mixed. In their current form it could be said that the Codes of Practice are only meeting the needs of certain parts of the industry and when they are read in conjunction with the other aspects of the WHS regulatory framework, many create confusion'.²⁵

The Australian Council of Trade Unions (ACTU) called for compliance with the model Codes to be mandatory (unless a higher standard has been complied with). The ACTU also recommended that duty holders not be able to rely on compliance with a code of practice to meet all their obligations if the code does not cover all potential risks. Duty holders should still be required to consider and address all risks, not just those set out in the WHS Regulations and model Codes.²⁶ The Shop Distributive and Allied Employees' Association proposed adding a caveat that makes it clear a duty of care is not discharged by a PCBU solely by complying with a code of practice.²⁷

Business groups did not support mandatory codes of practice. Some, such as the National Road Transport Association, supported maintaining the evidentiary status of model Codes,²⁸ while others, such as the Minerals Council of Australia, called for the automatic status of model Codes as evidentiary instruments to be removed from the model WHS Act, preferring courts to have discretion in considering a model Code. The Minerals Council is concerned that equating compliance with the WHS Act with compliance with a model Code improperly focuses the regulator's (and a court's)

¹⁹ See the submissions from Carolyn Davis, p 12; HIA, p 5; Safety Institute of Australia, pp 8–9; and Restaurant & Catering Australia, p 3.

²⁰ Chemistry Australia Submission, p 2.

²¹ Health Services Union Submission, pp 22–24.

²² See the submissions from Carolyn Davis, p 34; Business SA, p 4; Restaurant & Catering Australia, p 4; and the South Australian Wine Industry Association, p 5.

²³ For example, there were calls for new model Codes for the maritime sector and the residential housing industry and to deal with inorganic lead, psychological health and safe systems of work.

²⁴ Comcare Submission, p 2.

²⁵ Seyfarth Shaw Australia, *Review of the work health and safety regulatory framework in the building and construction industry*, Department of Jobs and Small Business, Canberra, 2018, p 34.

²⁶ Australian Council of Trade Unions (ACTU) Submission, p 18.

²⁷ Shop Distributive and Allied Employees' Association Submission, p 7.

²⁸ National Road Transport Association Submission, p 2.

attention on a broad model Code, which may have limited practical application to the nature of specific hazards and risks in a particular workplace.²⁹

The length of time taken to develop model Codes was raised by many stakeholders. The Northern Territory Government said the long time frame was problematic and that 'Following a 2014 COAG review it was recommended that in future the development of national guidance material should take the form of Guides, rather than approved Codes of Practice'.³⁰ It also suggested that the move towards guidance instead of model Codes raised questions about the status of approved model Codes and whether national or jurisdictional guides would be just as acceptable to a court as evidence of what is known about a hazard or risk.³¹ SafeWork SA also considered that the development of guidance material in the absence of a model Code was creating some confusion about where that material fits in the legislative scheme.³²

Discussion and recommendations

I find that the harmonisation objective which underpinned the development of the model WHS laws has been substantially achieved and retains the support of business, employer and industry representatives, unions and safety practitioners. This support was reinforced through the calls for harmonisation to be strengthened and maintained, with many of those consulted keen for Victoria and Western Australia to implement the model WHS laws. However, there were also acknowledgements that jurisdictional variations to the model WHS legislative framework continue to occur. The most recent set of amendments enacted in Queensland reinforce the challenge of maintaining harmonisation into the future and was an ever-present discussion point whenever the objective of harmonisation was raised during this Review.

Two key themes running through this Review process are confusion and complexity, mainly in relation to the model WHS Regulations and Codes. Businesses say that they find it difficult to navigate their way through the three tiers of the laws to select those aspects that specifically apply to them. Many small businesses in particular continually raised questions about how they should assess the risks and hazards in their workplace and what actions they should take to fulfil their WHS obligations.

In considering all of the feedback on the three-tiered structure of the model WHS laws, there appear to me to be some tensions at work when it comes to the practical application of the model WHS laws in workplaces. The first tension is between the small businesses' request that they be 'just told what to do' and the bigger businesses' comfort with the flexibility contained in the model WHS laws which allows them to assess and manage risks based on their own specific situation.³³ A related tension lies in the many calls from stakeholders for more guidance, with parallel and equally strong views that there is too much guidance material being produced, which can add to the confusion.

²⁹ Minerals Council of Australia Submission, p 5.

³⁰ Northern Territory Government Submission, p 2.

³¹ Northern Territory Government Submission, p 2. For a decision dealing with the status of guidance material see *Safework NSW v Universal Property Group* [2018] NSWDC 64.

³² SafeWork SA Submission 1, p 7.

³³ This tension is discussed in more detail in chapter 2 ('Duties of care'), in the discussion of 'reasonably practicable'.

However, there was overwhelming support from everyone involved in consultation for a continuation of the three-tiered legislative framework based on the Robens model. This was particularly the case when we discussed emerging industries and hazards and the future of work. It was highlighted by most participants that the new concepts contained in the model WHS Act establish a framework that is flexible enough to deal with technological advances and changing work arrangements through the broad definitions of 'PCBU', 'worker' and 'workplace'; the duties of care framework; the principles applying to the duties of care³⁴; and the ability to develop new industry and hazard-specific model WHS Regulations and model Codes as required.

I consider that, to a large extent, the development process that led to the making of the model WHS Regulations and model Codes has contributed to the difficulty that businesses appear to be having in navigating the three tiers to understand their WHS obligations. The model WHS Act was drafted to ensure that there would be a progressive and flexible WHS legislative framework capable of dealing with the future changes in work and working arrangements. Its development was guided by recommendations arising from a comprehensive public consultation and analytical process. The intention was always that the WHS Act would be principles-based and risk-focused. In contrast, not all of the WHS Regulations were drafted to complement the final vision of the model WHS Act. Rather, their development more closely reflected a consolidation process, drawing on what was already in place across jurisdictions.

Key concepts introduced in the model WHS Act

Key changes for most jurisdictions under the model WHS Act included:

- broadening the focus of the laws, as reflected in the change from 'occupational health and safety' to 'work health and safety'
- introducing a 'person conducting a business or undertaking' as the primary duty holder, moving away from traditional employment relationship definitions
- applying a definition of 'worker' which is broader than that of 'employee'
- explicitly requiring all duty holders to each meet their duties to the extent of their influence and control and to consult, co-operate and co-ordinate with other duty holders where their obligations overlap, and
- introducing a positive duty for 'officers' to proactively ensure the PCBU is meeting their safety duties.

The development of model Codes, similarly, was predominantly driven by which Codes already existed. The Ai Group submission provided a very useful summary of the development of the model WHS Act and the associated Regulations and Codes.

The summary highlights this point:

'The Regulations followed a different path, with the following principles applied:

³⁴ Sections 13–17 of the model WHS Act.

- There were some regulations that needed to be developed in conjunction with the Model WHS Act to ensure that the recommendations associated with the Act were sufficiently implemented.
- Where there was an existing national standard it was to be incorporated into the model WHS Regulations.
- Where matters were already included in two thirds of the jurisdictions, or more, there would need to be a very strong argument mounted to have those provisions NOT included in the model WHS Regulations.
- Where matters were already included in the Regulations in one or more jurisdictions, but less than two thirds, there would need to be a strong argument presented for the Regulations to be included in the model WHS laws.

For this reason, the model WHS Regulations are a consolidation of previous approaches, rather than looking towards the future. The same can be said for Codes of Practice.³⁵

I acknowledge that an enormous amount of work went into the development of the current model WHS Regulations and Codes and it was a significant achievement to find common ground across so many jurisdictions. However, the current situation is that, for some industries and activities, the model WHS Regulations are detailed and prescriptive, whereas for others all of the detail is in a model Code or guidance material. This has contributed to confusion about where to look in the model WHS laws to clarify obligations and about the status of obligations contained in model WHS Regulations, Codes and guidance material; and it has created a perception that, where an activity is not comprehensively addressed in the Regulations, duty holders have no obligations.

The balance between prescription and risk assessment arose in the South Australian Coroner's inquiry into the death of Mr Jorge Castillo-Riffo. The Coroner recommended further consideration be given to the balance between safety being managed by risk assessment as opposed to express mandatory rules in the WHS Act and Regulations, and he favoured a move towards more express mandatory rules.³⁶

I consider that it would be beneficial to have a fresh look at the model WHS Regulations and Codes with clearly defined objectives. By this I mean that they should be reviewed against clear criteria to determine what risks or activities should be prescribed in a regulation or supported by a model Code. They should also be assessed against the key concepts that underpin the model WHS Act (identified above) and against changing work practices and working arrangements to ensure the model WHS laws continue to meet the needs of developing industries and industry practice.

Safe Work Australia has published criteria for determining whether a model Code is required.³⁷

I suggest that these criteria be revisited and expanded to articulate more broadly what is most appropriately addressed through the model WHS Regulations and model Codes. An obvious starting point for these criteria is the Robens model, which was generally supported throughout this Review—

³⁵ Ai Group Submission, pp 7–8.

³⁶ South Australian Coroners Court, *Inquest into the death of Mr Jorge Castillo-Riffo*, 9/2018 (2071/2014), p 91.

³⁷ Safe Work Australia, *Codes of practice and guidance material information sheet*, Safe Work Australia, Canberra, 2012, p 2.

that the model WHS Regulations should provide standards required to meet the general duties in the WHS Act, with the model Codes providing practical guidance on how these standards are to be met in specific workplaces. Legislative drafters have drafting directions which should also be considered.

For example, the Office of Parliamentary Counsel (OPC) has published Drafting Directions³⁸ which note considerations for drafting provisions of legislation dealing with subordinate legislation.³⁹

It is important for both policymakers and business to have clarity, consistency and transparency on how WHS is regulated and why some activities have greater prescription than others. Within this context I note the continued support for the three-tiered framework, and I suggest that an objective of the review of the model WHS Regulations and model Codes be to ensure that the framework remains relevant, appropriate and robust into the future. I consider that those who are seeking an 'authoritative voice' on how to comply with the model WHS laws should be confident of their obligations and able to navigate these clearly through the three tiers.

The Australian Strategy identifies seven priority industries based on their high numbers and rates of injury and/or fatalities or generally hazardous nature. I suggest the model WHS Regulations and Codes be examined through an industry-specific lens to identify whether they adequately address the changing nature of work in each priority industry. This will also allow for consideration of calls for new WHS Regulations or Codes, such as the recommendation of the NSW Parliament Manufactured Stone Industry Taskforce to develop a Code for working with silica.⁴⁰

While the methodology for reviewing the model WHS Regulations and model Codes will need to be determined by Safe Work Australia, I have provided an indicative example of a possible approach in the box below. This process would be managed and driven by Safe Work Australia in consultation with relevant stakeholders, including relevant industries, as appropriate.

I see this process as one which should aim to clarify and reduce complexity and not increase it. I see it as an opportunity to refresh the approach to the second and third tiers of the model WHS laws in the context of specific industries and hazards and an opportunity to take the time to have a considered look at them in partnership with the end users in the context of modern working conditions and changing work practices across a range of industries.

I acknowledge that this process will take time and also that it is likely to provide an opportunity to deal with many of the other issues identified throughout this report. Given that it will take time, I have made separate recommendations in relation to those issues which I consider need to be dealt with as a matter of priority and parallel to the process that emerges from Recommendation 1.⁴¹ In chapter 7 of this report ('Model Work Health and Safety Regulations'), I have identified some specific issues within the content of the model WHS Regulations that warrant earlier attention. I have also identified psychological health as a priority issue, and I discuss this further below.

³⁸ Office of Parliamentary Counsel, *Drafting directions No 3.8 Subordinate legislation*, Office of Parliamentary Counsel, July 2017.

³⁹ Noting that generally the question of what provisions are included in an Act versus a regulation or code is a matter of judgment influenced by the policy, drafter's views, the instructor's preferences and the timetable.

⁴⁰ NSW Manufactured Stone Industry Taskforce, 'Letter from the NSW Minister for Innovation and Better Regulation to Safe Work Australia', unpublished, 2018.

⁴¹ For example, see Recommendations 2, 3, 5 and 17.

Recommendation 1: Review the model WHS Regulations and model Codes

Review the model WHS Regulations and model Codes against agreed criteria on the purpose and content of the second and third tiers of the model WHS laws as they relate to the seven Australian Strategy priority industries.

Reassessing the model WHS Regulations and model Codes—possible approach⁴²

I envisage a four-step process to reassess the model WHS Regulations and model Codes:

1. **Establish and agree criteria** on the appropriate purpose and content of the model WHS Regulations and model Codes.
2. **Review the current model WHS Regulations and model Codes against the agreed criteria for each priority industry.** This process will identify what existing model WHS Regulations and model Codes remain appropriate for each industry and any gaps. Additional factors that may be relevant may also be considered (for example, top causes of injuries and fatalities; historical reasons for inclusion of regulations and/or codes; a consideration of the key concepts of the model WHS Act; and assessment of the changing nature of work and working arrangements).
3. **Review industry-based analysis for commonalities.** Create a revised framework for model WHS Regulations and model Codes which covers the common and industry-specific needs identified in step 2.
4. **Approval and amendment process:** The revised framework and associated regulatory analysis would be considered by ministers with responsibility for WHS (WHS ministers). Safe Work Australia would progress drafting of agreed amendments.

Note that steps 2 and 3 will involve identifying the risks and hazards associated with the priority industries. Some will be industry-specific and others will be common across industries. For instance, when considering the agriculture industry, areas requiring regulations and codes could include animal handling (as an industry-specific need) and chemical handling (common across several industries).

1.2. Scope and application

In this section I specifically examine the scope and application of the model WHS laws in relation to four topics of concern raised in submissions: psychological health; extraterritoriality; public safety; and the future of work and emerging hazards.

I start by making some broad observations about the scope of the laws as they currently stand.

⁴² For the purposes of background, in my review of the model WHS Regulations and Codes, I noted that there are a number of different approaches to WHS Regulations. The New Zealand *Health and Safety at Work Act 2015* is largely based on the model WHS Act; however, the supporting regulations are split into separate regulations on specific duties, activities or hazards. In contrast, the United Kingdom's Construction (Design and Management) Regulations (CDM Regulations) provide an example of a more prescriptive approach, specifying how multiple duty holders consult and co-ordinate their duties. I note also that there was significant support during the Review for the CDM Regulations to be used as a model for a more effective approach to the regulation of this industry in Australia.

Current arrangements

The model WHS Act provides for a broad scope and application of the model WHS laws. This reflects the policy intention to:

- cover non-traditional, new and evolving working arrangements by moving away from a reliance on the traditional employer/employee relationship
- secure the health and safety of workers at work and ensure that the health and safety of others is not put at risk from work
- provide a broad definition of ‘workplace’, making it clear that a place does not cease being a workplace simply because there is no work being carried out at a particular time, and
- make it clear that the Crown is bound by the model WHS laws.⁴³

Psychological health

Current arrangements

The model WHS Act defines ‘health’ to include ‘psychological health’. This means that the primary duty of a PCBU is to ensure, so far as is reasonably practicable, that workers and other persons are not exposed to risks to psychological health and safety arising from the work carried out by the business or undertaking.

Section 276 of the model WHS Act confers regulation-making powers, including in relation to matters set out in Schedule 3 that expressly include provision for regulations to be made relating to exposure to psychological hazards. While Safe Work Australia has recently developed guidance material on systematically managing work-related psychological health and safety,⁴⁴ there are currently no model WHS Regulations or model Codes focused primarily on psychological health or how to manage psychosocial risks or hazards.

Stakeholder responses—2018 Review of the WHS laws

The effectiveness of the model WHS laws in addressing psychological health drew extensive comment both during the face-to-face consultations and within the majority of written submissions. The majority were of the view that the model WHS laws are currently inadequate and, unlike for physical hazards, there are no specific requirements for psychological hazards in the WHS Regulations or practical examples of how to comply with duties in the model Codes.

A small minority of those who participated in the consultations thought the laws are sufficient and that all that is required is more education and awareness-raising.⁴⁵ The HIA, for instance, said that ‘regulators must be mindful of expanding safety legislation beyond its intended scope’ and suggested

⁴³ Safe Work Australia, *Explanatory Memorandum—model Work Health and Safety Bill*, Safe Work Australia, Canberra, 2016, pp 1–15.

⁴⁴ Safe Work Australia, *Work-related psychological health and safety: A systematic approach to meeting your duties*, Safe Work Australia, Canberra, 2018.

⁴⁵ See, for example, the submissions from Master Builders Australia, p 49; Business SA, p 7; Victorian Automobile Chamber of Commerce, p 7.

the focus should be on more education and not more prescription.⁴⁶ The Australian Federation of Employers and Industries noted that ‘PCBUs already have an obligation to do what is reasonably practicable to eliminate or minimise risk to worker health and safety from the risk of harm from psychological stressors at work. This should not be further extended’.⁴⁷

Many stakeholders pointed to a lack of clarity about how to manage the risks to psychological health⁴⁸ and identified this as problematic in light of rising rates of psychological injuries. Some criticised the absence of specific references to psychological health within the general duties, while others were wary of creating a separation between psychological and physical health. The Mental Health Commission discussed how it should all just be about safety⁴⁹ and that ‘the model law’s narrow focus on physical hazards and risks creates the impression that physical health is the primary concern of WHS law. Psychological health, while subject to the same duties, feels very much an afterthought’.⁵⁰

The submissions identified that many employers find managing the risks to psychological health difficult. Most feel that they lack the requisite expertise and are wary of intervening in case they do further harm. While the importance of workers’ psychological health was unquestioned, some employer representatives queried the extent to which PCBUs should have responsibility for their workers’ overall psychological wellbeing.

While many submissions equated psychological harm with bullying and harassment, some emphasised the need to think more broadly about protecting workers’ psychological health. There were differing views about the extent to which psychosocial risks could be ‘designed out’ of the workplace. The National Road Transport Association suggested greater attention be given to controlling psychosocial hazards when considering work design.⁵¹ Some, such as Carolyn Davis,⁵² felt the existing hierarchy of control does not work in the psychological health context, given the difficulty of designing out psychological harm.

Ideas for strengthening the focus on workers’ psychological health included calls for the model WHS Act to highlight psychosocial risks in a similar way to physical risks,⁵³ for the legislation to reference risks associated with the ‘psychological working environment’ or workplace culture and hazardous workplace behaviours (similar to hazardous plant and substances),⁵⁴ and for proactive supportive mechanisms for improving psychological health to be incorporated into the WHS laws.⁵⁵ Several submissions, including that of the National Mental Health Commission, called for the development of a model Code on the management of risks to psychological health and safety.⁵⁶ The National Road

⁴⁶ HIA Submission, pp 8–9.

⁴⁷ Australian Federation of Employers & Industries Submission, p 13.

⁴⁸ See, for example, the submissions from the South Australian Wine Industry Association, p 6; Australian Energy Council, p 4.

⁴⁹ National Mental Health Commission, Consultation, March 2018.

⁵⁰ National Mental Health Commission Submission, p 3.

⁵¹ National Road Transport Association Submission, para 46.

⁵² Carolyn Davis Submission, p 12.

⁵³ National Mental Health Commission Submission, p 4.

⁵⁴ Carlo Caponecchia Submission, p 4.

⁵⁵ United Firefighters’ Union Queensland Submission, p 2.

⁵⁶ National Mental Health Commission Submission, p 4.

Transport Association, Comcare and the Australian Government Department of Jobs and Small Business called for the inclusion of criteria for incident notification to include reporting of work-related psychological illness to the WHS regulators.⁵⁷

The Safety Institute of Australia considered that the lack of specific regulations hampered inspectors' abilities to enforce the duty to ensure the psychological health of workers and suggested that there needs to be some mention of psychosocial hazards within the regulations.⁵⁸ Comcare highlighted the significant rate and impact of psychological claims across its jurisdiction and recommended amendments to the model WHS laws—'For example, specific provisions and a definition of psychological health in the WHS Act and Regulations'.⁵⁹

A number of specific psychosocial risks were highlighted in submissions and seen to warrant explicit attention in the development of guidance material or regulations:

- Geographically isolated workers were identified as being at particular risk of psychological harm given they often work alone and can lack access to support. One union spoke of the heightened risks that teachers in small and/or isolated communities face due to being unable to maintain a clear boundary between their workplace and their home. They noted that, for these teachers, inappropriate and often violent behaviour often occurs outside of work hours.⁶⁰
- The Construction, Forestry, Maritime, Mining and Energy Union (Construction and General Division) (CFMEU) highlighted multiple factors which are associated with the fly-in fly-out lifestyle that contribute to mental health problems, including separation from family; transitioning between home and work; maintaining meaningful relationships while missing out on key life events; and living conditions at camp.⁶¹
- The National Disability Services Commission raised the hazards associated with home-based disability support work: the solitary nature of the work environment; lack of peer and supervisory support; and job complexity.⁶²
- Migrant workers, especially those on temporary visas, were identified as being particularly vulnerable. Fearing for their job security, these workers were seen as unlikely to take action in their workplaces.
- Women, both prior to and returning from maternity leave, were often vulnerable to inappropriate behaviour which posed significant risks to their psychological health.⁶³

⁵⁷ National Road Transport Association Submission, p 6; Comcare Submission, p 5; Australian Government Department of Jobs and Small Business Submission, pp 23–24.

⁵⁸ Safety Institute of Australia Submission, pp 13–14.

⁵⁹ Comcare Submission, p 3.

⁶⁰ Australian Education Union New South Wales Teachers Federation Branch Submission, pp 3–4.

⁶¹ Construction, Forestry, Maritime, Mining and Energy Union (CFMEU) (Construction and General Division) Submission, pp 8–9. It is noted that Western Australia is working on a specific code of practice to deal with psychosocial risks in the fly-in fly-out industry.

⁶² National Disability Services Submission, p 2.

⁶³ Australian Education Union New South Wales Teachers Federation Branch Submission, p 6.

HSRs from the Australian Manufacturing Workers' Union suggested that businesses should be required to have mental health first aiders trained to attend to psychological injuries and incidents.⁶⁴ The CFMEU suggested there should be legislated minimum standards for fly-in fly-out rosters and stronger protections for workers suffering from mental health injuries to prevent them from losing their jobs.⁶⁵

Others, such as the Ai Group, did not support the development of either additional model WHS Regulations or model Codes to address psychosocial risks, noting that a one-size-fits-all approach is unlikely to be effective. Its submission noted that:

'a task with high cognitive demands might be stressful for one person, and highly motivational for another; one person may thrive on having an autonomous approach to work, whilst another might want to be told exactly what to do and when.'⁶⁶

In its submission, the Ai Group considered that the guidance developed by Safe Work Australia, which was designed to help PCBUs to understand the full range of their obligations from prevention to rehabilitation and return to work, was sufficient.⁶⁷

Discussion and recommendations

I have included a significant number of comments from the various submissions to this Review to reinforce that psychological health was one of the key issues raised in the consultations. I also wanted to provide a sense of how this issue impacts across so many different industries, working arrangements and workplaces. Everyone who participated in this Review held a strong position about this issue, with most favouring legislative action to specifically address psychosocial risks in the workplace.

I found that there is a general acceptance that the definition of 'health' in the model WHS Act explicitly includes psychological health. However, I also found that there is a widespread view that psychological health is neglected in the model WHS Regulations and Codes. Many PCBUs told me that they are uncertain about how to best address psychological health in the workplace, and the feedback from small businesses in particular was that they wanted more prescription and practical guidance to help them identify and manage psychosocial risks and hazards. A common landing point for our discussions on psychological health was that there was a need for some 'architecture' to build on the foundations laid by the primary duty of care under s 19 and other duties in the model WHS Act.

Prior to the introduction of the model WHS laws, only Victoria's jurisdictional health and safety laws defined 'health' to include psychological health.⁶⁸ Jurisdictions' existing pre-harmonisation regulations did not include explicit regulations on psychological health.

⁶⁴ Australian Manufacturing Workers' Union Submission 3, p 4.

⁶⁵ CFMEU (Construction and General Division) Submission, p 9.

⁶⁶ Ai Group Submission, p 9.

⁶⁷ Ai Group Submission, pp 9–11. Ai Group refers to the Safe Work Australia guide, *Work-related psychological health and safety: A systematic approach to meeting your duties*, which had not been released at the time of submission.

⁶⁸ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009.

To date, where there has been a focus on psychological health as a WHS issue, it has tended to be linked to widely recognised and acknowledged psychosocial hazards such as bullying and harassment. However, this has too often led to the individualisation of these complaints, their diversion into grievance processes and the removal of the original basis for the complaint from any assessment of the broader WHS organisational safety culture.

A 2007 survey suggested that one in five Australians experience a mental health condition in a given year and almost one in two will experience a mental health condition at some point in their lifetime.⁶⁹ The cost of mental illness to the economy, let alone the individual, is high. A University of South Australia study estimated the total economy-wide cost of workplaces with poor 'psychosocial safety climates'⁷⁰ to be approximately \$6 billion per annum and the total cost of depression to Australian employers through presenteeism and absenteeism to be approximately \$6.3 billion per annum. The study found workers with psychological distress took four times as many sick days per month, had 154 per cent higher performance loss at work and cost an average of \$6,309 per year more in sickness absence and presenteeism than those without psychological stress.⁷¹

Workers' compensation claims related to mental health conditions currently represent a relatively small proportion of all serious workers' compensation claims (around 6 per cent); however, they lead to significantly more time off work⁷²—typically 17 weeks off work compared with 5.8 weeks for all serious claims. Consequently, significantly higher compensation is paid for these claims—typically \$27,700 compared with \$11,500 for all serious claims.⁷³

Workplace psychological injuries place a personal and financial cost on workers, businesses and the broader community. There were persistent calls throughout the consultation process for a specific model WHS Regulation or a model Code to address psychosocial risks and hazards in the workplace. I recommend that new regulations be developed that deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.

I acknowledge that on 14 June 2018, after consultation was completed, Safe Work Australia published new national guidance, *Work-related psychological health and safety: A systematic approach to meeting your duties*. The guide provides a systematic and practical approach that PCBUs can follow to help meet their duties to prevent and manage harm to workers' psychological health. Issues covered include how to identify the hazards to good mental health, how to assess the severity of risks, what steps to take to eliminate and minimise risks, how to intervene early and how to support recovery. The guide is a practical tool that defines key terms and provides a framework to support positive action by PCBUs.

⁶⁹ Australian Bureau of Statistics, *National survey of mental health and wellbeing: Summary of results 2007*, cat no 4326.0, ABS, Canberra, 2008.

⁷⁰ 'Psychosocial safety climates' refers to a type of organisational climate, characterised by prioritising employee psychological health. The theory around psychosocial safety climates suggests it is a predictor of work conditions, worker health and engagement.

⁷¹ M Dollard & H Becher, *Psychosocial safety climate and better productivity in Australian workplaces*, University of South Australia, 2016, p 8.

⁷² It is acknowledged that not all cases of work-related psychological injury are reported through the workers' compensation systems.

⁷³ Safe Work Australia, *Comparative performance monitoring report: 19th edition*, Safe Work Australia, Canberra, 2017.

This national guidance has been well received, and I recognise that it may satisfy some stakeholders' calls for practical guidance on managing psychological health in the workplace. However, most stakeholders were aware that guidance was being produced, yet they still argued that psychological health should be dealt with in the model WHS Regulations or Codes to ensure that duty holders have a clear legislative framework within which to manage psychological health issues. I also note the announcement of a Productivity Commission inquiry into the role of mental health in the Australian economy and the best ways to support and improve national mental wellbeing.⁷⁴ The inquiry will investigate the impacts of mental illness on the economy and the effectiveness of the Australian mental health spend and make recommendations on improving mental health to help people to lead full and productive lives. I do not consider that work on my recommendation to create model WHS Regulations dealing with psychosocial risks should wait on the outcomes of the Productivity Commission's review given the persistent calls from stakeholders for action and the lead time required for this process. The national guidance will provide a good starting point for the development of a model WHS Regulation.

As noted earlier in the context of my earlier recommendation for a full review of the model Regulations and Codes (Recommendation 1), I note that Recommendation 2 should be progressed as a matter of priority.

Recommendation 2: Make regulations dealing with psychological health

Amend the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.

Extraterritorial application

Current arrangements

Each jurisdiction retains responsibility for enacting its own WHS laws, whether by following the model WHS legislative framework or otherwise. Jurisdictional notes in the model WHS Act were designed to ensure the workability of the model provisions in each jurisdiction without affecting harmonisation. For example, jurisdictional notes were used to explain how non-jurisdictional specific terms may be substituted to enable appropriate institutional arrangements to be put into place and to remove any unnecessary duplication with local laws.

A jurisdictional note allowed each jurisdiction to include its own extraterritorial provisions, including the extraterritorial reach of offences.⁷⁵ To date, the ACT, South Australia and the Commonwealth have enacted extraterritorial provisions in their WHS laws (noting that New South Wales recently adopted a new s 155A in the *Work Health and Safety Act 2012* (NSW) (NSW WHS Act), which explicitly provides for the service of a s 155 notice outside of New South Wales).

It was originally intended that inspection powers (Parts 9 and 10 of the model WHS Act) and powers of inquiry (Part 7 of the model WHS Act) would not have any extraterritorial application to workplaces

⁷⁴ The Hon Josh Frydenberg MP & the Hon Greg Hunt MP, 'New Productivity Commission Inquiry to shine a light on mental health', joint media release, 7 October 2018.

⁷⁵ Jurisdictional Note 11 in the Appendix to model WHS Act.

outside a specific jurisdiction.⁷⁶ Extraterritorial application of regulator and inspector powers are discussed in chapter 4, 'Compliance and enforcement'.

Stakeholder responses—2018 Review of the model WHS laws

A few submissions commented on the general extraterritorial application of the model WHS laws. Some submissions suggested that, although WHS regulators typically work co-operatively across state and territory boundaries, there would be benefit in the inclusion of an explicit provision in the model WHS Act (rather than the use of a jurisdictional note) to authorise the extraterritorial application of the laws. For example, the Australian Maritime Safety Authority suggested that a uniform model clause which clarifies extraterritorial jurisdiction could reduce confusion about responsibilities between jurisdictions and suggested that, from a maritime perspective, the South Australian version of s 11 of the model WHS Act provides an effective formulation.⁷⁷

An alternative position was proffered by the Chamber of Minerals and Energy. Although the Chamber granted that the extraterritorial application of the model WHS laws may be useful in some specific circumstances, it opposes the broad extraterritorial application of the model WHS laws. The Chamber considers that the extraterritorial application of regulators' and inspectors' powers should only be available in limited circumstances, clearly prescribed by the model WHS Act, and only where there is a clear, close nexus to WHS issues in the relevant jurisdiction.⁷⁸

Discussion and recommendations

Most comments I received regarding extraterritorial application of the model WHS laws related specifically to regulator and inspector powers. I address these in more detail in chapter 4, 'Compliance and enforcement'. I note that those jurisdictions which have not included any provision at s 11 of their WHS Act are likely to be relying on the provisions of the relevant criminal laws to give the WHS laws the desired extraterritorial operation. Ultimately, this is a decision for jurisdictions and is consistent with the intended operation of these provisions.

Public safety regulation

Current arrangements

The Explanatory Memorandum to the model WHS Act states:

'The duties under the Bill are intended to operate in a work context and will apply where work is performed, processes or things are used for work or in relation to workplaces. It is not intended to have operation in relation to public health and safety more broadly, without the necessary connection to work; and these elements are reflected in the model Bill by the careful drafting of obligations and the terms used in the Bill and also by suitably articulated objects.'⁷⁹

⁷⁶ Safe Work Australia, *Explanatory Memorandum—model Work Health and Safety Bill*, Safe Work Australia, Canberra, 2016, p 10.

⁷⁷ Australian Maritime Safety Authority Submission, p 4.

⁷⁸ Chamber of Minerals and Energy Submission, p 25.

⁷⁹ Safe Work Australia, *Explanatory Memorandum—model Work Health and Safety Bill*, Safe Work Australia, Canberra, 2016, p 10.

Stakeholder responses—2018 Review of the model WHS laws

Many stakeholders raised the issue of the public safety / WHS interface, perceiving the breadth of the WHS regulatory sphere as uncertain and expanding. Regulators spoke of being called upon to investigate incidents that would have traditionally been considered outside the scope of the WHS regulatory system—incidents that had taken place in schools, homes and recreational settings.⁸⁰ New business models were also creating challenges. For example, the National Disability Insurance Scheme (NDIS) has shifted how the disability industry operates and is increasingly bringing private homes into the definition of ‘workplace’.⁸¹

The National Road Transport Association felt that, because the model WHS laws have become broader to capture modern working relationships, the boundary between public health and safety and WHS has become less distinct. It said this is inevitable but not a detrimental issue.⁸²

Comcare suggested that developing a set of principles drawing the line between the model WHS laws and wider public protection would assist jurisdictions to apply a consistent approach to incidents that could be considered to fall within the context of regulatory scope creep.⁸³

Others recognised that this would be a very difficult task. For example, the Ai Group said it did not believe it would be possible to create a clear boundary between WHS and public health and safety:

‘this could only be achieved by rewriting the legislation in a way that specifically excludes particular categories of activity from the Act; that would then require other legislation, and potentially other regulators, to deal with those risks and incidents arising from them.’⁸⁴

It, and others, suggested that any incidents where there is a WHS / public safety crossover would need to be considered on a case-by-case basis.⁸⁵

The CFMEU said it is not always possible to separate workplace safety from more general public health issues. It suggested that ‘attempts to do so can create artificial jurisdictional demarcations which increase the risk of inadequate responses by regulators’.⁸⁶ Instead of trying to create a delineation in the model WHS Act, the union called for greater transparency about the existence and nature of workplace hazards, especially when not immediately apparent or associated with long latency periods (such as asbestos and other environmental contaminants).

Discussion and recommendations

Under the model WHS Act, a PCBU has a duty to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking (s 19(2)). As the Explanatory Memorandum makes clear, the policy intent

⁸⁰ Many examples were given during face-to-face consultations with the regulators in each jurisdiction.

⁸¹ NSW Work Health and Safety Regulators Submission, p 8.

⁸² National Road Transport Association Submission, para 23.

⁸³ Comcare Submission, p 4.

⁸⁴ Ai Group Submission, p 12.

⁸⁵ For example, see Ai Group Submission, p 12; Australian Government Department of Jobs and Small Business Submission, pp 17–18.

⁸⁶ CFMEU (Construction and General Division) Submission, p 9.

behind this provision is to protect members of the wider public from a risk of harm that arises from the performance of work, limited to circumstances where there is a clear link between the risk and the work, or the processes or things that are used for work.⁸⁷

This policy intention is supported by:

- the object of the model WHS Act, which includes securing the health and safety of workers and workplaces by protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work, and
- the Explanatory Memorandum, which states that the model WHS Act is not intended to have operation in relation to public health and safety more broadly without the necessary connection to work.⁸⁸

I spent considerable time examining the impact of the words contained in the Explanatory Memorandum and the reality of the WHS regulators' experience in being increasingly drawn into public health and safety matters.

I noted that the South Australian Industrial Relations Court has addressed questions about how broad the duty to 'other persons' is in a case involving the death of a young girl when she was ejected from a ride at the Royal Adelaide Show. In *Boland v Safe is Safe Pty Ltd & Munro*,⁸⁹ it was held that the duty in s 19(2) of the model WHS Act is capable of extending beyond customers and visitors to workplaces to create a wider duty that protects the public at large from the adverse health and safety consequences of work. While the court found it was possible for the duty to be owed to a member of the wider public, it did not decide if the duty was actually owed by the engineering company that inspected the ride in that case. A decision about whether the duty was owed in those circumstances may have provided useful guidance on the extent of the duty. However, the charges against the engineering company have been withdrawn.

I also noted that the Explanatory Memorandum states in relation to the definition of 'PCBU' at s 5 of the model WHS Act that:

'An exemption contemplated by subclause 5(6) may be required to remove unintended consequences associated with the new concept and to ensure that the scope of the Bill does not inappropriately extend beyond work health and safety matters.'

This would indicate the potential for a legislative solution to the issue of 'scope creep' but would require changing key definitions and other provisions that are central tenets of the model WHS Act. Further, there is unlikely to be any simple formula to determine the boundary between WHS laws and protection of the wider public, especially as work and how it is performed are subject to ongoing change.

I am therefore not making any recommendations to change the model WHS laws to deal with this issue, but I am suggesting that it continues to be one that will need to be determined by regulators on

⁸⁷ Section 8 of the model WHS Act defines 'workplace' as a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.

⁸⁸ Safe Work Australia, *Explanatory Memorandum—model Work Health and Safety Bill*, Safe Work Australia, Canberra, 2016, p 10.

⁸⁹ *Boland v Safe is Safe Pty Ltd & Munro* [2017] SAIRC 17.

a case-by-case basis. It will also be sensible to wait for relevant case law on the scope of s 19(2) of the model WHS Act and, if the case law is contrary to the intended policy operation of s 19(2), amendments to the model WHS Act may then be contemplated to ensure the legislation reflects that policy intention.

Future of work and emerging hazards

Current arrangements

The Terms of Reference for the 2008 National Review⁹⁰ required that the changing nature of work and employment relationships be taken into account.⁹¹ One of the significant regulatory advances made by the model WHS Act was to recognise that the standard employment model—of employers engaging employees under contracts of employment—is no longer the overwhelming norm in Australia. Since the late 1970s there has been a relative decline in full-time continuing work, accompanied by an increase in part-time and temporary work and increased incidence of home-based work, self-employment, diverse forms of subcontracting and the use of supply chain and franchising arrangements.⁹²

The model WHS Act was drafted to respond to these changes, and the need to protect workers from the new and emerging hazards arising from the wide variety of work arrangements, by moving away from references to an ‘employer’ and toward references to a ‘PCBU’ (s 5) and from an ‘employee’ to a ‘worker’ (s 7).

Together these changes significantly broadened the reach of the laws. In addition, the laws were crafted to deal with work being performed in any place and not necessarily at a single, fixed workplace. The principles applying to the duties (ss 13–17) combined with the duty of multiple duty holders to consult, co-operate and co-ordinate (s 46) also recognised that the health and safety of workers in a changing world would often rely on more than one organisation.

Stakeholder responses—2018 Review of the WHS laws

There was general acknowledgement that workplaces and the nature of work are evolving, with the emergence of the gig economy and the growth of automation highlighted by many stakeholders. However, there were differing views on whether amendments to the model WHS laws are necessary now to accommodate this evolution.

Unions raised concerns about the safety of those currently working in the gig economy—as well as future workers. Most wanted the model WHS Act amended now to strengthen protections for such workers.⁹³ They raised questions about the WHS coverage of gig economy participants and queried

⁹⁰ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: First report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2008; *National review into model occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009.

⁹¹ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: First report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2008, pp 8–17.

⁹² R Callus & R Lansbury, *Working futures: The changing nature of work and employment relations in Australia*, University of Sydney, Sydney, 2012.

⁹³ See submissions from The Australian Workers’ Union, p 2; Australian Manufacturing Workers’ Union, p 21.

whether gig economy workers, such as Uber drivers, would be considered PCBUs under the model WHS laws.

Business and industry representatives typically expressed the view that the model WHS laws are already sufficiently flexible to afford adequate protections to workers in evolving roles and industries and urged caution about making any changes at this point in time. The formulation of 'PCBU' in particular was considered by most employer groups to be broad enough to encompass gig economy PCBUs.⁹⁴ Regulators also generally considered that the model WHS laws were flexible enough to deal with emerging business models.

The National Road Transport Association felt that the broad definitions of 'PCBU' and 'worker' are effective in adapting to changes it is witnessing in employment relationships and business models.⁹⁵ It explained how the safety of work in the road freight transport sector has been significantly influenced by increasingly complex supply chains and new business models as a result of the rise of the digital marketplace. The growth in the number of online transactions has resulted in greater movements of people and goods and, subsequently, change in driver working patterns.

Several unions identified a growth in the use of labour hire companies and franchises and suggested, to avoid any uncertainty, that the primary duty is amended to ensure that labour-hire and supply chain arrangements are effectively covered by PCBUs.⁹⁶ The Ai Group presented an alternative perspective on this issue, providing data in its submission which questioned the growth in labour hire, independent contracting and casual employment.⁹⁷

The Queensland Council of Unions raised issues around the relationship between franchise owners and master franchise owners and noted the growth of franchises in the health and social assistance industry providing in-home care and assistance in addition to the provision of nursing services, including medication, palliative care and so on.⁹⁸ National Disability Services echoed this, noting the variety of non-traditional employment forms emerging in the disability sector, where increasing numbers of people with disability are managing their own plans and engaging staff themselves with greater or lesser degrees of formality (consistent with the goals of the NDIS to increase the independence of people living with disability).⁹⁹ Some people are finding support workers through digital platform sites, many of which require workers to be established as independent contractors and take little responsibility for the relationship between worker and client.

⁹⁴ See, for example, Australian Federation of Employers & Industries Submission, pp 19–20.

⁹⁵ National Road Transport Association Submission, paras 11–12.

⁹⁶ ACTU Submission, pp 29–30; Australian Manufacturing Workers' Union Submission 2, pp 16–18; and Unions NSW Submission 1, p 5.

⁹⁷ Ai Group Submission, p 14.

⁹⁸ Queensland Council of Unions Submission, p 21.

⁹⁹ National Disability Insurance Agency, *National Disability Insurance Scheme: COAG Disability Reform Council quarterly report 2017–18 Q2*, National Disability Insurance Agency, Canberra, 2017, p 28. The report states in the second quarter of 2017–18, 20 per cent of people were partly or fully managing their own plans and a further 15 per cent had their plans managed by an intermediary.

Owen Thomas's submission outlined a personal experience in teleworking. Mr Thomas felt that many PCBUs did not understand how to manage WHS in this context, with many perceiving compliance costs too high and subsequently not supporting telework.¹⁰⁰

Owen Thomas—case study¹⁰¹

Owen Thomas has a degree in computer science and has worked in the industry.

As a result of a bicycle accident as a child, he has a brain injury. He also has Asperger's syndrome. Owen has had difficulty working in a traditional office environment. He prefers to work where he can control his sensory stimulus and does not have close physical proximity to others.

Mr Thomas wants to be employed as a teleworker, but employers cite WHS legislation as a reason not to support this. They advised Mr Thomas that WHS laws make the proposition of telework 'a logistic and risk management cost which can only be properly managed by co-location'.

Mr Thomas thinks a teleworking code of practice could help PCBUs to understand how to manage associated WHS risks and break down misconceptions about these types of working arrangements, potentially encouraging their greater use by business. His suggestion was made after receiving advice from, and is supported by, Professor Richard Johnstone, School of Law, Queensland University of Technology.

Occupational violence was repeatedly highlighted during the public consultation process as a growing hazard in many professions¹⁰² which will continue to raise issues in the future, with risks of both physical and psychological harm. Several submissions raised the impact of domestic violence on an affected worker and the need to ensure the safety of everyone at an affected worker's workplace. Given that domestic violence is now being recognised as a legitimate industrial relations issue, it was suggested that it also needs greater explicit attention as a WHS issue.¹⁰³

Some stakeholders raised industry-specific risks—for example, many raised as key future WHS matters working in heat as the effects of climate change continue to have an impact into the future; exposure to silica (as a re-emerging risk);¹⁰⁴ the convergence of workers' compensation and WHS issues (where it was alleged that some PCBUs are suggesting that returning workers are in themselves a risk to health and safety¹⁰⁵); an ageing workforce; obesity; and the impact of drugs and alcohol. In general, the development of a Code or guidance was suggested as the solution to deal with these issues.

¹⁰⁰ Owen Thomas Submission, p 1.

¹⁰¹ Owen Thomas Submission, pp 2–3.

¹⁰² See the case studies and discussion provided in the submissions of the Health Services Union, Shop Distributive & Allied Employees Association, Australian Education Union New South Wales Teachers Federation Branch and Queensland Nurses and Midwives Union.

¹⁰³ National Working Women's Centres Submission, pp 1–4.

¹⁰⁴ I note that the NSW Manufactured Stone Industry Taskforce has examined how to better protect workers from silica dust exposure has recommended Safe Work Australia develop a Code for working with silica. This is also noted in discussion in relation to Recommendation 1.

¹⁰⁵ Shop Distributive and Allied Employees Association Submission, p 26.

Discussion and recommendations

Describing new and emerging business models and working arrangements as ‘disruptive’ and ‘innovative’ suggests a radical change in the nature of work which may in turn require radical changes in policy and legislation. However, the model WHS laws do contemplate non-traditional working relationships.

WHS regulators generally considered that the current model WHS laws are broad enough to deal with emerging business models. However, this view has not been comprehensively tested to date. I note in this context that a Senate select committee reporting on the future of work and workers in Australia recently recommended, among other things, that the Australian Government ensure legislated WHS rights for workers who perform non-standard work.¹⁰⁶

There are a number of options that will assist in enhancing certainty and clarity around WHS obligations and protections in various non-traditional working arrangements. The enforcement approach to labour hire, the NDIS working arrangements, franchising and gig work could be reinforced through the NCEP.¹⁰⁷ The practical application of principles applying to duties (ss 13–17 of the model WHS Act) and the duty of multiple duty holders to consult, co-operate and co-ordinate (s 46 of the model WHS Act) could be demonstrated in the context of non-traditional working arrangements, such as digital platforms and labour hire through a model Code or guidance.

It is important that the model WHS laws keep pace with the changing nature of work so that regulators can continue to work effectively to reduce harm as industries evolve. The model WHS laws anticipated that the capacity to develop model WHS Regulations and model Codes would enable them to respond to emerging hazards (such as those mentioned by stakeholders during this Review), industries or changing work arrangements. Within this context I am recommending that Safe Work Australia develop criteria to continuously assess new and emerging business models, industries and hazards in the context of considering the need for any legislative change, new model WHS Regulations or Codes. These criteria should include an assessment of whether participants in new business models meet the key definitions in the model WHS Act (for example ‘PCBU’ and ‘worker’), and, if so, how do the principles contained within the model WHS laws apply to them; and, if not, is there any need for legislative change, new model WHS Regulations or Codes. I consider that the process identified in Recommendation 1 will support Safe Work Australia to achieve this recommendation.

As noted in the context of my earlier recommendation for a full review of the model WHS Regulations and Codes (Recommendation 1), I note that Recommendation 3 should be progressed as a matter of priority.

¹⁰⁶ Senate Select Committee on the Future of Work and Workers, *Hope is not a strategy—our shared responsibility for the future of work and workers*, Commonwealth of Australia, Canberra, 2018, Recommendation 8, p viii.

¹⁰⁷ See chapter 5 for further discussion on the NCEP.



Recommendation 3: Continuously assess new industries, hazards and working arrangements

Safe Work Australia develop criteria to continuously assess new and emerging business models, industries and hazards to identify if there is a need for legislative change, new model WHS Regulations or model Codes.

Chapter 2: Duties of care

This chapter examines the duties of care framework under the model WHS laws and considers whether it is effective in protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships. It includes the identification of duty holders, the scope and limits of duties and the principles applying to duties.

Object of the model WHS Act (see s 3(1)(a))

To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.

Review Term of Reference

Whether the framework of duties is effective at protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships.

A duty holder is any person who owes a WHS duty under the model WHS Act. This includes PCBUs and other duty holders, including the Crown; and public authorities such as municipal and local governments, officers, workers and other persons at a workplace such as visitors and customers. Some PCBUs have specific duties in specific circumstances—for example, when they are in control of a workplace. There are also ‘upstream’ duties for designers, manufacturers, importers, suppliers and installers of products or plant used at work.

The model WHS Act sets out principles that apply to all duties. The principles were included to guide duty holders, regulators and the courts in applying and interpreting duties of care. A person may have more than one duty and more than one person can concurrently have the same duty, in which case it is shared. Duties cannot be transferred or delegated.¹⁰⁸

2.1. Duty of PCBUs

Current arrangements

The model WHS Act places the primary duty of care and various other duties and obligations on a PCBU. The meaning of ‘PCBU’ is set out in s 5 of the model WHS Act. It is a broad concept used to capture all types of modern working arrangements and includes employers, unincorporated bodies or associations, partnerships and joint ventures, principal contractors, head contractors, franchisors and the Crown.¹⁰⁹

Section 19 of the model WHS Act sets out the primary WHS duty which applies to PCBUs.

PCBUs are required to ensure, so far as is reasonably practicable, the health and safety of:

- workers engaged, or caused to be engaged, by the person, and
- workers whose activities in carrying out the work are influenced or directed by the person, while the workers are at work in the business or undertaking.

A PCBU must also ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.¹¹⁰

The primary duty also outlines specific things all PCBUs must do to ensure health and safety, as far as is reasonably practicable, such as providing information, training, instruction or supervision necessary to protect people from risks; and providing and maintaining safe plant, structures and systems of work.¹¹¹

Some PCBUs have further duties in certain circumstances—for example, when they are in control of a workplace or when they design, manufacture, import, supply and install products or plant used at work.¹¹² The latter are sometimes referred to as ‘upstream’ duties.

¹⁰⁸ Sections 13–17 of the model WHS Act.

¹⁰⁹ For further information, see Safe Work Australia, *How to determine what is reasonably practicable to meet a health and safety duty*, Safe Work Australia, Canberra, 2013.

¹¹⁰ Section 19(2) of the model WHS Act.

¹¹¹ Section 19(3) of the model WHS Act.

¹¹² Sections 20–26 of the model WHS Act.

Stakeholder responses—2018 Review of the model WHS laws

Most of those consulted were supportive of the PCBU concept and considered it was working well.

The Australian Government Department of Jobs and Small Business stated that the PCBU concept works well for the following reasons:¹¹³

- It is flexible enough to adapt and remain relevant in the face of the changing nature of work.
- Having a single inclusive term which clarifies that an overarching duty is owed for the health and safety of workers and others reduces confusion and perceived loopholes.

A representative from the Australian Hotels Association (SA Branch) said that, despite significant concerns prior to the introduction of the model WHS laws in South Australia, there had been minimal negative feedback from members arising from the introduction of the new duties of care framework and the concept of the PCBU.¹¹⁴

Some stakeholders noted that, for small businesses in particular, the term is not always understood in practice.¹¹⁵ Research conducted by Safe Work Australia supported this view, finding that some small businesses had neither the awareness of the term nor the knowledge of how to apply the definition to their own situation.¹¹⁶

Consistent feedback about the upstream duties of designers, manufacturers, importers, suppliers and installers was that these provisions¹¹⁷ had the potential to work well but that they were not being enforced. The importance of the upstream duties to the objective of safety by design was reinforced by many of those consulted as part of the Review. The Australian Construction Industry Forum, in its policy statement provided to the Review, noted that safety in design is a key issue in eliminating risks and must be incorporated as a central component of any project.¹¹⁸ The National Road Transport Association recommended a review of upstream duties to ascertain whether they are broad enough to capture technological developments and the digital economy—for example, designers and developers of software and mobile applications used for work.¹¹⁹

Discussion and recommendations

Throughout the consultations, I sought comments about the principles that apply to duties and also how the definitions and obligations of PCBUs, officers, workers and others are working in practice. I also asked for examples of emerging industries, new working arrangements and new hazards and whether those consulted felt that the current duties of care framework was capable of dealing with these changes.

I found that the duties of care framework is generally understood, settling in people's understanding and working well. Initial concerns with the introduction of the PCBU concept have been largely

¹¹³ Australian Government Department of Jobs and Small Business Submission, pp 5–6.

¹¹⁴ Australian Hotel Association (SA Branch), Consultation, 26 April 2018.

¹¹⁵ NSW Minerals Council Submission, p 16; Ai Group Submission, p 16.

¹¹⁶ Safe Work Australia, 'Qualitative research for the 2018 Review of the Model Work Health and Safety Laws', report prepared by Instinct and Reason, unpublished, 2018.

¹¹⁷ Sections 22–26 of the model WHS Act.

¹¹⁸ Australian Construction Industry Forum Submission, p 2.

¹¹⁹ National Road Transport Association Submission, p 5.

unfounded, with very few unintended consequences or problems reported. The definitions of 'PCBU', 'worker' and 'workplace' as applied to the duties of care framework were perceived to be broad enough and flexible enough to deal with changing work arrangements and emerging industries and business models.

However, while most considered the framework adaptable, many remained unclear about how that adaptation worked in practice. For example, Comcare's submission reflected the views of others, stating that:

'The emergence of the gig economy and the growth of peer to peer platforms such as Uber, Deliveroo, and Airtasker (among others) have brought into question whether the definitions of 'worker' and 'PCBU' are sufficient to ensure duties of care continue to be responsive to the changing nature of work ...'¹²⁰

Within this context, I have earlier in this report recommended that Safe Work Australia develop criteria to continuously assess new and emerging business models, industries and hazards to identify if there is a need for new model WHS Regulations or model Codes (Recommendation 3).

I am not recommending major changes to the definition of 'PCBU', but I consider that, for the avoidance of any doubt, there is merit in clarifying that a contractor or subcontractor in a contractual chain can meet the definition of 'worker' as well as 'PCBU'.¹²¹ This technical drafting issue was originally identified by Professor Richard Johnstone and Michael Tooma.¹²² They suggested that addressing this technical issue will help to clarify the policy intention of the 2008 National Review that a contractor or subcontractor in a contractual chain can be a worker and be owed a duty by PCBUs further up the supply chain and at the same time be a PCBU and owe duties to those further down the supply chain.

This amendment will also assist with providing clarity in relation to PCBUs' shared duties and the practical challenges and concerns that were raised in the Review regarding the PCBU's obligation to consult, co-operate and co-ordinate with other PCBUs where they have a shared duty of care as part of a supply chain, network or project.¹²³



Recommendation 4: Clarify that a person can be both a worker and a PCBU

Amend s 5(4) of the model WHS Act to make clear that a person can be both a worker and a PCBU, depending on the circumstances.

¹²⁰ Comcare Submission, p 5.

¹²¹ Note that this is only if the person is a natural person. A body corporate contractor or subcontractor could not be a worker.

¹²² R Johnstone & M Tooma, *Work health & safety regulation in Australia: The model Act*, The Federation Press, Sydney, 2012, pp 57–58.

¹²³ This is discussed further later in this chapter.

2.2. Reasonably practicable

Current arrangements

Section 18 of the model WHS Act defines ‘reasonably practicable’ and the matters that need to be taken into account to ensure health and safety under the model WHS laws. The standard of ‘reasonably practicable’ in ensuring health and safety under the model WHS Act is linked to the duties of a PCBU.

Safe Work Australia has also published the guide *How to determine what is reasonably practicable to meet a health and safety duty* to assist PCBUs in meeting their primary duty.¹²⁴

Stakeholder responses—2018 Review of the model WHS laws

The concept of ‘reasonably practicable’ attracted a considerable amount of comment from stakeholders. The Health Services Union suggested ‘that this section as it stands is legally well crafted and is open to the receipt of new research to allow for continual improvement in the standards required of PCBUs’.¹²⁵ However, it noted that, when its members suggest safety improvements, managers often tell them the budget does not permit consideration of the idea.

Andrew Moon suggested, ‘this is a very fair and common sense approach, some autonomy and judgement needs to be left to the PCBU’.¹²⁶

The Australian Government Department of Jobs and Small Business stated that it believes the concept works well for a range of reasons, including that it is an objective two-stage test which is flexible enough to accommodate high- and low-risk situations. There is also a clear presumption in favour of safety ahead of cost, and it recognises that some matters may be beyond a person’s control.¹²⁷ The Ai Group emphasised that the primary duty of care must continue to be qualified by what is reasonably practicable.¹²⁸

Small business feedback was consistent in highlighting that the ‘reasonably practicable’ concept is particularly difficult for them to understand and apply. They are keen to be told what they need to do to meet their WHS obligations.¹²⁹

New definitions of ‘reasonably practicable’ were called for, to include reference to a person’s capacity to influence and control a matter. The Australian Chamber suggested amending the definition to take into account who has the control, knowledge and skill and is best placed to manage, remove or mitigate risk.¹³⁰

¹²⁴ Safe Work Australia, *How to determine what is reasonably practicable to meet a health and safety duty*, Safe Work Australia, Canberra, 2013.

¹²⁵ Health Services Union NSW–ACT–Qld Branch Submission, p 34.

¹²⁶ Andrew Moon Submission, p 2.

¹²⁷ Australian Government Department of Jobs and Small Business Submission, p 7.

¹²⁸ Ai Group Submission, p 16.

¹²⁹ Australian Chamber Submission, p 6; Ai Group Submission, p 17; Australian Small Business and Family Enterprise Ombudsman Submission, p 1.

¹³⁰ Australian Chamber Submission, pp 5–6. Also see HIA Submission, p 9.

The issue of how cost is to be factored into what is reasonably practicable was raised consistently by PCBUs and worker representatives.¹³¹ The Department of Defence suggested that:

‘section 18 of the model WHS Act [should] be revised to provide more clarity on its application, in particular, in relation to paragraph 18(e) ... and the consideration of costs. This will provide more clarity about control implementation and increase the quality of risk management.’¹³²

The Shop Distributive and Allied Employees Association commented that:

‘Although the cost of eliminating or minimising risk is relevant in determining what is reasonably practicable, it should be spelled out more clearly in the Act how to consider cost.’¹³³

The Ai Group expressed the view that relevant guides and Codes provide good information to duty holders about what is meant by ‘reasonably practicable’.¹³⁴

Discussion and recommendations

I found that there were mixed views on the definition of ‘reasonably practicable’, whether it was an appropriate qualifier to the primary duty and particularly its ability to be easily applied in practice. While big business supported the qualifier, valuing the flexibility it offered, small business generally expressed a preference for more prescription, which is summed up in the constant refrain throughout the Review: ‘just tell us what to do’.

It was often suggested that a better approach for small business would be to provide a baseline or set of minimum standards for small business to meet their WHS obligations rather than relying on a consideration of what is reasonably practicable.¹³⁵ The Australian Chamber’s 2018 report *Enabling safe and healthy workplaces for small business* reinforced that the key issue is how WHS material and guidance is presented to small business. It suggested that small business should not be treated as ‘little big business’ and that they need help to translate the obligations contained in the model WHS laws into practice in their own workplaces.¹³⁶

Apart from the broader issue of flexibility versus prescription, there were two specific issues which were raised consistently throughout the Review. The first was how to assess cost in the balancing of the issues listed in the s 18 definition. I note that the definition of ‘reasonably practicable’ at s 18 of the model WHS Act is clarified in the Safe Work Australia guide *How to determine what is reasonably practicable to meet a health and safety duty* in relation to the consideration of cost. The relevant paragraphs are extracted below, with the final one being the most critical to the issues raised:

‘The cost of eliminating or minimising risk must only be taken into account *after* identifying the extent of the risk (the likelihood and degree of harm) and the available ways of eliminating or minimising the risk.

¹³¹ See the Australian Education Union New South Wales Teachers Federation Branch Submission, pp 6–7; Unions NSW Submission 1, p 6.

¹³² Department of Defence Submission, p 3.

¹³³ Shop Distributive and Allied Employees’ Association Submission, p 27.

¹³⁴ Ai Group Submission, p 17.

¹³⁵ Australian Small Business and Family Enterprise Ombudsman, Consultation, April 2018.

¹³⁶ T McKeown & T Mazzarol, *Enabling safe and healthy workplaces for small business*, Australian Chamber, 2018.

The costs of implementing a particular control may include costs of purchase, installation, maintenance and operation of the control measure and any impact on productivity as a result of the introduction of the control measure.

A calculation of the costs of implementing a control measure should take into account any savings from fewer incidents, injuries and illnesses, potentially improved productivity and reduced turnover of staff.

If a PCBU cannot afford to implement a control measure that should be implemented after following the weighing up process set out in section 18 of the WHS Act, they should not engage in the activity that gives rise to that risk.¹³⁷

I found that businesses and their representatives continually asked questions about the issue of influence and control, particularly in the context of when a PCBU can rely on an expert contractor to manage safety. Reliance on the expertise of contractors is one of the considerations of the reasonably practicable calculus, and it is also linked to the principles that apply to duties (ss 13–17 of the model WHS Act) and the requirement for PCBUs with concurrent duties to consult, co-operate and co-ordinate with other duty holders (s 46 of the model WHS Act).¹³⁸ The principles applying to the duties appear to be generally understood, but the questions about a PCBU's influence and control, which were originally answered as part of the 2008 National Review, were raised again during the development of the model WHS laws.

These questions included:

- When does my liability stop?
- When can I rely on an expert contractor?
- Why should I be at risk of prosecution for something I have no control over?

I am not making any recommendations for legislative change relating to the issue of influence and control and note the comprehensive analysis of this issue in the 2008 National Review.¹³⁹ It is worth highlighting that the Safe Work Australia guide confirms that consideration of what is 'reasonably practicable' includes (but is not limited to) the extent to which the duty holder is able to exercise influence and control over a matter.¹⁴⁰ I acknowledge that the issue of influence and control was raised most regularly in the context of multiple duty holders, with many questions raised during the Review about what compliance with the principles applying to duties (particularly shared duties) looked like in practice. This is discussed further below, and Recommendation 5 is intended to address the issues raised in this context.

¹³⁷ Safe Work Australia, *How to determine what is reasonably practicable to meet a health and safety duty*, Safe Work Australia, Canberra, 2013, section 5.3, pp 15–16.

¹³⁸ These issues will be further discussed later in this chapter.

¹³⁹ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: First report*, report prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2008, pp 45–46.

¹⁴⁰ Safe Work Australia, *How to determine what is reasonably practicable to meet a health and safety duty*, Safe Work Australia, Canberra, 2013, p 7.

2.3. Duty of officers

Current arrangements

The model WHS Act imposes a duty on an officer to exercise due diligence to ensure that their organisation (PCBU) complies with its duties of care. An 'officer' is defined in s 4 of the model WHS Act and the due diligence requirements require an officer to ensure that the PCBU uses and applies appropriate resources, policies, procedures and health and safety practices in the conduct of a business or undertaking. The 'officer' definition at s 4 of the model WHS Act includes 'a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation'.¹⁴¹

A list of the steps that must be taken to meet this standard is provided at s 27(5) of the model WHS Act. This list is not exhaustive and so, depending on the circumstances, an officer may need to take other steps to discharge their duty.

Stakeholder responses—2018 Review of the model WHS laws

Overwhelming feedback from the public consultation process was that officers' duties were generally supported and accepted. SafeWork SA noted in its submission that:

'as the duty of an officer was new to WHS legislation in South Australia, there was a level of concern and uncertainty about what it would entail and to whom it would apply. As the legislation has been in operation now for over four years, this seems to be less of an issue.'¹⁴²

One university stakeholder said that top-level university executives are now discussing their roles and responsibilities more seriously.¹⁴³ It has encouraged a discussion and consideration of who is an officer and what it means for them.

The National Road Transport Association said that it 'strongly supports the requirement for officers to exercise due diligence. This is helping to drive safety from the top of an organisation and ensure that information about safety performance is reported back up again from the 'factory floor' to the board room'.¹⁴⁴

The Ai Group considered the introduction of the officer duty has increased clarity and awareness of WHS responsibilities. In larger organisations, more people in the organisation will consider they are officers and responsible for WHS.¹⁴⁵ However, in meetings, some regulators and government agencies noted the concept of an 'officer' can still raise questions within government operations, particularly in health care and education.

In business roundtables and HSR forums, it was suggested that there should be better training provided to officers and that, possibly, qualifications for officers should be required.

¹⁴¹ Note the definition of 'officer' in s 4(a) of the model WHS Act refers to an officer within the meaning of s 9 of the *Corporations Act 2001* (Cth).

¹⁴² SafeWork SA Submission 1, p 13.

¹⁴³ Australasian University Safety Association Submission, p 3.

¹⁴⁴ National Road Transport Association Submission, p 3.

¹⁴⁵ Ai Group Submission, pp 17–18.

Discussion and recommendations

The positive duty that is placed on officers of organisations to exercise due diligence to ensure their organisations meet their duties of care under the model WHS Act was highlighted throughout the Review as one of the key successes of the model WHS laws.

Across the diverse range of individuals and groups, it was reported that the introduction of due diligence requirements for officers has placed accountability for management of WHS at the appropriate level within organisations.

I received consistent feedback that discussions about WHS have been brought into the boardroom and that safety issues are being considered alongside other corporations' due diligence requirements.

I note that, when the model WHS Act was first developed, there was considerable unease around the introduction of officers' duties, but it is clear that the concern about this duty acting as a disincentive for people to take up officer roles has been unfounded. My findings in this context are consistent with those of the 2014 COAG Review.¹⁴⁶

While I am not making any specific recommendations for legislative change relating to officer duties, I will be suggesting at chapter 5 of this report that a revised NCEP provide more detail about how regulators will enforce the due diligence provisions.

2.4. Duty of workers and other persons at the workplace

Current arrangements

Workers have a duty to take reasonable care for their own health and safety while at work and also to take reasonable care so that their acts or omissions do not adversely affect the health and safety of other persons at the workplace.¹⁴⁷ 'Reasonable care' is a lower standard than 'so far as is reasonably practicable' and reflects that the worker has a more limited level of influence at work and is less able to take active measures to eliminate or reduce risks to health and safety than other duty holders such as a PCBU. Workers must also comply, so far as they are reasonably able to, with any reasonable instruction that is given by the PCBU to allow compliance with the WHS Act and co-operate with any reasonable policy or procedure relating to WHS that has been notified to them.

The broad definition of 'worker' at s 7 of the model WHS Act supports the policy intention of extending the scope of the model WHS laws beyond the traditional employer/employee relationship.

Similar duties apply to other persons¹⁴⁸ at a workplace. For instance, a customer or a visitor must take reasonable care for their own safety at the workplace and take reasonable care that their acts or omissions do not adversely affect the health and safety of others at the workplace. Other persons at a workplace must also comply, so far as they are reasonably able to, with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the model WHS Act.

¹⁴⁶ Safe Work Australia, *Improving the model Work Health and Safety laws: Report*, Safe Work Australia, Canberra, 2014, p 7.

¹⁴⁷ Section 28 of the model WHS Act.

¹⁴⁸ Section 29 of the model WHS Act.

Stakeholder responses—2018 Review of the model WHS laws

Most submissions endorsed the definition and duties of workers as appropriate. The Australian Government Department of Jobs and Small Business, in its submission, outlined several supporting reasons, including that the breadth of the definition enabled it to cover emerging employment arrangements while the duty still recognises that there should be limits on a PCBU's duty and liability.¹⁴⁹ In the HIA's view:

'The current definition of worker is appropriate to respond to changes in the nature of work and work relationships.'¹⁵⁰

The Queensland Council of Unions considers the broad definition of 'worker' in the model WHS laws is vastly superior to definitions of 'employee' in other industrial legislation.¹⁵¹ This view was also supported in a submission by the Australasian University Safety Association, which said that the expanded definition of 'worker' to encompass those who are undertaking work at the workplace and the requirement for broader consultation have ensured consistency in providing safe systems of work across all levels of the organisation.¹⁵²

In some instances, the language around workers' duties is seen as inadequate. The Australian Federation of Employers and Industries called for workers' duties to be made clear and unambiguous, suggesting the legislation should spell out that each individual has responsibilities for workplace safety, and for the limits to those responsibilities to be made clear.¹⁵³ The Australian Chamber agreed, stating that, while industry generally supports the current definition of 'worker', it would like more materials and resources dedicated to increasing workers' awareness of their duties, particularly in non-traditional work environments.¹⁵⁴

In terms of other suggested changes in this area, the Australian Manufacturing Workers' Union suggested that labour hire workers and similar be specifically recognised as a prescribed class of workers to avoid any doubt.¹⁵⁵

There were few comments provided on the duties of others at the workplace. Those that commented mainly sought recognition of the changing nature of the workplace and a need for further guidance.

The NSW Work Health and Safety Regulators noted that 'other persons' are increasingly present at workplaces—for example, the increasing numbers of people with a disability who are being cared for by disability support workers in their own homes¹⁵⁶—and the duty of care relating to 'other persons' will need to evolve to recognise this.

The Australian Federation of Employers and Industries raised concerns about the duty to 'others', suggesting that it is unacceptably broad and exposes PCBUs to liability in areas that are primarily

¹⁴⁹ Australian Government Department of Jobs and Small Business Submission, pp 10–11.

¹⁵⁰ HIA Submission, p 11.

¹⁵¹ Qld Council of Unions Submission, p 21.

¹⁵² Australasian University Safety Association Submission, p 3.

¹⁵³ Australian Federation of Employers & Industries Submission, p 25.

¹⁵⁴ Australian Chamber Submission, p 29.

¹⁵⁵ Australian Manufacturing Workers' Union Submission 2, p 21.

¹⁵⁶ NSW Work Health and Safety Regulators Submission, p 12.

public safety and public health issues.¹⁵⁷ I have discussed public safety issues in chapter 1, 'Legislative framework'.

Discussion and recommendations

I found that, at this stage, the duties of care for workers and other persons are appropriate, so I have made no specific recommendations for change. The implementation of Recommendation 3 (discussed in chapter 1) and Recommendation 5 in this chapter should provide clarity about how workers and other persons fit within the context of the evolving nature of work, particularly where there are complex contracting and subcontracting arrangements.

2.5. Principles applying to duties including multiple duty holders

Current arrangements

The model WHS Act includes a set of principles that apply to all WHS duties (ss 13–17) which is included to guide duty holders, regulators and the courts in applying and interpreting duties. The principles state that a duty cannot be transferred to another person, a person can have more than one duty and more than one person can have the same duty at the same time—if so, they must each comply with that duty.

Section 17 of the model WHS Act specifies that a person with a duty to ensure health and safety must do so by managing risks, which requires:

- eliminating the risks, to health and safety so far as is reasonably practicable, and
- if eliminating the risk is not reasonably practicable, minimising the risks to health and safety so far as is reasonably practicable.

Stakeholder responses—2018 Review of the model WHS laws

The NSW Work Health and Safety Regulators supported the continued importance of the principle that a duty cannot be transferred to another person, reinforcing that 'the principles that apply to health and safety duties are critical to the intent of the model WHS laws'.¹⁵⁸

SafeWork SA noted that it was often difficult to enforce the principles and suggested that 'it may be beneficial to consider linking the duties at s 16 and s 46 [of the model WHS Act] to clarify the requirements for duty holders to determine shared duties and consult on those'.¹⁵⁹

Some stakeholders expressed concern that there may not be enough protection for a person being held criminally liable for something they cannot control. The Chamber of Minerals and Energy recommended that it should be clarified in the model WHS Act that companies have flexibility to apportion principal responsibility where there are multiple PCBUs.¹⁶⁰ The Australian Federation of Employers and Industries said that 'the reality is that the multiple overlapping duties with no limit to

¹⁵⁷ Australian Federation of Employers & Industries Submission, p 16.

¹⁵⁸ NSW Work Health and Safety Regulators Submission, p 12.

¹⁵⁹ SafeWork SA Submission 1, pp 12–13.

¹⁶⁰ Chamber of Minerals and Energy Submission, p 24.

control breeds confusion and frustration, and leads ultimately to a failure of effective action. It does not improve effective safety management'.¹⁶¹

The Australian Chamber suggested amending s 17 of the model WHS Act ('Management of risks') to adopt the variation implemented in the *Work Health and Safety Act 2012 (SA)* (SA WHS Act) for the same provision.¹⁶² This adds a qualifier confirming that a PCBU has to comply with this duty only to the extent to which the person has the capacity to influence or control the matter.

Discussion and recommendations

I found that, while most of those who contributed to the Review understood the rationale behind the principles applying to duties and accepted them, they found it difficult to apply these principles in practice.

Section 16 of the model WHS Act in particular ('More than one person can have a duty') is proving problematic, and I found this principle, when combined with the s 46 duty on multiple duty holders to consult, co-operate and co-ordinate, to be a key area of the model WHS Act which is not operating as intended.

Under s 46 of the model WHS Act, a PCBU has the duty to consult, co-operate and co-ordinate activities with any other PCBU who has a duty in relation to the same matter. The principles applying to all duties mean that each duty holder retains their duty and must comply with that duty to the standard required by the WHS laws. An example of this situation is construction projects, where there are likely to be a range of businesses, labour hire firms, contractors and subcontractors involved in completing a project. Each PCBU will have a particular role and specific ability to influence or direct particular matters relevant to health and safety for that project. To avoid duplication of effort, or an absence of effort due to presumptions that other PCBUs are managing risks, s 46 of the model WHS Act places a duty on multiple duty holders to properly consult, co-operate and co-ordinate their activities to ensure the health and safety of workers and other persons affected by the work of the project.

I found that those PCBUs who are at the 'top' of a supply chain, project or network were still asking questions like 'Where does my liability end?', 'When can I rely on an expert contractor to take over responsibility for WHS matters?' and 'If I can't control a WHS matter, why should I be liable?'. Those PCBUs who are lower down the supply chain, network or project consistently provided feedback that the shared duty principle had become for them an issue of providing paperwork to the PCBUs higher up the chain.

While noting that some suggested that the South Australian amendment, which reinforces the importance of influence and control at s 17 of the model WHS Act, would be helpful, it is significant that the concerns about the interaction of s 16 and s 46 were also raised by South Australian participants in the Review.

As discussed in chapter 1, I found that a significant general issue raised throughout the consultations was that there were key concepts contained in the model WHS Act which were not then explicitly

¹⁶¹ Australian Federation of Employers & Industries Submission, p 23.

¹⁶² Australian Chamber Submission, p 26. Also see HIA Submission.

supported/elaborated on in the model WHS Regulations and model Codes. The principles applying to multiple duty holders were highlighted in this context. For example, the ACTU noted that, while the model laws set out detailed legislative guidance on the duty to consult with workers and their representatives, the same level of guidance is not provided for the obligation for duty holders to consult each other (the model WHS Regulations do not address these duties at all, and the model Codes address the issue in insufficient detail).¹⁶³

Within this context, unpublished research prepared for Safe Work Australia reviewed court decisions interpreting the model WHS Act and WHS Regulations across a range of areas, including those that considered the concepts of 'PCBU', 'worker' and 'officer' and the principles applying to duties. The report found that most of the decisions at that time had interpreted the model WHS Act provisions consistently with its underlying policy objectives. However, it recommended additional guidance to assist duty holders in certain circumstances, including where an expert, independent contractor is engaged to carry out skilled work.¹⁶⁴

Stakeholders mainly suggested guidance material or a model Code to clarify when, how and to what extent PCBUs must consult, co-operate and co-ordinate with each other about concurrent duties.¹⁶⁵ The ACTU submission noted the importance of 'horizontal' consultation and called for 'detailed explanation of the s 46 duty to consult horizontally, including matters such as the triggers for consultation, the information to be provided, documentation and reporting, issue resolution and how horizontal consultation interacts with consultation with workers'.¹⁶⁶

The existing model Code of Practice: *Work health and safety consultation, co-operation and co-ordination* provides some guidance for PCBUs on how to meet their duties to consult with other duty holders, but it predominantly focuses on consultation with workers. A standalone model Code would elevate the importance of these obligations and provide necessary authoritative guidance. Considering the range of issues raised in the context of multiple shared duties, I am recommending that a new model Code be developed that clearly demonstrates how the principles applying to duties operate, with particular reference to their interaction with s 46 ('Duty to consult with other duty holders'), using examples from a variety of modern working arrangements.

In the context of my earlier recommendation for a full review of the model WHS Regulations and model Codes (Recommendation 1), I note that Recommendation 5 should be progressed as a matter of priority.

¹⁶³ ACTU Submission, p 38.

¹⁶⁴ Safe Work Australia, 'Project 1: Legal construction of key sections of the model Work Health and Safety Act', project undertaken by R Johnstone of the National Research Centre for Occupational Health and Safety Regulation, unpublished, 2016.

¹⁶⁵ For example, see Ai Group Submission, p 21.

¹⁶⁶ ACTU Submission, p 38.



Recommendation 5: Develop a new model Code on the principles that apply to duties

Develop a model Code to provide practical guidance on how PCBUs can meet the obligations associated with the principles contained in ss 13–17 (the Principles), including examples of:

- the application of the Principles to labour hire, outsourcing, franchising, gig economy and other modern working arrangements, and
- processes for PCBUs to work co-operatively and cohesively to discharge their duties (in the context of the duty to consult, co-operate and co-ordinate with other duty holders—s 46 of the model WHS Act).

Chapter 3: Consultation, representation and participation

This chapter considers whether the consultation, representation and issue resolution provisions contained in the model WHS laws are effective and used by duty holders; and whether workers are protected when they participate in these processes.

Object of the model WHS Act (see s 3(1)(b) and (c))

Providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety.

Encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment.

Review Term of Reference

Whether the consultation, representation and issue resolution provisions are effective and used by duty holders and workers are protected where they participate in these processes.

3.1. Consultation with workers

The model WHS laws recognise the value of worker participation and representation in improving health and safety at the workplace. Processes and procedures in the laws aim to support genuine and effective consultation with workers through consultation procedures specifically agreed at a workplace, or through the election of HSRs and the establishment of HSCs.

Duty to consult

Current arrangements

A PCBU has a duty to consult with its workers who are likely to be directly affected by a health and safety matter arising from the work, so far as is reasonably practicable. The consultation can take any form that is agreed by the PCBU and its workers as long as it is consistent with the model WHS laws.¹⁶⁷

Under the model WHS Act, 'consultation' means:¹⁶⁸

- relevant WHS information is shared with workers
- workers have reasonable opportunity to express their views, raise issues and contribute to the decision-making process relating to the health and safety matter
- the views of workers are taken into account
- workers are advised of the outcome of any consultation in a timely manner, and
- if the workers are represented by an HSR, consultation includes involvement of that representative.

A PCBU and its workers can agree to a consultation procedure tailored to their needs. However, if there is a request to have HSRs or a HSC, the PCBU must put those arrangements in place. This could be in addition to or instead of other consultation processes.¹⁶⁹

There are specific situations where the model WHS laws require consultation.¹⁷⁰ For example, consultation is required when making decisions on measures to eliminate or minimise risks or on procedures for consulting with workers, resolving WHS issues at the workplace, or providing information and training to workers.

Stakeholder responses—2018 Review of the model WHS laws

Many of those who participated in the Review considered that the duty to consult with workers was not operating as intended. Research on the model WHS laws found that consultation between managers and workers about health and safety decisions occurs in many but not all businesses.¹⁷¹

¹⁶⁷ Section 47(3) of the model WHS Act.

¹⁶⁸ Section 48 of the model WHS Act.

¹⁶⁹ See ss 50–51 and 75 of the model WHS Act. An HSR may be requested by one worker; for HSCs, the request may be made by one HSR or five or more workers at the workplace.

¹⁷⁰ Section 49 of the model WHS Act.

¹⁷¹ Safe Work Australia, 'Evaluation of the model work health and safety laws: Synthesis of findings', unpublished, 2015.

Unions raised concerns that the laws were not always resulting in genuine consultation and that often workers' views were not being taken into account.¹⁷² The ACTU submission suggested requiring PCBUs to document how workers' views are taken into account as part of consultation obligations.¹⁷³

Feedback from some businesses (especially small businesses) was that the legislative framework for consultation is impractical and unnecessarily prescriptive and is not easily adaptable for many workplaces.¹⁷⁴ However, it was recognised by others that the model WHS laws provided the flexibility for businesses to adapt their consultation processes to suit their needs and those of their workers.¹⁷⁵

A number of PCBUs, HSRs and unions suggested there should be more guidance provided, with case studies and examples of how consultation worked in practice.

Discussion and recommendations

I have considered the provisions of the model WHS Act, particularly those that outline what constitutes consultation.¹⁷⁶ The laws make it clear that consultation should be about more than merely sharing information but should be a two-way conversation in which workers have a reasonable opportunity to participate in the resolution of WHS matters at a workplace. The Explanatory Memorandum to the model WHS Act reinforces that s 48(1) establishes the requirements for 'meaningful consultation' (emphasis added).¹⁷⁷

Given the feedback that genuine consultation is not always occurring as required under the model WHS laws and that many of those consulted suggested looking at the New Zealand approach, I compared the provisions of the model WHS Act with the New Zealand *Health and Safety at Work Act 2015*. These are similar, but New Zealand has included additional provisions regarding participative work practices. I also looked at WorkSafe New Zealand's equivalent publication *Good practice guidelines: Worker engagement, participation and representation*.¹⁷⁸ I noted a strength of New Zealand's guidelines is its focus on practical examples, including ways PCBUs can engage in genuine consultation in traditional and non-traditional work settings.¹⁷⁹

I recommend that the model Code of Practice: *Work health and safety consultation, co-operation and co-ordination* be amended to include practical examples and case studies on how genuine consultation with workers can occur. This may include a number of examples in traditional and non-

¹⁷² For example, see Shop Distributive and Allied Employees' Association Submission, pp 28–29.

¹⁷³ ACTU Submission, pp 38–40.

¹⁷⁴ For example, Restaurant & Catering Australia Submission, pp 5–6; South Australian Wine Industry Association Submission, pp 6–7; Ai Group Submission, p 22.

¹⁷⁵ See the examples of different consultation mechanisms given in the Victorian Automobile Chamber of Commerce Submission, pp 13–14.

¹⁷⁶ Section 48 of the model WHS Act.

¹⁷⁷ Safe Work Australia, *Explanatory Memorandum—model Work Health and Safety Bill*, Safe Work Australia, Canberra, 2016, p 25.

¹⁷⁸ WorkSafe New Zealand, *Good practice guidelines: Worker engagement, participation and representation*, WorkSafe New Zealand, 2016.

¹⁷⁹ Examples of this include the WorkSafe New Zealand *Good practice guidelines: Worker engagement, participation and representation* (p 29) that not only sets out what must be done to remain compliant with the Health and Safety at Work Act but also provides a practical example of what it looks like to take the workers' views into account. Safe Work Australia's Code of Practice: *Work health and safety consultation, co-operation and co-ordination* and the New Zealand guidelines both note there is no legal obligation for a PCBU to keep records of engagement. The New Zealand guidelines (p 32) encourage documentation by providing specific examples of the benefits for a PCBU to do so.

traditional workplaces and demonstrate how to genuinely consult with, for example, fly-in fly-out workers, seasonal workers and workers with English as their second language. My objective in making this recommendation is to support compliance with the PCBU's obligation to undertake genuine consultation with workers.



Recommendation 6: Provide practical examples of how to consult with workers

Update the model Code of Practice: *Work health and safety consultation, co-operation and co-ordination* to include practical examples of how meaningful consultation with workers can occur in a range of traditional and non-traditional settings.

Health and safety representatives

Current arrangements

PCBUs can consult with workers through their elected HSRs. The provisions dealing with HSRs in the model WHS laws are extensive, covering processes for forming groups to be represented by HSRs,¹⁸⁰ election¹⁸¹ and training of HSRs,¹⁸² and their functions and powers once elected.¹⁸³ The model WHS laws also set out obligations for PCBUs to the HSRs¹⁸⁴ and mechanisms for disqualifying the HSR if they misuse the powers or information obtained as part of their role.¹⁸⁵

Stakeholder responses—2018 Review of the model WHS laws

Most of the comments about consultation during the review were in relation to the HSR framework. I received some examples of the HSR system working well to achieve good safety outcomes. The case study in this section shows that, by enabling workers to have access to trained HSRs and deputy HSRs who understand the work and its risks while at the same time providing the PCBU with ready access to a trained individual whom they know is representing their workers, a collaborative, proactive safety culture where WHS outcomes are enhanced can be established.

¹⁸⁰ Sections 50–59 of the model WHS Act.

¹⁸¹ Sections 60–64, 67 of the model WHS Act.

¹⁸² Sections 72–73 of the model WHS Act.

¹⁸³ Part 5, Division 3 of the model WHS Act.

¹⁸⁴ Section 70 of the model WHS Act.

¹⁸⁵ Section 65 of the model WHS Act.

Draft worker participation—case study¹⁸⁶

Dave joined the HSC at his mining manufacturing workplace with some reluctance. He had heard of issues of lack of management engagement and worker participation in the forum. He confirmed this during the first few meetings he attended.

Dave contacted the Australian Manufacturing Workers' Union to get advice on options for training HSC members and how to elect and train HSRs. Dave took his concerns to management and passed this information on to management.

Dave subsequently arranged for the Australian Manufacturing Workers' Union to conduct a presentation on the role of HSCs and HSRs. As a result, worker engagement on WHS increased and, at the workers' request, the union conducted the election of five HSRs. The elected HSRs selected an HSR training provider with extensive industry experience. Management agreed with their choice.

Since the introduction of HSRs, Dave has seen many improvements to how safety is approached in the workplace. All HSC members have received WHS training and meetings are now co-operative and effective. There is genuine two-way consultation between workers and management, with workers and HSRs involved in the implementation of safe work procedures and risk assessments. Safety upgrades have also been prioritised, including:

- regular safety walks
- safer working at height measures and procedures, including use of a fit-for-purpose access system
- safe work loading engineering controls on all jigs, rack and stands, and
- broader first aid coverage.

Additionally, Lost Time Injury and Medically Treatable Injury rates have decreased.

Research undertaken for SafeWork SA¹⁸⁷ shortly after the model WHS laws were implemented indicates that managers identify the following benefits of meaningful consultation with their workers:

- better outcomes when involving people with practical knowledge who 'do the job'
- more creative solutions as you hear different points of view
- increased ownership of WHS decisions by workers, and
- improvement in workers' commitment to implementing change.

However, I also received examples of where the HSR framework was not working well. These examples highlighted a range of factors that hindered good outcomes, such as a lack of clear direction from the regulator when assistance was requested (by the PCBU or the HSRs) and lack of knowledge on the part of the PCBU about their obligations to HSRs.

¹⁸⁶ Based on Australian Manufacturing Workers' Union Submission 3, pp 3–4. A pseudonym has been used.

¹⁸⁷ J Clarke, *Consultation doesn't happen by accident: A report to SafeWork SA on successful consultation about work, health and safety*, Centre for Work + Life, University of South Australia, 2012, p 6.

Research supports the importance of a commitment to worker consultation, noting that ‘effective WHS consultation does not happen by accident. It takes planning, resourcing and requires a high level of skills of both managers and WHS representatives’.¹⁸⁸

Work groups and HSR elections

Current arrangements

If a worker requests an HSR, the PCBU must commence negotiations for a work group or work groups so that HSRs can be elected to represent each work group. The model WHS Act and Regulations set out a process for this to occur.

All workers in the work group, including volunteers, are eligible to nominate for election as an HSR or deputy HSR unless they have previously been disqualified from an HSR role.¹⁸⁹ All workers in a work group are eligible to vote for an HSR for that work group.¹⁹⁰ Members of the work group can decide how the election will be conducted, including whether a union or another organisation will assist if the majority of workers agree.¹⁹¹ The HSR is elected for a term of three years.¹⁹²

Stakeholder responses—2018 Review of the model WHS laws

A number of submissions suggested placing the detailed consultation provisions, including those for HSRs, work groups and committees, in a schedule or in the model WHS Regulations to better reflect the flexibility to agree with workers on other consultation methods.¹⁹³

The Chamber of Minerals and Energy raised concerns about the provisions of the model WHS Act in respect of the election and activities of HSRs, considering that they create an adversarial rather than collaborative environment between workers, HSRs and the PCBU. It suggested a range of amendments to the HSR provisions, including a more restrictive process for triggering an election and the number of successive appointments available to an HSR.¹⁹⁴

Some expressed particular difficulties for small and non-traditional businesses with consultation and representative provisions. This was due to a predominantly casual workforce, higher staff turnover or lack of resources to create local consultation arrangements.¹⁹⁵ For example, SafeWork SA noted that the functions and powers of HSRs are not as effective for smaller businesses and subcontractors:

‘SafeWork SA is aware that for workers in small to medium size businesses, and particularly businesses with only small numbers of workers, there can be little or no opportunity to be involved in WHS consultation, representation and participation.’¹⁹⁶

¹⁸⁸ J Clarke, *Consultation doesn't happen by accident: A report to SafeWork SA on successful consultation about work, health and safety*, Centre for Work + Life, University of South Australia, 2012, p 9.

¹⁸⁹ Section 60 of the model WHS Act.

¹⁹⁰ Section 62 of the model WHS Act.

¹⁹¹ Section 61 of the model WHS Act.

¹⁹² Section 64(1) of the model WHS Act.

¹⁹³ For example, see National Road Transport Association Submission, pp 3–4.

¹⁹⁴ Chamber of Minerals and Energy Submission, p 21.

¹⁹⁵ For example, see Unions NSW Submission, pp 2, 8–9; NSW Work Health and Safety Regulators Submission, p 14.

¹⁹⁶ SafeWork SA Submission 1, p 16.

Some workers suggested that their workplace did not provide genuine opportunities to take up an HSR role, saying they were not told about these options contained in the model WHS laws.¹⁹⁷ Another submitted that when he asked about HSR roles ‘excuses such as costs, “its [sic] a union job” and we don’t need that sort of thing around here are the response’.¹⁹⁸ Unions also stated a need for roving HSRs to deal with non-traditional working arrangements.¹⁹⁹

Discussion and recommendations

I note the concerns raised by many stakeholders regarding the prescription in the model WHS laws for establishing work groups and conducting elections and, in particular, the perceived impracticality of these provisions for small business. For small business the provisions that are intended to provide a clear process for facilitating worker representation on WHS issues may be having the unintended consequence of creating a barrier or disincentive to promoting and supporting the election of HSRs in their workplaces. This is reflected in research undertaken for Safe Work Australia that demonstrates smaller businesses and undertakings do not generally have an HSR.²⁰⁰

I therefore recommend a different approach to the formation of work groups where the operations of a business or undertaking ordinarily involves 15 workers or fewer and an HSR is requested. I am suggesting that, in this case, the model WHS laws would not require negotiation of a number of work groups. Instead, there would be a default requirement for the PCBU to form one work group with one HSR and one deputy HSR (unless otherwise agreed between the PCBU and the workers). The election process for the positions would be in accordance with the rules currently in the model WHS laws.



Recommendation 7a: New arrangements for HSRs and work groups in small businesses

Amend the model WHS Act to provide that, where the operations of a business or undertaking ordinarily involves 15 workers or fewer and an HSR is requested as per the requirements of the model WHS laws, the PCBU will only be required to form one work group for all workers represented by one HSR and a deputy HSR unless otherwise agreed between the workers and the PCBU.

For larger businesses and undertakings I consider it is appropriate for negotiation of work groups and numbers of representatives to occur in accordance with the model WHS laws as currently drafted.

Some stakeholders also called for the model WHS laws to provide for roving HSRs to represent workplaces or worksites where an HSR has not been appointed. This suggestion was also put to the 2008 National Review. That review considered that the provisions for multiple PCBUs to form work groups represented a more appropriate mechanism.²⁰¹ I consider that Recommendation 3 provides

¹⁹⁷ Online Discussion Forum 2.

¹⁹⁸ James Nolan Submission, p 1.

¹⁹⁹ ACTU Submission, pp 43–44.

²⁰⁰ Safe Work Australia, ‘Qualitative research for the 2018 Review of the model WHS laws’, report prepared by Instinct and Reason, unpublished, 2018.

²⁰¹ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009, p 120.

the opportunity for Safe Work Australia to continue to assess whether the current model remains the most appropriate as working arrangements change into the future.

The issue raised by Justice Kite in *NSW Rural Fire Service v SafeWork NSW*²⁰² should be addressed. In that case, Justice Kite identified that it may be difficult for a PCBU to identify who they must negotiate with if the workers who must be party to the negotiations are those who will form the group, the identification of which is the subject of the negotiations. Although in practice this issue could be dealt with by a PCBU ensuring that, at the end of the process, all relevant workers have been included in negotiations, the model WHS Act could be amended to provide clarification to PCBUs. To address this, the provisions in s 52(1)(b) of the model WHS Act should be aligned with the discussion in the Explanatory Memorandum²⁰³ so that negotiations for a work group are held with workers who are *proposed* to form the work group.



Recommendation 7b: Work group is negotiated with proposed workers

Amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group.

HSR powers and functions—assistant to an HSR

Current arrangements

The HSR has specific functions for their work group, including representing the workers in the work group in WHS matters and investigating WHS complaints from members of the work group.²⁰⁴ Whenever necessary, the HSR may request the assistance of any person in the performance of these functions.²⁰⁵ If an assistant requires access to the workplace to assist, the HSR must provide notice of the proposed entry to the PCBU and the person with management and control of the workplace at least 24 hours before the assistant's entry.²⁰⁶

If the assistant is or has been a WHS entry permit holder, the model WHS Regulations require the notice of the assistant's proposed entry to include a declaration by the assistant that the WHS entry permit is not suspended or revoked and the assistant is not disqualified from holding a WHS entry permit.²⁰⁷ Guidance from Safe Work Australia makes clear the assistant's only role is in advising the HSR; the assistant has not accessed the workplace as a WHS entry permit holder and so may not exercise any of the rights associated with that type of entry.²⁰⁸

²⁰² *NSW Rural Fire Service v SafeWork NSW* [2016] NSWIRComm 4.

²⁰³ Safe Work Australia, *Explanatory Memorandum—model Work Health and Safety Bill*, Safe Work Australia, Canberra, 2016, para 219.

²⁰⁴ Section 68(1) of the model WHS Act.

²⁰⁵ Section 68(2)(g) of the model WHS Act.

²⁰⁶ Sections 68(3A) and (3B) of the model WHS Act. Note: this was an amendment made to the model WHS Act in 2016. It has not yet been implemented in any jurisdiction.

²⁰⁷ Regulation 20A(2) of the model WHS Regulations.

²⁰⁸ Safe Work Australia, *Worker representation and participation guide*, Safe Work Australia, Canberra, 2016, p 13. Currently not available on the Safe Work Australia website pending updates.

The PCBU has obligations to allow HSRs to perform their role. These obligations include allowing adequate time, resources and facilities for them to fulfil their role; including the HSR in WHS consultations or interviews (with the workers' consent); allowing the HSR to access information about hazards and risks at the workplace; and permitting the HSR to accompany a WHS inspector during an inspection of the workplace.²⁰⁹

Stakeholder responses—2018 Review of the model WHS laws

A number of submissions raised concerns about the ability of HSRs to seek the assistance of any person, and several others advocated adoption by jurisdictions of the requirement for 24 hours' notice prior to entry as is in the model WHS laws.²¹⁰

The Australian Chamber noted that it can be difficult to determine those that are genuinely entering to assist an HSR.²¹¹ The Ai Group suggests the provision can be used to circumvent the usual right of entry provisions and can result in HSRs being pressured by union organisers to arrange for their entry.²¹²

The Minerals Council of Australia suggested that only union officials with a valid entry permit under WHS and workplace relations laws should be allowed to enter a workplace to assist an HSR.²¹³ The Chamber of Minerals and Energy suggested that only those ordinarily entitled to enter the workplace be allowed access to assist an HSR and that the person must have relevant knowledge or expertise.²¹⁴ The Ai Group suggested a number of other requirements, including that the HSR identifying the need for assistance include the particular skill or expertise required and whom the HSR intends to approach for assistance.²¹⁵

Most union submissions included support for the current provisions to be maintained or expanded. The Australian Manufacturing Workers' Union suggested that the prohibition on disqualified WHS entry permit holders attending a workplace to assist an HSR be removed because it 'confuses the right of assistance to a Health and Safety Representative with the right of workers to request an investigation or consult with their union about WHS matters'.²¹⁶

Discussion and recommendations

The Terms of Reference for the 2014 COAG Review asked for the HSR right to request assistance from 'any person' to be examined.²¹⁷ In early 2014, prior to commencement of the 2014 COAG Review, WHS ministers agreed to amend the model WHS laws to require HSRs to give at least 24 hours' but not more than 14 days' notice of entry for an assistant and to allow a PCBU to refuse

²⁰⁹ Section 70 of the model WHS Act.

²¹⁰ For example, see Ai Group Submission, p 25; and Australian Chamber Submission, p 34.

²¹¹ Australian Chamber Submission, p 34

²¹² Ai Group Submission p 25.

²¹³ Minerals Council of Australia Submission, pp 15–16.

²¹⁴ Chamber of Minerals and Energy Submission, pp 22–23.

²¹⁵ Ai Group Submission, pp 23–25.

²¹⁶ Australian Manufacturing Workers' Union Submission 2, p 29.

²¹⁷ Safe Work Australia, *Decision Regulation Impact Statement: Improving the model Work Health and Safety laws*, Department of Prime Minister and Cabinet, Canberra, 2014, p 13.

entry to a person assisting an HSR if the notice of entry requirements are not met. This followed amendments introduced by the Queensland Government in its WHS laws. These have subsequently been repealed in Queensland and have not been adopted in any other jurisdiction.

Access to a workplace by an assistant who is also a union official was considered in *Australian Building and Construction Commissioner v Powell*²¹⁸ (*Powell*). Although this case dealt with the *Occupational Health and Safety Act 2004* (Vic) (Vic OHS Act), it is likely the decision is relevant to the operation of the model WHS Act given the provisions for access to a workplace by an HSR assistant are similar. The potential effect of *Powell* on the operation of the model WHS Act is that a union official accessing a workplace as an assistant to a HSR under ss 68(2)(g) and 70(1)(g) of the model WHS Act will require an entry permit under Division 3 of Part 3-4 in Chapter 3 of the *Fair Work Act 2009* (Cth) (an FW Act entry permit).

It is, of course, open for Parliament to amend legislation if a court interprets the law contrary to the way Parliament intended. The Explanatory Memorandum to the model WHS Act does not make clear whether the original policy intention was that a union official entering a workplace as an assistant to an HSR must hold a WHS entry permit (and therefore have an FW Act entry permit).²¹⁹ The 2008 National Review also does not clarify the issue—Recommendation 106 on the functions and rights of HSRs does not explicitly list the right to request assistance from other persons or experts despite this being suggested in stakeholder comments.

The Federal Court has recently been asked to consider workplace entry issues similar to those raised in *Powell* regarding the capacity of a union official to enter a workplace (in this instance, as a representative of a party to a dispute under s 81(3) of the WHS Act) without holding or showing a FW Act entry permit.²²⁰ One of the issues the court is likely to consider is whether a person who is a union official could enter a workplace in a capacity that is not as a ‘union official’.

In my view, the rights of an HSR to bring in a person with appropriate experience and knowledge to assist them should not be restricted if that person is also a union official. In practice, persons assisting an HSR will not necessarily be union officials. For example, an HSR might ask for the PCBU’s health and safety manager, a hearing specialist or an occupational health nurse to be present to give advice on technical health or safety matters. However, in some cases, an HSR may ask for someone with appropriate experience and knowledge from their relevant union to assist them. It is significant that, while the effect of *Powell* is that a union official must have an FW Act entry permit to access a workplace as an assistant to a HSR, they are unlikely to require a WHS entry permit to enter a workplace in that capacity. This is because access to a workplace by an assistant under ss 68(2)(g) and 70(1)(g) of the model WHS Act is not strictly a WHS right of entry under the right of entry system provided for in Part 7 of the model WHS Act.

²¹⁸ *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89.

²¹⁹ Safe Work Australia, *Explanatory Memorandum—model Work Health and Safety Bill*, Safe Work Australia, Canberra, 2016, para 293 (s 71(4) applies in relation to certain HSR assistants who are or who have been WHS entry permit holders).

²²⁰ *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bruce Highway Caloundra to Sunshine Upgrade Case)* [2018] FCA 553; and *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union & Ors* [2018] QUD 785.

Stakeholders raised concerns about potential misuse of these provisions. I note in this context that the model WHS Act includes provisions to ensure the right to request assistance is used appropriately. Under s 65 of the model WHS Act an HSR can be disqualified from holding that position if they exercise their powers for an improper purpose (and this would include their powers related to requesting assistance from any person). There are also exceptions to the obligation of a PCBU to allow access to the workplace by an assistant to an HSR. For example, a PCBU may refuse access to the workplace on 'reasonable grounds' (s 71(5) of the model WHS Act).

I am recommending that Safe Work Australia and relevant policy agencies investigate how to best provide for a union official to access a workplace to provide assistance to an HSR without the need to hold an entry permit under the FW Act or another industrial law.

I recognise this issue involves the operation of the Fair Work Act and interaction of state, territory and Commonwealth laws. This will need to be taken into account in considering any amendments to the model WHS Act and jurisdictional laws, including potential constitutional issues relating to interaction of Commonwealth and state law.



Recommendation 8: Workplace entry of union officials when providing assistance to an HSR

Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the Fair Work Act or another industrial law, taking into account the interaction between Commonwealth, state and territory laws.

HSR training and additional powers

Current arrangements

If requested, the PCBU must allow the HSR to attend up to five days of initial HSR training and up to one day of annual refresher training. The selected training provider must be approved by the regulator and chosen by the HSR in consultation with the PCBU.²²¹

Once an HSR has completed approved training, they will have powers to:

- direct a worker to cease unsafe work if the HSR has a reasonable concern the work would expose workers to a serious risk emanating from immediate or imminent exposure to a hazard, and
- issue provisional improvement notices (PINs) where the HSR reasonably believes the WHS Act is being contravened.²²²

The model WHS Act allows an HSR to issue a PIN after reasonable consultation with the person and may require the person to remedy the contravention or prevent a likely breach of WHS laws.²²³ The

²²¹ Regulation 21(1) of the model WHS Regulations. The obligation to train HSRs is outlined in s 72 of the model WHS Act.

²²² Sections 85 and 90 of the model WHS Act.

²²³ Section 90 of the model WHS Act.

PIN must be issued in writing and can include recommendations on how to address the relevant contravention.²²⁴

It is an offence under the model WHS Act for the person to contravene a PIN. However, the person issued with the PIN can request, within seven days of its issue, that the regulator appoint an inspector to review the PIN.²²⁵

Stakeholder responses—2018 Review of the model WHS laws

Stakeholder views were divided on HSR training. Some called for training to be mandatory in line with recent changes to the WHS laws in Queensland. This was on the basis that trained HSRs have a clearer understanding of their role and are better able to identify risk and make better decisions. Some feedback also advised that many HSRs are not aware that they have the right to request training.²²⁶

Some called for HSR training to be competency-based or contribute towards a formal certification. Others highlighted the additional cost PCBUs would incur from competency training.²²⁷

In consultation meetings, business groups said that the five days allowed for initial HSR training is too much and that training of one day every two to three years should be sufficient.

Some submissions instead supported the HSR training provisions applied in South Australia, where a sliding scale of training days is used.²²⁸

Comcare and a number of submissions pointed to the recent decision in *Sydney Trains v SafeWork NSW*²²⁹ (*Sydney Trains*), which highlighted inconsistency between provisions in the model WHS Act and the *Worker representation and participation guide*²³⁰ relating to the choice of HSR training provider.²³¹ HSRs and unions have called for the model WHS laws to be amended to allow the HSR to choose their course or provider as long as they provide sufficient notice to the PCBU.²³² Notice of at least 14 days was suggested as sufficient.²³³ Unions NSW and others also called for mutual recognition of training across jurisdictions.²³⁴

The topics covered in HSR training also provoked comment. Some submissions called for an expanded range of topics in HSR training to enhance effectiveness and increase understanding of the

²²⁴ Sections 91 and 93 of the model WHS Act.

²²⁵ Sections 99–100 of the model WHS Act.

²²⁶ For example, see Michael Shellshear Submission; Phil Hammond 1 Submission, p 41; Qld Council of Unions Submission, p 24; ACTU Submission, p 44.

²²⁷ For example, in Discussion Forums 2 and 6; Phil Hammond 1 Submission, p 1; Ai Group Submission, p 28.

²²⁸ For example, see Australian Manufacturing Workers' Union Submission 2, p 29; and CFMEU (Construction and General Division) Submission, p 12.

²²⁹ *Sydney Trains v SafeWork NSW* [2017] NSWIRComm 1009.

²³⁰ Safe Work Australia, *Worker representation and participation guide*, Safe Work Australia, Canberra, 2016. Currently not available on the Safe Work Australia website pending updates.

²³¹ Comcare Submission, pp 7–8.

²³² For example, see the ACTU Submission, pp 42–43; The Australian Workers' Union Submission 2, p 2; Unions NSW Submission, p 9.

²³³ Australian Manufacturing Workers' Union Submission 2, p 29.

²³⁴ Unions NSW Submission 2, p 41.

object of the WHS laws and their role in supporting the achievement of these. Additional suggested topics included investigation, negotiation, identifying mental health issues, protecting personal reputation in cases of conflict, and 'how to more strategically identify the person with the responsibility to do something about a problem and provide them with the advice or request in such a way that it is dealt with effectively the first time'.²³⁵

Views were also divided on the powers of HSRs to direct unsafe work cease and to issue PINs after completing training. These views are similar to those expressed previously in the 2008 National Review and the 2014 COAG Review. Some thought these powers were potentially unnecessary, as workers' right to cease unsafe work is enshrined in the model WHS laws and at common law; and issuing notices is the role of inspectors who have specialised training.²³⁶

In face-to-face consultations, businesses pointed out the process to review a PIN is time-consuming and intensive for both the PCBU and the regulator. It was suggested that PINs should not be issued without consulting the PCBU first and that the details of those consultations should be reflected in the PIN.²³⁷ In my consultation meetings, PCBUs and HSRs also expressed frustration when inspectors attend and cancel a PIN on technical grounds but do not then address the underlying safety issue that led to the PIN being issued.

A small number of submissions also suggested introducing a penalty for vexatiously using the power to direct that unsafe work cease.²³⁸ Another suggestion was the suspension of the power where an inspector attends and considers the direction to be improper.²³⁹

The Queensland Council of Unions stated, '[t]he capacity of HSRs being able to stop a dangerous process is fundamentally important to protecting workers, and assists an employer in the primary obligations under the Act', '[c]ommon law rights are vague and there is benefits to codifying such rights in specific legislation' and that the law includes appropriate remedies if HSRs abuse these powers.²⁴⁰

WorkSafe Victoria's submission noted that it does not require training before HSRs can exercise their powers on the basis that:

'Victoria recognises that the provision of training to HSRs is key to supporting and enabling them in the performance of their functions. However it has been WorkSafe's experience that HSR's [sic] who have not undergone training, may still be able to identify serious health and safety risks that may warrant the issue of PINs or directions. Disqualifying HSRs from issuing PINs or directions in these circumstances may mean that identified risks to health and safety are not addressed or that actions to address these risks may be delayed.'²⁴¹

²³⁵ David J Dempsey Submission, pp 10–11.

²³⁶ For example, see NSW Mineral Council Submission, pp 19–20; Australian Federation of Employers & Industries Submission, p 30; HIA Submission, p 13.

²³⁷ Ai Group Submission, p 26.

²³⁸ Chamber of Minerals and Energy Submission, p 21; Ai Group Submission, p 27.

²³⁹ Ai Group Submission, p 27.

²⁴⁰ Qld Council of Unions Submission, pp 24–25.

²⁴¹ WorkSafe Victoria Submission, p 2.

Discussion and recommendations

I found that the HSR framework is generally robust and, when applied by all parties at workplaces and enforced where it is not being applied as required by the laws, it is operating as intended. However, there are two areas which could be further clarified by minor amendments to the model WHS Act.

First, I have considered the feedback that inspectors often cancel PINs issued by HSRs on technical grounds²⁴² without dealing with the safety issue that led to the PIN being issued, therefore leaving that issue to fester. This was raised as a frustration by both PCBUs and HSRs. In response I am recommending that, following the cancellation of a PIN for technical reasons, the inspector will be required to assist in the resolution of the safety issue which led to the PIN being issued.



Recommendation 9: Inspectors to deal with safety issue when cancelling a PIN

Amend the model WHS Act to provide that, if an inspector cancels a PIN for technical reasons under s 102 of the model WHS Act, the safety issue which led to the issuing of the PIN must be dealt with by the inspector under s 82 of the model WHS Act.

Secondly, I have also considered the issue of the choice of HSR training provider. A number of union submissions called for the model WHS laws to be amended to allow HSRs to choose their preferred training provider, as long as the course is approved by the regulator and reasonable notice is provided.²⁴³

Within this context, I have considered the outcomes of the recent *Sydney Trains* case. A key issue in this case was the scope of the 'consultation' requirements in s 72(1)(c) of the NSW WHS Act. In particular, the Commissioner considered a submission that an HSR has the absolute right to nominate a course and that a PCBU could do no more than agree to that specific course or disagree with it. The Commissioner rejected this argument and concluded that no party (HSR or PCBU) has a unilateral right to enforce their preferred training course or to bar the other party's preference.²⁴⁴ I can see where the operation of these provisions could lead to a stalemate at the workplace, although I note that, where agreement cannot be reached, either party may ask the regulator to appoint an inspector to decide the matter.

I am sympathetic to concerns that disagreements on the choice of HSR training can cause unnecessary delays which subsequently defer an HSR's ability to fulfil their role and exercise their powers under the model WHS Act. I also consider that the choice of provider remains a necessary feature in encouraging the independence of HSRs.

It is important to note that an HSR can only choose a course of training that is approved by the regulator (s 72(1)(a) of the model WHS Act). In approving a course of training in WHS for the purposes of s 72(1)(a), the regulator may have regard to any relevant matters, including relevance of

²⁴² Examples include the wrong subsection of the WHS Act being included on the PIN or a paraphrasing of the WHS Act which is technically incorrect.

²⁴³ See ACTU Submission, pp 42–43; CFMEU (Construction and General Division) Submission, pp 11–12; Australian Manufacturing Workers' Union Submission 2, pp 5 and 28–29.

²⁴⁴ *Sydney Trains v SafeWork NSW* [2017] NSWIRComm 1009, para 47.

the training to the powers and functions of the HSR and the qualifications, knowledge and experience of the person who is to provide the course (reg 21(2) of the model WHS Regulations).

In my view, an HSR should be able to choose their preferred training course if that course has been approved by the regulator and is one that the HSR is entitled to attend. I recommend the model WHS Act be amended to remove the requirement for the HSR to consult the PCBU about their choice of training course. This also means the provision for either party to ask for appointment of inspector to decide an issue about the HSR's choice of training is no longer needed.

However, issues about timing and cost are critical and directly impact on the PCBU, given the PCBU's obligations in s 72(2) of the model WHS Act to cover course fees, pay reasonable costs and provide an HSR with time off work to attend the course. Given this impact, I think it is appropriate that a PCBU and an HSR reach agreement on these issue of cost and timing of a training course. Either party should still be able to ask for appointment of an inspector when agreement cannot be reached on matters of cost and timing set out in s 72(2) of the model WHS Act.



Recommendation 10: HSR choice of training provider

Amend the model WHS Act to make it clear that for the purposes of s 72:

- the HSR is entitled to choose the course of training, and
- if the PCBU and HSR cannot reach agreement on time off for attendance or the reasonable costs of the training course that has been chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter.

Health and safety committees

The role of HSCs is to promote consultation and co-operation between PCBUs and workers.

Current arrangements

A PCBU may voluntarily decide to establish an HSC, but, under the model WHS laws, it must do so within two months after it has been requested by an HSR or five or more workers.²⁴⁵ Section 76 of the model WHS Act sets out the constitution of HSCs. It states membership must comprise:

- at least 50 per cent workers who have not been nominated by the PCBU, and
- one or more HSRs, unless they decline membership.

As with the formation of work groups, if workers and the PCBU cannot agree on the constitution of an HSC within a reasonable time, either party can request the regulator appoint an inspector to assist.

The model WHS laws also set out the functions of the HSC and require HSCs to meet no less than once every three months or within a reasonable time at the request of at least half of the members. They also require the PCBU to allow the HSC access to information about hazards and risks at the workplace.²⁴⁶

²⁴⁵ Section 75 of the model WHS Act.

²⁴⁶ Sections 77–79 Model WHS Act.

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In some consultations, participants reported that the requirements for HSCs, including the obligation to hold quarterly meetings, to be arbitrary and onerous if other effective consultation measures are in place.

One WHS professional reported being issued with PINs for failing to hold an HSC meeting within three months but noted:

‘Outside of WHS committees other consultation arrangements are entirely non-prescriptive. If blended, robust and effective WHS consultation arrangements can clearly be demonstrated—why does the law obsess when a WHS committee comes into frame?’²⁴⁷

A number of those consulted discussed measures to improve the operation of HSCs, including providing examples of documents associated with the HSC in guidance material—for example, charter, agenda and minute templates.²⁴⁸

The ACTU submission, with the support of other unions, suggested the model WHS laws should require:

- that the HSC constitution is negotiated and agreed with workers, or their representatives where requested, and covers functions of the committee, timing of meetings, nomination of the chair and processes for minutes
- that non-HSR members of the HSC are elected by workers and that all HSC members undertake WHS training, and
- that PCBUs facilitate HSC members’ attendance at meetings and discourage cancellation of planned meetings.²⁴⁹

Unions NSW suggested that the model WHS laws should require that a worker is appointed to the chair of the HSC to address the imbalance of power inherent in the worker/PCBU relationship.²⁵⁰ The NSW Nurses and Midwives Association suggested specified terms for members and that the chairperson is provided with training on conducting effective meetings.²⁵¹

Comcare suggested that there is ambiguity in s 75 of the model WHS Act regarding requests for additional committees. For example, the laws do not make clear whether an HSC is required for a part of the business even if there is an overarching HSC in place or if the laws, and their subsequent provisions for membership and meeting frequency, only apply when there is no HSC that covers a part of the business or undertaking.²⁵²

²⁴⁷ Graham Burton Submission p1.

²⁴⁸ Phil Hammond Submission 1, p 41.

²⁴⁹ ACTU Submission, p 44.

²⁵⁰ Unions NSW Submission 2, p 12.

²⁵¹ NSW Nurses & Midwives Association Submission, p 18.

²⁵² Comcare Submission, p 8.

Discussion and recommendations

Most of the issues raised related to the administration of HSCs. I therefore recommend that sample constitutions, agendas, minute templates and other supportive documents are included in the appropriate model Codes and guidance material. This will assist PCBUs and workers to get the most out of the HSCs and meet their legislative obligations.



Recommendation 11: Provide examples of HSC constitutions, agendas and minutes

Update the model Codes and guidance with examples of HSC constitutions, agendas and minutes.

3.2. Issue resolution

Current arrangements

Part 5 of the model WHS Act includes provisions for resolving WHS issues at the workplace. Workplaces may develop their own WHS issue resolution procedure.²⁵³ Where a workplace has not developed its own WHS issue resolution procedure, a default process is provided in the model WHS Regulations.²⁵⁴

Parties in relation to an issue are:²⁵⁵

- the PCBU(s) or their representative/s (noting this cannot be the HSR and that the representative must have sufficient seniority and competence to act as the PCBU's representative)
- the HSRs for any of the affected worker(s) or their representative(s), and
- if there is no HSR, the affected worker(s) or their representative(s).

The workers' representative can enter the workplace to attend discussions to resolve the issue.²⁵⁶

The model WHS Act provides that a party in relation to the issue may ask for an inspector's assistance to help resolve it. However, prior to requesting the attendance of an inspector, the parties need to make reasonable efforts to resolve the issue themselves. Section 82(4) allows the inspector to exercise any of their compliance powers in assisting to resolve WHS issues.

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Stakeholder comments on provisions for resolving WHS issues under the model WHS laws focused on the default process, involvement of worker representatives in that process and the inspector's role in assisting to resolve the dispute.

²⁵³ Section 81(2) of the model WHS Act; and reg 22 of the model WHS Regulations.

²⁵⁴ Section 81(2) of the model WHS Act; and reg 23 of the model WHS Regulations.

²⁵⁵ Section 80 of the model WHS Act.

²⁵⁶ Section 81(3) of the model WHS Act.

Default issue resolution

The Ai Group submission suggested that the construction of the agreed resolution procedure 'is not helpful to the PCBU, as the Model WHS Act does not indicate that there is any need to consider the Regulations unless you do not have an agreed procedure'.²⁵⁷ It is also concerned that the default issue resolution procedures in the model WHS Regulations are also operating as minimum requirements for workplace agreed procedures, but the model WHS Act does not mention this. The Ai Group suggested that the intended flexibility would be better achieved by removing the minimum requirements from the WHS Regulations and providing guidance on agreed procedures.

Representation in dispute resolution

The CFMEU submission noted what it considered to be deficiencies in the issue resolution provisions, including the following:

- a. the procedure fails to appropriately recognise the role of unions in the resolution of safety disputes
- b. s 81(3) should provide a straightforward mechanism for unions to assist workers and HSRs, but is being undermined by difficult PCBUs
- c. where a matter does not resolve, there are no straightforward mechanisms to break deadlocks or progress the dispute other than through the referral of an unresolved dispute to an inspector, and
- d. internal and external review mechanisms exclude unions from participating in dispute resolution as initiating parties and are otherwise unnecessarily cumbersome procedurally.²⁵⁸

Along with the ACTU and other union submissions,²⁵⁹ the CFMEU called for the model WHS laws to make it clear to PCBUs that the relevant unions are parties to a dispute, so they can represent workers to facilitate issue resolution. They also sought clarification that any person acting in this role as representative does not need to be an entry permit holder.

Inspector powers to resolve disputes

Both PCBU and worker representatives expressed concerns about their experiences when inspectors are requested to assist in resolving safety issues either under the dispute resolution provisions or otherwise. Inspectors have no final power of arbitration to resolve or settle matters, so disputes are often left to fester.

²⁵⁷ Ai Group Submission, p 29.

²⁵⁸ CFMEU (Construction and General Division) Submission, p 13.

²⁵⁹ CFMEU (Construction and General Division) Submission, pp 14–15; ACTU Submission, p 45; Unions NSW Submission 1, p 9.

The Queensland Government submission raised concerns about inspectors' role in dealing with right of entry following *Ramsay & Anor v Menso & Anor*.²⁶⁰ The Queensland Government stated:

'[The government understands that the] effect of this decision is that the role of inspectors is limited to facilitating discussions between parties, and inspectors are prevented from expressing a conclusion on the validity of a right of entry. As such, under the model WHS legislation, there is little an inspector can do to assist workplace parties to resolve a right of entry dispute.'²⁶¹

To address this, the Queensland Government amended²⁶² the *Work Health and Safety Act 2011* (Qld) (Qld WHS Act)²⁶³ from 13 November 2017 to empower inspectors to make a decision about whether a WHS entry permit holder has a right to enter a workplace and whether notice requirements have been complied with; and to direct duty holders to permit entry. If an issue is still unresolved 24 hours after an inspector is requested, the matter can be referred to the Queensland Industrial Relations Commission (QIRC), which can deal with the matter as it sees fit, including by means of mediation, conciliation or arbitration. The Queensland Government's submission recommended that similar amendments be made to the model WHS Act.

Discussion and recommendations

Default issue resolution

Work undertaken by Safe Work Australia following the 2014 COAG Review considered whether the default issue resolution process in the WHS Regulations should be removed.²⁶⁴ The majority of Safe Work Australia Members supported retaining the current provisions.

The 2008 National Review supported default issue resolution procedures as they provided a necessary safety net and, indeed, had numerous benefits for businesses, including providing a ready mechanism for small businesses to adopt as well as clarity and consistency for PCBUs and workers.

I am not persuaded to recommend the removal of the default procedure from the model WHS Regulations, as it was clear during this Review that this is an area that has not completely settled and the prescription provides a good basis for everyone to be clear about how to meet their obligations.

However, to assist in providing further clarity about the issue resolution procedures, I recommend that some practical examples of the process, including a clear identification of the various representatives entitled to be parties in relation to the issues, be included in the model *Worker representation and participation guide*.²⁶⁵

²⁶⁰ *Ramsay & Anor v Menso & Anor* [2017] FCCA 1416.

²⁶¹ Queensland Government Submission, p 7.

²⁶² *Work Health and Safety and Other Legislation Amendment Act 2017* (Qld).

²⁶³ *Work Health and Safety Act 2011* (Qld).

²⁶⁴ Safe Work Australia, 'Decision Regulation Impact Statement: Reducing regulatory burden in the model Work Health and Safety Regulations', unpublished, 2016, pp 30–35.

²⁶⁵ Safe Work Australia, *Worker representation and participation guide*, Safe Work Australia, Canberra, 2016.

Representation in dispute resolution

It would appear from submissions to the Review that many PCBU and workers are not aware of the relevant definition of 'representative' of a worker as it relates to the issue resolution provisions (s 82 of the model WHS Act). Because of this, workers may not be currently accessing the range of representatives that they are entitled to under the model WHS laws. As outlined in the current arrangements, parties to a dispute can include a PCBU, a worker, an HSR, or representatives of these persons. A worker's representative includes an HSR, a union representing the worker or 'any other person the worker authorises to represent them'. This last category is particularly broad. Further information, including ways of selecting a representative and informing the other parties of the representative's involvement, should be included in the *Worker representation and participation guide*.

While the model WHS laws identify the relevant parties to an issue and make it clear that the parties must be informed that there is an issue to be resolved, it does not prescribe who else those parties may inform about a dispute. It is evident from the provisions that there are a range of individuals and organisations, in addition to an HSR, that parties to an issue may inform. It seems reasonable that an issue may, in some circumstance, be reported directly to a union. If the union is a representative of the worker(s) involved in the dispute, it will be party to the issue under s 80(1) of the WHS Act. Even if it is not a party in this sense, the model WHS laws allow a worker to seek assistance or representation from a nominated person (such as a union representative) in resolving the dispute.

There is also nothing to prevent a worker from reporting a concern about health and safety to the regulator, or seeking their advice or guidance, outside the issue resolution process described in the model WHS laws.



Recommendation 12: Update guidance on issue resolution process and participants

Update the *Worker representation and participation guide* to include:

- practical examples of how the issue resolution process works, and
- a list of the various representatives entitled to be parties in relation to the issues under s 80 of the model WHS Act as well as ways of selecting a representative and informing the other parties of their involvement.

Inspector powers to resolve disputes

I found that an overwhelming response to the issue resolution provisions was that the role of the inspector was ineffective due to a lack of power to definitively decide the issue. I note in this context that inspectors can use their compliance powers when assisting in resolving disputes; however, for the most part, it appears that parties to disputes have been left feeling frustrated at a lack of enforcement action.

As discussed above, this issue was considered as part of the Best Practice Review of Workplace Health and Safety Queensland (the 2017 Queensland Review). It led to an amendment allowing

disputes to be lodged with the QIRC 24 hours after an inspector has been requested to assist with resolving a dispute and where the dispute remains unresolved.²⁶⁶

The 2017 Queensland Review recommended this approach on the basis that it 'recognises the important role the inspector plays and the intention of the WHS Act 2011 for disputes be resolved as quickly and as effectively as possible between the parties and preferably at the workplace'. This was in addition to allowing unresolved disputes to be 'progressed immediately to the QIRC without need for an internal review process'.²⁶⁷

I consider that similar measures should be adopted in the model WHS laws to ensure disputes are resolved quickly and effectively. Accordingly, I am recommending that the model WHS laws provide that, where there are provisions in the model WHS Act that enable an inspector to assist in resolving an issue, the issue may be progressed to the relevant jurisdictional court or tribunal if the matter is still unresolved within a short period after an inspector has been requested to assist. The relevant provisions and recommended time periods before progression are:²⁶⁸

- 48 hours after an inspector is requested if there is an unresolved WHS issue following attempts to apply the issue resolution procedures, and
- 48 hours after an inspector is requested if there is an issue in relation to cessation of work, with or without attempts to apply the issue resolution procedures.

The court or tribunal should be able to deal with the matter using any of its available powers, including conciliation, arbitration and dismissal of a matter to protect against vexatious referrals. Appeals on these decisions should progress in the usual way for the authority hearing the matter in the jurisdiction.

I note that an inspector may be requested to deal with a right of entry dispute under s 141 of the model WHS Act. However, I also note that relevant parties to the dispute can also apply to the authorising authority to deal it at any time (s 142). I suggest that this provides the appropriate approach to dealing with disputes that may be ongoing under this Part of the model WHS Act.

²⁶⁶ *Work Health and Safety and Other Legislation Amendment Act 2017* (Qld).

²⁶⁷ T Lyons, *Best practice review of Workplace Health and Safety Queensland: Final report*, Workplace Health and Safety Queensland, Brisbane, 2017, pp 88–89.

²⁶⁸ Sections 82(2), 89, 71(6) and 141 respectively of the model WHS Act. These are reinforced by s 160, which sets out inspectors' functions and powers.



Recommendation 13: Resolving outstanding disputes after 48 hours

Amend the model WHS Act 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. a PCBU, a worker, an HSR affected by the dispute or any party to the dispute to notify the court or tribunal of the 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, and
- d. appeal rights from decisions of the court or tribunal to apply in the normal way.

3.3. Discriminatory, coercive and misleading conduct

Current arrangements

The model WHS laws prohibit a person from engaging in discriminatory conduct for a prohibited reason. 'Prohibited reason' is defined in the model WHS Act. It includes:

- dismissing a worker
- terminating a contract for services with a worker
- altering the position of a worker to their detriment
- refusing or failing to engage a prospective worker or treating a prospective worker less favourably in the terms of engagement that are offered to them, and
- terminating a commercial arrangement or refusing or failing to enter into a commercial arrangement with a person.

The intention is to allow workers, prospective workers and others to perform legitimate safety-related functions or activities and to raise health and safety issues or concerns under the model WHS Act without fear of reprisal. The prohibition also applies to commercial arrangements. Civil or criminal proceedings can be initiated.²⁶⁹

The model WHS Act also makes it an offence for a person to knowingly or recklessly make a false or misleading representation to another person about the other person's rights or obligations under the WHS Act. This includes their rights to participate in WHS processes and report WHS issues.²⁷⁰

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There was minimal response to questions about the model WHS Act's discriminatory, coercive and misleading conduct provisions. The main issue raised, predominantly by unions, was lack of enforcement of these provisions by regulators. For example, the CFMEU suggested that research be

²⁶⁹ Section 107 of the model WHS Act.

²⁷⁰ Section 109 of the model WHS Act.

undertaken to determine why regulators have not taken action under the provisions.²⁷¹ Some other more specific issues were also raised. For example, the ACTU suggested courts should have the power to issue declaratory orders, noting they can be a flexible, inexpensive and effective way to resolve issues.²⁷²

Discussion and recommendations

Unpublished research²⁷³ commissioned by Safe Work Australia reviewed court decisions, including *Thorburn v SafeWork SA*²⁷⁴ (*Thorburn*), that interpret the model WHS Act and WHS Regulations across a range of areas. In *Thorburn*, the South Australian Industrial Relations Court held that the power of the court to make orders in s 112 of the model WHS Act did not include the power to grant declaratory relief. This case has caused some uncertainty about the power to make declaratory order under s 112 in relation to whether certain conduct was occurring or had occurred, particularly where the application does not also seek compensation or some other remedy which is within the court's power to grant or there is no real consequence of making the order. The report recommended that Safe Work Australia consult widely to see whether s 112 of the model WHS Act needs amendment to empower a tribunal or court to make a declaratory order.²⁷⁵

Declaratory orders assist courts to achieve procedural fairness for litigants by resolving legal uncertainty. The model WHS Act provides for the court to make any other orders they consider appropriate. In light of *Thorburn*, it appears the model WHS Act and Explanatory Memorandum do not make it clear whether a court can make declaratory orders using this catchall.

Where proceedings are brought for discrimination or coercion under s 112 of the model WHS Act, I consider the ability of the courts to make declaratory orders would provide more flexibility in resolving matters. I am therefore recommending that the model WHS laws are amended to make it clear that courts have the power to issue declaratory orders in proceedings for discriminatory or coercive conduct. This will remove any doubt regarding the ability of the courts to make a declaratory order.



Recommendation 14: Clarify court powers for cases of discriminatory or coercive conduct

Amend the model WHS Act to make it clear that courts have the power to issue declaratory orders in proceedings for discriminatory or coercive conduct.

²⁷¹ CFMEU (Construction and General Division) Submission, p 17.

²⁷² ACTU Submission, p 66.

²⁷³ Safe Work Australia, 'Project 1: Legal construction of key sections of the Model Work Health and Safety Act', report prepared by Richard Johnstone of the National Research Centre for Occupational Health and Safety Regulation, unpublished, 2016.

²⁷⁴ *Thorburn v SafeWork SA* [2014] SAIRC 29.

²⁷⁵ Safe Work Australia, 'Project 1: Legal construction of key sections of the Model Work Health and Safety Act', report prepared by Richard Johnstone of the National Research Centre for Occupational Health and Safety Regulation, unpublished, 2016, p 58.

3.4. Workplace entry by WHS entry permit holders

The model WHS laws recognise that involvement by unions in WHS matters at the workplace is important for the effective operation of consultation and participation mechanisms for workers. The model WHS Act encourages unions and employer organisations to take a constructive role in promoting improvement in WHS practices as one way to support the object of providing a balanced and nationally consistent framework for WHS.

Current arrangements

The model WHS Act and WHS Regulations outline the requirements and processes for obtaining a WHS entry permit, the occasions and processes for entry, and the WHS entry permit holder's powers on entry.²⁷⁶

A permit holder may enter a workplace to:²⁷⁷

- inquire into a suspected contravention of the model WHS Act that relates to or affects a relevant worker
- inspect employee records or other documents that are directly relevant to the suspected contravention, and
- consult and advise relevant workers on WHS matters.

The model WHS laws place limits on when entry may be sought and require written notice of any entry to be provided at least 24 hours, but not more than 14 days, before entering a workplace.²⁷⁸ The model WHS Act did not initially require prior notice for all entry by entry permit holders. The 2014 COAG Review led to an amendment to the model WHS Act to require at least 24 hours' notice for entry to inquire into a suspected contravention consistent with the other entry types. This amendment has not yet been implemented in any jurisdiction.

The model WHS laws also specify where a WHS entry permit holder may go in the workplace when exercising the right of entry and how they must behave.

To obtain and retain a WHS entry permit, the union official must also hold an FW Act entry permit.²⁷⁹ When exercising a right of entry under the WHS laws, the permit holder must comply with relevant parts of the Fair Work Act.²⁸⁰ These are broadly consistent with the current model WHS laws for entry.

Workplace access by a WHS entry permit holder is supported by prohibitions on a person unreasonably refusing, delaying, hindering or obstructing entry.²⁸¹ There are also prohibitions against a WHS entry permit holder intentionally and unreasonably delaying, hindering or obstructing any person or disrupting work at a workplace, making false declarations about their powers under the

²⁷⁶ Part 7 of the model WHS Act; and Part 2.4 of the Model WHS Regulations.

²⁷⁷ Sections 117, 120 and 121 of the model WHS Act.

²⁷⁸ Section 117(5) of the model WHS Act.

²⁷⁹ If a WHS entry permit holder seeks to enter a workplace that is covered by a state or territory industrial law, they must also hold a permit under that law.

²⁸⁰ *Fair Work Act 2009* (Cth), ss 494–504.

²⁸¹ Sections 144–145 of the model WHS Act.

model WHS Act, and using or disclosing information for a purpose that is not related to the WHS enquiry or rectification of the WHS contravention.²⁸²

Civil penalty provisions apply to breaches of these laws. The penalties are consistent with the national workplace relations laws generally.

Disputes about WHS entry by WHS entry permit holders may be referred to an inspector or the authorising authority²⁸³—for example, in New South Wales, this is the Industrial Relations Commission of New South Wales; in Queensland, this is an individual registrar under the *Industrial Relations Act 1999* (Qld).

Stakeholder responses—2018 Review of the model WHS laws

The provisions relating to workplace entry by WHS entry permit holders drew opposing comments from employer and industry representatives and unions. A consistent theme from the former was the need for greater consistency with right of entry provisions in the Fair Work Act. The National Road Transport Association, for example, suggested it would be simpler if all right of entry provisions were contained in the industrial relations legislation, similar to Western Australia.²⁸⁴

There were allegations that entry permit holders from some unions are not complying with the provisions, leading to lost production. For example, the Ai Group submission said:

‘it has been our experience that union officials from construction industry unions have frequently used WHS/OHS entry powers to access sites for industrial purposes, as has been well documented in Court decisions relating to prosecutions pursued by the ABCC and its predecessor the FWBC.’²⁸⁵

Unions, on the other hand, reinforced the importance of these provisions, noting that a union right of entry for WHS reasons existed for many decades prior to the introduction of the model WHS laws in most jurisdictions.²⁸⁶

Amendments were made to the model WHS Act notice provisions for entry to inquire into a suspected WHS contravention following the 2014 COAG Review.²⁸⁷ These amendments were the subject of divided commentary during consultations: employer and industry representatives called for jurisdictions to implement the amendments; and unions called for the amendments to be removed from the model WHS Act.

Those supporting implementation of the amendments did so because, in their view, the amendments provide additional protection against abuse of entry rights and were consistent with the object of the model WHS Act.²⁸⁸ There was also general consensus amongst PCBUs and their representatives that more detail about the suspected contravention should be supplied as part of the notice

²⁸² Sections 146–148 of the model WHS Act.

²⁸³ Sections 141–142 of the model WHS Act.

²⁸⁴ National Road Transport Association Submission, p 6.

²⁸⁵ Ai Group Submission, p 31.

²⁸⁶ For example, see the Qld Council of Unions Submission, p 25.

²⁸⁷ Section 117 of the model WHS Act.

²⁸⁸ For example, see Australian Chamber Submission, p 33; HIA Submission, p 14.

requirements.²⁸⁹ Those opposed cited safety concerns, regulatory burden and inconsistency with the object of model WHS Act.²⁹⁰

Some stakeholders suggested that, if the right of entry provisions were retained, the South Australian amendments should be adopted.²⁹¹ Under the South Australian arrangements, the entry permit holder needs to give consideration to whether it is reasonably practicable to notify the regulator before exercising a right of entry to inquire into a suspected contravention of the WHS laws. This is not a permissive step. Instead, it allows the regulator to decide if an inspector will also attend. If the inspector does not attend, the entry permit holder must provide the regulator with a report following the entry. However, I note the CFMEU categorised the South Australian provisions as being unnecessarily bureaucratic and not effective in enhancing safety outcomes.²⁹²

The ACTU submission, with endorsement in other union submissions, called for a number of new powers and roles for entry permit holders. It suggested the model WHS laws provide that permit holders lawfully entering a workplace be allowed to:²⁹³

- perform the role and exercise the powers of an HSR where one has not been appointed
- collect evidence through photos, video, voice recordings, measurements and tests
- request documentation after entry (as allowed under the Fair Work Act), and
- remain onsite to inquire into any WHS issues that become apparent while they are there, regardless of what laws they have entered under.

The CFMEU submission cited *CFMEU v Bechtel Construction (Australia) Pty Ltd*²⁹⁴ as supporting the view that entry permit holders should be able to remain at a workplace rather than re-enter to inquire into suspected contraventions of another law.²⁹⁵

The NSW Minerals Council suggested the basis for exercising a right of entry should be increased from 'reasonable suspicion' to 'reasonable belief'.²⁹⁶

The ACTU and other union submissions called for entry permits to have extraterritorial application to the extent that a jurisdiction's legislative powers allow.²⁹⁷ It also suggested the regulator should be authorised to make orders to deal with misconduct by the PCBU and the entry permit holder in relation to right of entry.²⁹⁸

An area of agreement between employer and industry representatives and unions was in relation to compliance and enforcement. All agreed that there needed to be consistent application of the

²⁸⁹ For example, see HIA Submission, p 14.

²⁹⁰ For example, see WorkSafe Victoria Submission, pp 2–3; CFMEU (Construction and General Division) Submission, pp 17–18.

²⁹¹ For example, see Chamber of Minerals and Energy Submission, pp 12–13; NSW Minerals Council Submission, p 21.

²⁹² CFMEU (Construction and General Division) Submission, p 19.

²⁹³ ACTU Submission, pp 41–42.

²⁹⁴ *CFMEU v Bechtel Construction (Australia) Pty Ltd* [2013] FCA 667.

²⁹⁵ CFMEU (Construction and General Division) Submission, pp 20–21.

²⁹⁶ NSW Minerals Council Submission, p 21.

²⁹⁷ ACTU Submission, p 22; Unions NSW Submission, p 10.

²⁹⁸ ACTU Submission, p 11.

provisions across jurisdictions and that strategies for enforcement should be considered as part of a review of the NCEP (discussed in chapter 5).

Discussion and recommendations

One of the objects of the model WHS Act is to encourage 'unions and employer organisations to take a constructive role in promoting improvements in WHS practices, and assisting PCBUs and workers to achieve a healthier and safer working environment'.²⁹⁹

A complete reliance on workplace relations laws for WHS entry was considered in the 2008 National Review and was not recommended on the basis that:³⁰⁰

1. it would be out of context and removed from the framework of harmonised laws
2. the federal industrial laws do not cover all business or undertakings, and
3. most state industrial laws do not provide a right of entry for WHS purposes.

The 2008 National Review report also observed that the change would further blur the lines between WHS and industrial issues. I consider these comments remain relevant. It is also important to note that most employer and industry representatives expressed support for the WHS right of entry provisions where they were being 'genuinely used for safety purposes'.³⁰¹

I note the suggestion for WHS right of entry to be dealt with in workplace relations laws, but I do not consider that entering a workplace to deal with a concern about an industrial right can be equated with entering a workplace to deal with a serious risk to a worker arising from an imminent or immediate hazard which could cause illness, injury or death.

The calls for alignment of WHS and industrial relations right of entry schemes are particularly relevant in the context of the requirement in the model WHS Act for entry permit holders to provide 24 hours' notice when seeking to enter a workplace to investigate a suspected contravention of the WHS Act under s 117. I note that the original consideration of the notice requirements for union right of entry for WHS purposes included a table which highlighted that no notice was required for union right of entry across all of the pre-model WHS legislation which provided that right.³⁰² This is among the reasons why the original model WHS Act did not contain a 24-hour notice requirement in the context of a suspected breach. However, the 24-hour notice period was inserted into the model WHS Act following the 2014 COAG Review.

The 2014 COAG Review focused on reducing regulatory burden for business and, from that perspective, found 'permitting entry without notice when a matter is not urgent, the [model] WHS Act establishes a right of entry regime that risks causing unnecessary inconvenience and disruption, potentially leading to resentment and conflict'.³⁰³ To avoid a diminution of safety standards, a system

²⁹⁹ Section 3(1)(c) of the model WHS Act.

³⁰⁰ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009, p 388.

³⁰¹ This phrase was used regularly throughout the face-to-face consultations.

³⁰² Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009, p 401.

³⁰³ Safe Work Australia, *Improving the model Work Health and Safety laws: Report*, Safe Work Australia, Canberra, 2014, p 22.

of exemptions to providing prior notice similar to that under the Fair Work Act was also included in the model WHS Act.

To date no jurisdiction has amended its versions of the model WHS laws to include a notice requirement under s 117 of the model WHS Act. I acknowledge employer and industry concerns and note the jurisprudence on this matter since the introduction of the model WHS laws. I also note that the recent report on Western Australia's adoption of the model WHS laws has specifically recommended enacting the right of entry provisions from the 2011 version of the model WHS Act.

I consider that the original approach of the 2008 National Review to right of entry remains valid. I note in this context that there are provisions in the model WHS Act that deal with misuse of WHS right of entry and disputes about right of entry. Given no jurisdiction has enacted the 24-hour notice period for s 117 since the 2014 COAG Review, it would appear that this is the general view across those jurisdictions which have enacted the model WHS laws. I am therefore recommending that the model WHS Act should be amended to return s 117 to its original wording. This will restore consistency and harmonisation to this important part of the model WHS laws.



Recommendation 15: Remove 24-hour notice period for entry permit holders

Amend the model WHS Act to retain previous wording in s 117.

Chapter 4: Compliance and enforcement

Ensuring compliance with the model WHS laws by enforcing its provisions is central to the effective operation of the model WHS laws. This chapter examines the compliance and enforcement provisions in the model WHS laws and considers whether they are effective and sufficient to deter noncompliance with the model WHS laws.

Object of the model WHS Act (see s 3(1)(d)–(h))

Promoting the provision of advice, information, education and training in relation to WHS.

Securing compliance with the model WHS Act through effective and appropriate compliance and enforcement measures.

Ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under the model WHS Act.

Providing a framework for continuous improvement and progressively higher standards of WHS.

Maintaining and strengthening the national harmonisation of laws relating to WHS and to facilitate a consistent national approach to WHS in this jurisdiction.

Review Term of Reference

Whether the compliance and enforcement provisions are effective and sufficient to deter noncompliance with the WHS legislation.

4.1. Regulator functions

Current arrangements

Under Part 8 of the model WHS Act, the functions of the regulator include the following:

- monitor and enforce compliance with the WHS Act and Regulations
- provide WHS advice and information to duty holders and the community
- foster and promote WHS
- conduct and defend legal proceedings under the WHS Act, and
- advise and make recommendations to the minister.

Section 153 of the model WHS Act confers a general power on the regulator to do all things necessary or convenient in relation to its functions.

Stakeholder responses—2018 Review of the model WHS laws

In consultations, small business advocates noted that many small and medium-sized businesses fear engaging with the regulator and are reluctant to seek advice from inspectors.³⁰⁴ However, many considered that the regulator plays an important role in helping small business to understand the WHS laws.³⁰⁵ A 2018 Australian Chamber report found that small and medium-sized businesses felt the model WHS Regulations were formulated with large business in mind, with many of the owner managers suggesting that the ability of regulators to adopt a small business perspective themselves would see them able to tailor their advice in ways that would better suit small business management practices.³⁰⁶

Unions and business representatives considered there should be a clearer separation between the prosecution function and the education function of WHS regulators.³⁰⁷ Recent changes in South Australia, where the regulator has split functions into separate education and compliance arms, were presented as being successful in encouraging PCBUs to call for assistance without fear of triggering enforcement activity.³⁰⁸ The Australian Chamber noted that the separation of education functions from enforcement functions is very positive, has reduced fear and stigma and has fostered a more collaborative approach between employers and the regulator.³⁰⁹

³⁰⁴ For example, Western Australian Small Business Commissioner, Consultation, 14 February 2018.

³⁰⁵ For example, see HIA Submission, p 16.

³⁰⁶ T McKeown & T Mazzarol, *Enabling safe and healthy workplaces for small business*, Australian Chamber, 2018, pp 17–18. See also Master Builders Australia Submission, p 30.

³⁰⁷ For example, Australian Federation of Employers & Industries Submission, p 31; Australian Chamber Submission, p 37; Qld Council of Unions Submission, p 29.

³⁰⁸ These changes reflected the outcomes of the 2014 review of the *Work Health and Safety Act 2012* (SA), where participants reported that they were unclear about how to meet their duties and how the regulator would apply the provisions of the model WHS laws. See R Stewart-Crompton, *Report of the 2014 Review of the South Australian Work Health and Safety Act 2012*, SafeWork SA, 2014.

³⁰⁹ Australian Chamber Submission, pp 37–38. See also Restaurant & Catering Australia Submission, p 6; Business SA Submission, p 8.

Many industry groups supported a collaborative relationship between businesses and the regulator, including an incremental approach to achieving WHS compliance.³¹⁰ Qualitative research for this Review also found that respondents would prefer a more collaborative relationship with the regulator, including an incremental approach to achieving WHS compliance.³¹¹

In contrast, the 2017 Queensland Review recommended that the regulator place less emphasis on education and more emphasis on what it termed 'hard compliance'.³¹² Feedback from unions about the regulator reflected this approach and focused primarily on the regulator's enforcement functions. The CFMEU suggested that the majority of practical problems arise because of a lack of effective compliance and enforcement of existing obligations within the framework.³¹³

Some submissions raised the importance of inspector recruitment, training and skills to ensure consistency in interpretation and strong enforcement of the laws.³¹⁴ Concerns were also raised about generalist inspectors being asked to deal with specific industries, such as construction, or specialist occupations, such as electrical.³¹⁵ There was a view that consistency in the application and enforcement of the laws would be improved through better co-ordination of standards across jurisdictions, including, for example, inspector appointment processes; training; qualifications; investigation techniques; evidence gathering; compliance activities; educational campaigns; and intelligence sharing.³¹⁶ To support the proper use of the extensive powers given to inspectors under the model WHS laws, some also advocated an inspectors' code of conduct or inclusion of mandatory skills or qualifications.³¹⁷

Discussion and recommendations

There are two key messages I took from this Review in relation to the regulators' powers and functions.

The first is the importance of a clear, consistent, fair and authoritative application of the model WHS laws both within and across jurisdictions.

The second is the challenge to find an appropriate balance between the regulator's education functions, which support businesses to meet their WHS obligations, and its enforcement functions, which deter noncompliance. How regulators choose to achieve this balance and carry out their functions, including decisions regarding training, recruitment, and education campaigns, are operational in nature and out of scope for this Review.

³¹⁰ See Restaurant & Catering Australia Submission, p 6.

³¹¹ Safe Work Australia, 'Evaluation of model work health and safety (WHS) laws: Non-employing, small and medium business interviews', report prepared by Instinct and Reason, unpublished, 2014.

³¹² T Lyons, *Best practice review of Workplace Health and Safety Queensland: Final report*, Workplace Health and Safety Queensland, Brisbane, 2017, pp 93–94.

³¹³ CFMEU (Construction and General Division) Submission, p 4.

³¹⁴ For example, see Master Electricians Australia Submission, p 5; Victorian Automobile Chamber of Commerce Submission, p 16; Australian Government Department of Jobs and Small Business Submission, p 22; NSW Minerals Council Submission, p 24; Minerals Council of Australia Submission, p 18.

³¹⁵ See Master Electricians Australia Submission, p 5; Victorian Automobile Chamber of Commerce Submission, p 16.

³¹⁶ Australian Government Department of Jobs and Small Business Submission, p 22.

³¹⁷ For example, see NSW Minerals Council Submission, p 24; Minerals Council of Australia Submission, p 18.

I discuss regulatory consistency, balance and approach in more detail and make associated recommendations in chapter 5 ('National Compliance and Enforcement Policy'). This chapter primarily deals with technical issues raised by regulators and with the incident notification provisions.

4.2. Powers of regulator to obtain information

Regulators and inspectors have a range of powers to collect information and evidence to assist their investigations and secure compliance with the model WHS Act. There is nothing in the model WHS Act that prevents a regulator or inspector from asking for information to be provided voluntarily; however, broad powers are also included to require a person to provide information or documentation when necessary.

Current arrangements

Section 155 of the model WHS Act provides the regulator with the power to require a person to provide information or documents or give evidence through a written notice (often referred to as a 's 155 notice'). The regulator must take all reasonable steps to obtain information in writing before they can issue a notice to require a person to appear before them (s 155(4) of the model WHS Act). It is an offence to refuse or fail to comply with such a request without a reasonable excuse.

Stakeholder responses—2018 Review of the model WHS laws

The use of the power to obtain information was raised consistently by regulators as creating problems for them. Some indicated that, at times, issuing notices to obtain information could frustrate and prolong an investigation process, with written exchanges going back and forth for months. It was suggested that the requirement to exhaust attempts to obtain information in writing before compelling an interview unnecessarily delays investigations.³¹⁸ SafeWork SA suggested that it is not clear whether the regulator can expand on the questions asked in writing when a person appears before the regulator in accordance with s 155(2)(c) of the model WHS Act.³¹⁹ Other regulators talked of the practical challenges of serving notices in person.

Discussion and recommendations

It became clear during the Review that regulators have different approaches to the use of their powers to obtain information. Some use them as a key element in the early evidence-collecting phase of an investigation; others use them to supplement investigation approaches.

I found that there are two elements of the power to obtain information (under s 155 of the model WHS Act) that regulators believe are not operating effectively: the staged approach to seeking information (prolongs investigations); and the service of related notices (often impractical).

In addressing the first issue, I note that s 155(2)(a) of the model WHS Act allows the regulator to specify the time and manner in which the information or documents are to be produced. The model WHS Act does not specify a minimum time that must be allowed in the notice, so, as a matter of construction, the time must be reasonable in all the circumstances. In my view, this means that a

³¹⁸ NSW Work Health and Safety Regulators Submission, p 19; SafeWork SA Submission 1, p 17.

³¹⁹ SafeWork SA Submission 1, p 17.

regulator may require short time frames for the production of information or documents where warranted in the circumstances—for example, if there is some urgency in obtaining the information in order to enforce compliance with the WHS Act.

I also note that the regulator can require a person to appear to give evidence or documents at a specified time and place that are reasonable in the circumstances.³²⁰ The regulator can exercise this power where they have taken reasonable steps to obtain the information in writing but have been unable to do so.³²¹ The regulator may obtain information quickly if there is some urgency in obtaining the information and there has been delay in otherwise obtaining it.³²²

These provisions are intended to provide flexibility to cater to the circumstances of each individual matter. However, I acknowledge concerns that the process can often lead to delays, and I understand the calls from regulators for greater clarity and guidance on what might constitute reasonable steps to seek information via written notice as well as what may constitute a reasonable excuse to refuse or fail to provide information. The Explanatory Memorandum to the model WHS Act offers some assistance in this context. It includes three examples of ‘reasonable excuse’ in the context of other model WHS provisions.³²³ In chapter 5 (‘National Compliance and Enforcement Policy’), I note that, to support consistent decision-making in relation to the use of s 155 notices, an enhanced NCEP decision-making framework could provide details about what regulators will take into account when considering what is (and what is not) a reasonable excuse. I am not making any specific recommendations for legislative change in this context.

It is important to note that s 155 of the model WHS Act does not require an inspector to be onsite for the notice to be issued or served. Service of notices is dealt with under jurisdictional laws. For example, in the Commonwealth jurisdiction, the *Acts Interpretation Act 1901* (Cth) provides that notice may be served ‘on a person’ in a number of ways.³²⁴ One of these ways is to deliver the notice personally. Notice may also be served:

- on a natural person by sending it by prepaid post to the address of the place of residence or business of the person last known to the person serving the document, or
- if the person is a body corporate, by leaving it at, or sending it by prepaid post to, the head office, a registered office or a principal office of the body corporate.

A notice may also be served electronically in accordance with the *Electronic Transactions Act 1999* (Cth). However, to avoid doubt, I recommend that the provisions for issuing and service of s 155 notices to obtain information should be aligned with those for improvement, compliance and non-disturbance notices under s 209 of the model WHS Act. This alignment should also be extended to the issuing and service of s 171 notices by inspectors to ensure clarity and consistency across all of the notices in the model WHS laws.

³²⁰ Section 155(2)(c) of the model WHS Act.

³²¹ Section 155(4) of the model WHS Act.

³²² Section 155(2)(c) of the model WHS Act.

³²³ Sections 118(3), 144(2) and 165(2) of the model WHS Act.

³²⁴ *Acts Interpretation Act 1901* (Cth), s 28a.



Recommendation 16: Align the process for the issuing and service of notices under the model WHS Act to provide clarity and consistency

Amend the model WHS Act to align the service of notices provisions under s 155 and s 171 with those in s 209 of the model WHS Act dealing with improvement, compliance and non-disturbance notices.

4.3. Inspectors' powers and functions

Current arrangements

Parts 9 and 10 of the model WHS Act provide inspectors appointed by WHS regulators with statutory functions and powers. These include providing information and advice about compliance with the WHS Act and Regulations, assisting in resolving WHS issues, requiring compliance with the WHS Act by issuing notices, investigating contraventions of the WHS Act, and assisting in prosecuting offences. In order to carry out their functions, inspectors have broad powers to enter workplaces to inspect and examine anything including documents, make enquiries, take measurements, conduct tests, and make sketches or recordings.³²⁵

Inspectors can issue different types of notices: improvement notices to remedy or prevent contraventions of the Act, prohibition notices to prevent activities that involve serious risks emanating from immediate or imminent exposure to hazards, non-disturbance notices to preserve or prevent disturbance of the site, and infringement notices to impose a fine for certain prescribed offences.

Section 171 of the model WHS Act provides an inspector with powers, when they enter a workplace, to require production of documents and answers to questions. This includes requiring a person to tell the inspector which person has custody of or access to a document, to produce that document while the inspector is at the workplace or within a specified time, and to answer any questions put by the inspector.

Stakeholder responses—2018 Review of the model WHS laws

Both regulators and businesses suggested that there should be a new enforcement tool for inspectors which could encourage long-term change in workplace safety cultures.

In their submission, the NSW Work Health and Safety Regulators discussed their use of 'agreed actions', consistent with the NCEP, which states, 'Having provided the duty holder with advice or guidance as to how compliance may be achieved, if satisfied that a person has taken timely and satisfactory steps to remedy a breach at the time of detection or through agreed action, the regulator may decide to take no further action'.³²⁶ The submission noted concerns that the use of agreed actions is likely to be inconsistent across jurisdictions, as it is not explicitly provided for in the model WHS Act.³²⁷

³²⁵ Section 160 of the model WHS Act.

³²⁶ Safe Work Australia, *National Compliance and Enforcement Policy*, Safe Work Australia, Canberra, p 7.

³²⁷ NSW Work Health and Safety Regulators Submission, p 21.

The Ai Group suggested that improvement notices and prohibition notices are 'quite short term in nature, allowing for quick fixes, but being mostly inadequate to deal with situations where more time will be needed to plan and implement detailed controls'. It went on to submit:

'where there are a range of issues in the workplace, or a risk that is embedded into the organisational processes, consideration should be given to an approach that allows the PCBU to develop a structured plan for improvement in consultation with their workers and, if applicable, elected HSRs.'³²⁸

Its view is that such a tool is more likely to create long-term change in a business than any number of improvement notices.

Unpublished research commissioned by Safe Work Australia on Regulator Compliance Support, Inspection and Enforcement reflects these considerations and discusses whether the range of mechanisms and tools available to inspectors is adequate to implement responsive enforcement. It asks whether new tools such as 'risk control plans' similar to those used in Victoria should be introduced.³²⁹

Comments in relation to improvement notices³³⁰ included the suggestion by some regulators that an inspector should be able to issue a notice that is applicable to all activities undertaken by the PCBU rather than just to the specific workplace where they witnessed a breach. Others called for an obligation to be placed on PCBUs to notify the regulator when an improvement notice's requirements have been met.³³¹ The Minerals Council of Australia called for laws to prescribe the form and manner in which an inspector confirms that a notice issued under the model WHS Act has been complied with and is no longer in effect.³³²

Regulators raised concerns about the operation of an inspector's power to require production of documents and answers to questions under s 171 of the model WHS Act. SafeWork SA and the Queensland Government highlighted the impracticality associated with the power to require production of documents and answers to questions being restricted to when the inspector is physically at the workplace.³³³ They suggested allowing s 171 notices to be issued by post and email, similar to other notices, or adopting the recent Queensland amendments.³³⁴

During an HSR forum, anecdotal evidence was provided of situations where inspectors allegedly refused HSRs access to their inspection reports, claiming this was due to confidentiality provisions in

³²⁸ Ai Group Submission, p 33.

³²⁹ Safe Work Australia, 'Project 3: Regulator compliance support, inspection and enforcement', project undertaken by E Bluff, R Johnstone & N Gunningham of the National Research Centre for Occupational Health and Safety Regulation, unpublished, 2015.

³³⁰ Part 10, Division 1 of the model WHS Act.

³³¹ Raised in meetings with various regulators.

³³² Minerals Council of Australia Submission, p 17.

³³³ SafeWork SA Submission, pp 17–18; Queensland Government Submission, p 11.

³³⁴ These amendments extend the power under s 171 of the Qld WHS Act to require production of documents or to answer questions on entry to where a workplace has been entered previously. Under the amendments, the documents that could be required under s 171 may be located at any place (not just the workplace) and a person could be required to answer questions at any time and place convenient.

the model WHS Act.³³⁵ To address this, it was suggested that the confidentiality provisions could be made clearer.³³⁶

Discussion and recommendations

I did not find evidence of a significant gap in the range of enforcement tools available to the inspectorate in the model WHS laws. Many of the issues raised were technical or derived from the fact that the laws are still settling and regulators are continuing to test and refine their compliance and enforcement strategies.

Regarding the prescription of tools such as risk control plans and ‘agreed action’ notices, I consider that there is already scope for inspectors to agree on ‘action plans’ with duty holders. The functions of regulators and inspectors outlined in the model WHS Act include the provision of advice and information on WHS and compliance with the WHS Act.³³⁷ This high-level function provides regulators with the ability to decide how they will work with duty holders to ensure compliance and improve WHS practices. I discuss how the use of these broad powers in the context of agreeing ‘action plans’ could be further clarified in chapter 5 (‘National Compliance and Enforcement Policy’).

With regard to the technical issues raised, I have given close consideration to the uncertainty about whether improvement notices could be applied across multiple worksites. An improvement notice is issued to a person where the inspector reasonably believes the person is contravening the WHS Act or has contravened in circumstances where the contravention is likely to continue or be repeated.³³⁸ The notice can be applied to a person and the things or operations causing the contravention, or likely contravention, wherever they occur. In my view, this means that improvement notices may be issued to address contraventions, or likely contraventions, across multiple workplaces. For example, if an inspector reasonably believes a PCBU is breaching the model WHS laws in relation to a risk that could result in a fall from height, the improvement notice can be given to the PCBU to ensure that they remedy the unsafe system of work where used on any of their worksites. Given that this was not clear to many during the consultations, further guidance for inspectors and duty holders on the use of improvement notices may be useful as part of a revised NCEP.³³⁹

A second issue I have examined closely relates to the operation of the inspectors’ power to require production of documents and answers to questions under s 171 of the model WHS laws. The drafting of this provision does appear to restrict the use of the power to when an individual inspector has physically entered a workplace. I consider that this restriction is not pragmatic, as it is reasonable that an inspector may identify documents or information they require to support their investigation after they have left the workplace. The current drafting of s 171 of the model WHS Act could potentially limit the efficiency and effectiveness of inspectors’ investigations, particularly where the workplace is in a regional or remote location.

³³⁵ Australian Manufacturing Workers’ Union Health Safety Representative Forum, Consultation, 2 May 2018.

³³⁶ Section 271 of the model WHS Act.

³³⁷ Sections 152 and 160 of the model WHS Act.

³³⁸ Section 191 of the model WHS Act.

³³⁹ Discussed in chapter 5.

This issue is linked to the interaction of the regulator's power to obtain information (s 155 of the model WHS Act) with the inspector's power to require production of documents and answers to questions (s 171 of the model WHS Act). It seems clear that the original policy intention was that these provisions would serve two different purposes. In *Hunter Quarries Pty Ltd v State of New South Wales*³⁴⁰ (*Hunter Quarries*) (where the court confirmed that an inspector could interview witnesses under s 171 before the regulator issued written notices under s 155), the court noted that inspectors are expressly granted an *investigative function* into contraventions as well as requiring compliance and assisting in prosecutions.³⁴¹ It is they (rather than the regulator) who are empowered to enter a workplace to deal immediately with the causes of an incident or compliance issues that pose risks to health and safety. The powers under s 171 of the model Act reflect this.

I do not believe that an inspector can rely on the use of the regulator's power to obtain information under s 155 of the model Act (either directly or via delegation to an inspector) to request information or documents once they have left the premises. Unlike the inspector's power, the regulator's power provides that the regulator must first have reasonable grounds to believe that a person is capable of giving information in relation to a possible intervention.³⁴² *Hunter Quarries* showed that the information gathered by an inspector may form the 'reasonable belief' needed for the regulator to obtain further documents or information.³⁴³ However, in circumstances where the inspector's visit to the workplace has not provided sufficient evidence to form the required opinion of 'reasonable belief', follow-up work by the inspector is likely to be required.

I am therefore recommending that s 171 of the model WHS Act is amended to provide that, instead of being limited to the inspector who enters a workplace, the powers under s 171 can be exercised by any inspector so long as there has been entry to the specific workplace which is the subject of inquiry by an inspector within the previous 30 days. This recommendation is consistent with the amendments made to the Qld WHS Act in October 2017 and, amongst other practical issues, it allows for investigations to continue in cases of personnel changes.

As indicated at Recommendation 16, I am also recommending that the process for issuing and serving s 171 notices should be aligned with those for prohibition and improvement notices at s 209 of the model WHS Act.

³⁴⁰ *Hunter Quarries Pty Ltd v State of New South Wales (Department of Trade & Investment)* [2014] NSWSC 1580.

³⁴¹ *Hunter Quarries Pty Ltd v State of New South Wales (Department of Trade & Investment)* [2014] NSWSC 1580, 54.

³⁴² Section 155(1) of the model WHS Act.

³⁴³ *Hunter Quarries Pty Ltd v State of New South Wales (Department of Trade & Investment)* [2014] NSWSC 1580, 61.



Recommendation 17: Provide the ability for inspectors to require production of documents and answers to questions for 30 days after the day they or another inspector enter a workplace

Amend the model WHS Act to provide that, instead of being limited to the inspector who enters (or has entered) a workplace, the powers to require production of documents and answers to questions can be exercised by any inspector within 30 days following an inspector's entry to that workplace.

I note the concerns about protections for information obtained through inspector's powers.³⁴⁴ However, the confidentiality of information provisions (s 271(2) of the model WHS Act) already contain penalties for misuse of information.

4.4. Internal/external reviews

Current arrangements

The model WHS laws set out procedures for the review of decisions that are made under the model WHS laws.

Section 223 of the model WHS Act sets out the decisions under the Act that are reviewable and who is eligible to apply for a review of each such decision. In most cases this will be the worker, their HSR or the PCBU affected by the decision, but in some cases it can also be a union representative. In general, reviewable decisions under the model WHS Act are those that are made by:

- inspectors—these are reviewable by the regulator internally at first instance and then may go on to external review, and
- the regulator—these go directly to external review.³⁴⁵

Regulation 676 of the model WHS Regulations sets out decisions made under the model WHS Regulations that are reviewable, and who is eligible to apply for a review of each decision. Reviewable decisions under the model WHS Regulations primarily deal with decisions about licensing, authorisation and exemption applications.

Stakeholder responses—2018 Review of the model WHS laws

Consultation did not generate a significant amount of comments on reviewable decisions. The capacity to seek review was generally supported by those who commented, with the Ai Group saying that it 'increases transparency, creates an opportunity for a counter view to be considered by a relatively independent body and provides learnings for inspectors and the regulator'.³⁴⁶

Amongst union submissions there was a common view that unions should have a right to seek internal and external review of decisions as an 'eligible person' under the model WHS Act, except for

³⁴⁴ NSW Minerals Council Submission, p 25.

³⁴⁵ Safe Work Australia, *Explanatory Memorandum—model Work Health and Safety Bill*, Safe Work Australia, Canberra, 2016, pp 82–83.

³⁴⁶ Ai Group Submission, p 33.

decisions relating to the forfeiture and return of seized things.³⁴⁷ Unions said this was because, in practice, the review process is very complex and unions have to assist nearly every time that a member applies for a review or that a worker or HSR may not make an application for a review of a decision for fear of reprisals.³⁴⁸

The NSW Work Health and Safety Regulators raised issues around the time limit for making a decision on internal reviews.³⁴⁹ SafeWork SA said that the review system seems to be working as intended, with relatively low levels of referral to external reviews after the internal review process.³⁵⁰

Discussion and recommendations

The internal and external review provisions appear to be operating as intended. I note that there are a number of decisions under s 223 of the model WHS Act which provide for applications by workers' representatives, including unions.³⁵¹

4.5. Exemptions

Current arrangements

Part 11.2 of the model WHS Regulations outlines the exemption provisions that each jurisdictional regulator can use to exempt any person or class of persons from complying with any regulation in the model WHS Regulations. Division 1 provides a regulator with general powers to grant exemptions, while Divisions 2 and 3 allow regulators to grant exemptions in terms of holding a high-risk work licence and provisions regarding major hazards facilities respectively. These exemptions are subject to review.

Regulators can also grant exemptions that are subject to conditions. For example, the regulator may grant an exemption from any regulation but require that the person nevertheless monitor risks, keep certain records or use a particular system of work. Any condition that a regulator imposes on an exemption can be subject to review.

Stakeholder responses—2018 Review of the model WHS laws

During consultations, most regulators raised the issue of how exemptions operated for complex matters, particularly their status outside of or across jurisdictions. However, SafeWork SA said that it found the provisions are appropriate and work effectively.³⁵²

³⁴⁷ See, for example, ACTU Submission, p 48; Health Services Union NSW–ACT–Qld Branch Submission, p 44.

³⁴⁸ ACTU Submission, p 48; CFMEU (Construction and General Division) Submission, p 25.

³⁴⁹ NSW Work Health and Safety Regulators Submission, p 22.

³⁵⁰ SafeWork SA Submission, pp 18–19.

³⁵¹ Worker representatives are eligible to request review of decisions relating to Item 1 (s 54(2) of the model WHS Act, 'Decision following failure to commence negotiations').

³⁵² SafeWork SA Submission, p 19.

The Chamber of Minerals and Energy considered that, if an exemption was needed, this itself was proof that the model WHS Regulations were too prescriptive.³⁵³ Submissions from other industry stakeholders indicated areas where they would like regulators to grant exemptions.³⁵⁴

Discussion and recommendations

I am not making any recommendations for change with regard to exemptions. Most stakeholders who expressed a view considered that the exemption provisions were working as intended. The decision to issue exemptions is retained by each WHS regulator. A WHS regulator cannot exempt a PCBU from a duty under WHS Regulations where those Regulations are outside of its jurisdiction. However, whether an exemption granted by a WHS regulator within its jurisdiction can operate extraterritorially will depend on the drafting of each jurisdiction's WHS Act—in particular, its use of the jurisdictional note at s 11. There is also scope for regulators to agree on mutually recognised exemptions through the co-operative Heads of Workplace Safety Authorities (HWSA) process.

The power for a regulator to grant exemptions from duties under the WHS Act was not provided because these duties were considered fundamental to protecting the health and safety of workers and others.

4.6. Cross-jurisdictional co-operation

Current arrangements

Under s 152(g) of the model WHS Act, one of the functions of the regulator is to engage in, promote and co-ordinate the sharing of information to achieve the object of the model WHS Act, including the sharing of information with a corresponding regulator. There are two key provisions in the model WHS Act which enable cross-border co-operation between jurisdictions:

- information-sharing provisions (s 271(3)(c)) where information or documents held by a regulator may be shared across jurisdictions where the regulator has a reasonable belief that it is necessary for administering, monitoring or enforcing compliance with their WHS Act, or for administration or enforcement of prescribed Acts or another Act where disclosure is necessary to lessen or prevent a serious risk to public health and safety, and
- provision for 'dual appointees' (s 156(d)) where an inspector from one jurisdiction can be appointed as an inspector for another jurisdiction.

Stakeholder responses—2018 Review of the model WHS laws

Stakeholders held mixed views on the current effectiveness of cross-jurisdictional co-operation. In meetings, some regulators said sharing information with each other and investigating potential breaches of the model WHS laws across jurisdictions worked but could be a 'clunky' process. The NSW Cross Border Commissioner provided good examples of co-operation around WHS/OHS

³⁵³ Chamber of Minerals and Energy Submission, p 30.

³⁵⁴ See, for example, Restaurant & Catering Australia Submission, p 3; Association of Tourist and Heritage Rail Australia Submission, pp 2–8; and Australian Energy Council Submission, pp 7–8.

compliance and enforcement along the border of New South Wales and Victoria.³⁵⁵ The Australian Government Department of Jobs and Small Business noted that, while the existing powers under the model WHS laws allow for sharing of information between jurisdictions, issues arise when investigators from one jurisdiction wish to gather information in another jurisdiction which relates to a suspected breach in their own jurisdiction. It suggested that a specific power be introduced that enables regulators to share information with each other where doing so would aid them to perform their functions.³⁵⁶

The scope of information-gathering powers was raised in the context of the ability to interview workers (under the powers of the regulator to obtain information under s 155 of the model WHS Act) when companies have moved key staff interstate or offshore after an incident (particularly where there has been a fatality). In face-to-face meetings, a few regulators sought clarification on the use of their powers to compel the provision of information from another jurisdiction.³⁵⁷

Discussion and recommendations

It is clear that there are many instances of good co-operation between regulators across jurisdictions. The uncertainty raised by regulators appears to primarily relate to the extraterritorial reach of s 155 of the model WHS Act ('Powers of regulator to obtain information').

I note that the 2008 National Review considered the issue of cross-jurisdictional co-operation and recommended that the model WHS Act should:

- subject to written agreement between ministers or regulators, specifically permit inspectors appointed in one jurisdiction to be authorised to perform functions and exercise powers in, or for the purposes of, another jurisdiction (Recommendation 157)
- set out clearly the scope and limits (if any) of cross-jurisdictional appointments and authorisations (Recommendation 158), and
- provide for the valid use and admissibility of evidence gathered by an inspector exercising cross-jurisdictional authority (Recommendation 159).

These recommendations are reflected in the provision for 'dual appointees' under s 156(d) of the model WHS Act, where an inspector from one jurisdiction can be appointed as an inspector for another jurisdiction.

The power to compel a person to provide information under s 155 of the model WHS Act came up as a common example of where the model laws were unclear in the cross-jurisdictional context. An amendment to the NSW WHS Act clarifies that a notice to obtain information can be served outside of its jurisdiction. Prior to these amendments, the validity of such a notice issued by a New South Wales regulator to a business based in another jurisdiction was arguably resolved in the New South Wales courts through *Perilya Ltd v Nash*.³⁵⁸ In that case, the judge held there is no restriction on the

³⁵⁵ NSW Cross Border Commissioner, Consultation, March 2018.

³⁵⁶ Australian Government Department of Jobs and Small Business Submission, p 22. See also Comcare Submission, p 9.

³⁵⁷ Through the powers of the regulator to obtain information under s 155 of the model WHS Act.

³⁵⁸ *Perilya Ltd v Nash* [2015] NSWSC 706. The case concerned a New South Wales inspector's ability to issue a s 155 notice to obtain documents from a Western Australian based holding company.

regulator issuing such notices in another jurisdiction provided the requirements of s 155 are satisfied. This suggests that the addition to the NSW WHS Act is likely to have been unnecessary.³⁵⁹ However, there is now a concern that courts might interpret the model provision more narrowly in other model law jurisdictions given the New South Wales amendment.

Given that there is now increased uncertainty, I recommend that the model WHS Act be amended to clarify that WHS regulators can issue a notice under s 155 to obtain information or documents outside their jurisdiction where the information is relevant to administration of the WHS Act in their jurisdiction.



Recommendation 18: Clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the model WHS laws outside of their jurisdiction

Amend the model WHS Act to clarify that the regulator's power to obtain information under s 155 has extraterritorial application.

The other area where cross-border co-operation occurs is through the sharing of information amongst regulators. Concerns were raised that the ability of regulators to meet the requirements of s 152(g) of the model WHS Act³⁶⁰ was hindered by a 'clunky' process and concerns about the extent of the confidentiality provisions in s 271 of the model WHS Act.

I have found that the objective of the model WHS Act that regulators share information and, indeed, promote the sharing of information with each other is not operating as smoothly and effectively as intended. The confidentiality provisions in s 271 of the model WHS Act include a list of circumstances where the provisions do not apply.³⁶¹ The Explanatory Memorandum to the model WHS Act states that these exemptions enable the sharing of information between inspectors who exercise powers and functions under different Acts.³⁶² Arguably these exemptions provide flexibility to jurisdictional regulators to share information to assist in investigations; however, it became clear to me during consultations that more explicit guidance on how regulators share and disclose information would be beneficial.



Recommendation 19: Enable cross-border information sharing between regulators

Amend the model WHS Act to include a specific power enabling regulators to share information between jurisdictions in situations where it would aid them in performing their functions in accordance with the model WHS laws.

³⁵⁹ Inclusion of s 155A.

³⁶⁰ The regulator's function to engage in, promote and coordinate the sharing of information to achieve the object of the model WHS Act, including the sharing of information with a corresponding regulator.

³⁶¹ Section 271(3) of the model WHS Act.

³⁶² Safe Work Australia, *Explanatory Memorandum—model Work Health and Safety Bill*, Safe Work Australia, Canberra, 2016, p 94.

4.7. Incident notification

Current arrangements

Section 35 of the model WHS Act defines the kinds of workplace incidents that must be notified to the regulator. A 'notifiable incident' is an incident involving:

- the death of a person
- 'serious injury or illness' of a person, which is defined as including an injury or illness requiring a person to have immediate treatment as an inpatient, or immediate treatment for certain identified injuries, or medical treatment within 48 hours of exposure to a substance, or
- a 'dangerous incident', which exposes a worker or other persons to serious risks to their health and safety from immediate or imminent exposure to the incidents listed in the section.

The model WHS laws require:

- the PCBU to ensure the regulator is notified immediately after becoming aware a notifiable incident has occurred
- written notification within 48 hours of the request if the regulator asks for it, and
- the incident site to be preserved until an inspector arrives or directs otherwise (subject to some exceptions).

Failing to report a 'notifiable incident' is an offence and penalties apply.

Stakeholder responses—2018 Review of the model WHS laws

A consistent view expressed in the Review consultation process was that the incident notification provisions were causing confusion, were ambiguous and did not necessarily capture all relevant incidents.

The most common concern was the lack of express notification triggers for psychological injuries.³⁶³ This creates confusion about whether psychological health issues need to be notified and when.³⁶⁴ Comcare suggested that adding a notification trigger for psychological injury would 'send a clear message that this risk category is a priority just like the physical hazards'.³⁶⁵

The consistent message from regulators was that, in their experience of the incident notification and site preservation requirements in the model WHS Act, they were poorly understood and often misinterpreted by PCBUs. This results in either over-reporting or under-reporting of particular incidents, both of which impact on regulator and PCBU resourcing.³⁶⁶ For example, the NSW Work Health and Safety Regulators stated that they receive and triage around 6,000 incident notifications each year. Their experience is that workplaces tend to either over-notify by reporting every incident,

³⁶³ See, for example, National Mental Health Commission Submission, pp 2 and 4; National Road Transport Association Submission, p 46; Chamber of Minerals and Energy Submission, p 7; Australian Government Department of Jobs and Small Business Submission, p 24; NSW Work Health and Safety Regulators Submission, p 24; ACTU Submission, pp 49–50.

³⁶⁴ NSW Minerals Council Submission, pp 27–28; Carolyn Davis Submission, p 50.

³⁶⁵ Comcare Submission, p 3.

³⁶⁶ SafeWork SA Submission 1, p 20; Comcare Submission, pp 9–10; Australian Government Department of Jobs and Small Business Submission, p 23.

often for fear of being open to prosecution for non-notification, or under-report based on their interpretation of what constitutes a serious injury or illness or dangerous incident under the model WHS Act.³⁶⁷ While there was support from regulators for the development of improved guidance for PCBUs, there was also a view that updating guidance would not fully address the issues and that the provisions in the model WHS Act should be revised to address ambiguities.³⁶⁸

Industry representatives also called for improved guidance for businesses.³⁶⁹ For example, Master Builders Australia supported greater education and awareness around the provisions related to incident notification and site preservation, noting that 'WHS Incident notification is not top of mind for employers in terms of "things they ought to know"'.³⁷⁰ A few submissions sought formal feedback loops from the regulator to the PCBU following the notification of an incident. For example, the Victorian Automobile Chamber of Commerce said that often a small business preserves the site of an incident following notification to the regulator but does not get a response to the notification. It suggested there should be a time frame within which the regulator reports back on the outcomes of its investigation or response to the notified incident.³⁷¹

A number of union submissions called for revisions to the definitions of 'notifiable incident', 'serious injury or illness' and 'dangerous incident' in the model WHS Act.³⁷² For example, the ACTU recommended that the definitions be revised to capture new and emerging areas of risk, such as occupational violence, bullying and fatigue.³⁷³ The NSW Nurses and Midwives Association provided examples of incidents that would have been notifiable under the New South Wales WHS laws prior to harmonisation but are no longer captured under the model WHS laws and which, in its view, are therefore receiving insufficient attention.³⁷⁴ Some industry submissions also referred to incidents specific to their workplaces and questioned whether they need to be included in the notification provisions,³⁷⁵ while others highlighted emerging and re-emerging work-related illnesses, such as silicosis, asbestosis and occupational lung cancer, and argued that these be included in reg 699 of the model WHS Regulations as prescribed serious illnesses for the purposes of incident notification.³⁷⁶

³⁶⁷ NSW Work Health and Safety Regulators Submission, pp 23–24.

³⁶⁸ SafeWork SA Submission 1, p 20; Comcare Submission, pp 9–10; NSW Work Health and Safety Regulators Submission, pp 23–24.

³⁶⁹ See, for example, HIA Submission, p 15; Ai Group Submission, pp 35–36.

³⁷⁰ Master Builders Australia Submission, p 65.

³⁷¹ Victorian Automobile Chamber of Commerce Submission, pp 17–18.

³⁷² See Qld Council of Unions Submission, p 28; Queensland Nurses and Midwives' Union Submission, pp 7–8.

³⁷³ ACTU Submission, pp 49–50.

³⁷⁴ NSW Nurses & Midwives Association Submission, pp 28–29. Also see Australian Manufacturing Workers' Union Submission, p 50.

³⁷⁵ See, for example, the Minerals Council of Australia Submission, p 20, in relation to damage to authorised plant and uncontrolled escapes, spillage or leakage of substances.

³⁷⁶ NSW Department of Planning and Environment, Resources Regulator Submission, p 1. Within this context, I also noted the outcomes of the NSW Manufactured Stone Industry Taskforce (November 2018).

Discussion and recommendations

I found that the incident notification provisions are not working as intended and that there is a significant level of confusion being felt by everyone who has a role to play in ensuring good WHS outcomes.

The primary intention of incident notification, as discussed in the Explanatory Memorandum to the model WHS Act, is to allow regulators to investigate incidents and potential WHS breaches in a timely manner.³⁷⁷ Regulators may also use incident data to understand emerging trends in incidents, injury and illnesses and to target duty holders with education and compliance activities. It is therefore essential within this context that everyone is applying the incident notification provisions clearly and consistently.

It is clear that the lack of notification criteria under s 35 of the model WHS Act to capture psychological injury is of concern to many who participated in the consultation for the Review. I consider that there should be a notification trigger included in s 35 of the model WHS Act for psychological injuries. However, I acknowledge that this will require some further assessment and analysis to ensure that everyone is clear about what should and should not be notified in this context.

The 2008 National Review recommended that only the most serious incidents should be notified to the regulator—those causing, or which could have caused, fatality and serious injury or illness. The rationale was to reduce the compliance burden this imposes on duty holders.³⁷⁸ The reviewers discussed the challenges of developing definitions of ‘serious injury or illness’ and ‘dangerous incident’. It concluded that the best approach to defining ‘serious injury or incident’ was a combination of specified injuries and threshold levels of medical intervention; and, for ‘dangerous incident’, events that could have caused fatality, serious illness or injury, or suggest the existence of a serious risk to health and safety. The current drafting of these provisions reflects this.³⁷⁹

However, there are two important principles that are missing from the drafting of these definitions. The Explanatory Memorandum to the model WHS laws states that ‘the test [for a serious incident or injury] is an objective one and it does not matter whether a person actually received the treatment referred to in the provision. The test is whether the injury or illness could reasonably be considered to warrant such treatment’.³⁸⁰ This is an important principle which is not included in the wording of the provision, and it would assist PCBUs in deciding what to report to the regulator.

³⁷⁷ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009, p 230.

³⁷⁸ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009, p 232.

³⁷⁹ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009, pp 232–233.

³⁸⁰ Safe Work Australia, *Explanatory Memorandum—model Work Health and Safety Bill*, Safe Work Australia, Canberra, 2016, p 20. Also stated in the Department of Employment and Workplace Relations, *National review into occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009, p 233.

Similarly, the 2008 National Review considered that incidents should be notified where there is a causal link to the work activity of the PCBU rather than the workplace.³⁸¹ This principle is mentioned in the Safe Work Australia incident notification factsheet,³⁸² but it is not reflected in the wording of the provisions or noted in the Explanatory Memorandum to the model WHS Act. This gap was highlighted by the Australian Government Department of Jobs and Small Business submission, which suggested the issue of what constitutes a notifiable incident arising from the conduct of a business or undertaking be revisited with a view to developing further guidance for PCBUs.³⁸³ I note the Safe Work Australia incident notification factsheet, which provides general guidance to PCBUs to help them decide when they need to notify the regulator. Jurisdictional regulators also publish their own supplementary guidance material.

However, in my view, revising guidance material will not go far enough toward addressing the current confusion about a PCBU's mandatory incident reporting requirements. Therefore, consistent with the Terms of Reference for this Review, I am identifying that the incident notification provisions³⁸⁴ require further assessment and analysis with a view to amending the model WHS Act to ensure that they:

- are meeting the original intent of the model WHS laws as described in the 2008 National Review
- provide for a notification trigger for psychological injuries,³⁸⁵ and
- capture relevant incidents, injuries and illnesses that are emerging and re-emerging from new work practices, industries and work arrangements.³⁸⁶

This assessment and analysis should clarify ambiguity, particularly around the definitions of 'serious injury or illness' and 'dangerous incident'. In addition, it should consider some of those issues raised in submissions to this Review, including:

- an analysis of the number and types of notifications each jurisdiction receives, the types of notifications and what the outcomes are in order to evaluate the current situation
- whether the incident notification requirements should include adverse health reports (disease notification) due to exposures to a substance that may require medical treatment some time later than the current 48-hour provision after exposure (long latency)
- ways to ensure that the criteria for notification are clear and easily applicable by relevant duty holders, including in relation to methods of notification and time frames in relation to site preservation and feedback from the regulators on action proposed to be taken, and

³⁸¹ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009, p 233.

³⁸² Safe Work Australia, *Incident notification factsheet*, Safe Work Australia, Canberra, 2015, p 5.

³⁸³ Australian Government Department of Jobs and Small Business Submission, p 23.

³⁸⁴ Part 3 of the model WHS Act.

³⁸⁵ For occupational diseases and psychological injuries, a possible approach could be that, once the employer is notified of the injury (with a diagnosis) and provided with documentation showing work-related causation, they then notify the regulator.

³⁸⁶ This should include consideration of the recommendation regarding inclusion of long latency disease as a notifiable incident by the NSW Parliament Manufactured Stone Industry Taskforce.

- moving additional notifiable incidents prescribed in reg 699 of the model WHS Regulations to the model WHS Act or including a direct reference to reg 699 within the model WHS Act.



Recommendation 20: Review incident notification provisions

Review incident notification provisions in the model WHS Act to ensure they meet the intention outlined in the 2008 National Review, that they provide for a notification trigger for psychological injuries and that they capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements.

Chapter 5: National Compliance and Enforcement Policy

The NCEP is a key element of the model WHS laws framework. It is a 'model policy' that jurisdictions can refer to or adopt as their own. This chapter considers whether the NCEP adequately supports the object of the model WHS Act.

Object of the model WHS Act (see s 3(1)(h))

Maintaining and strengthening the national harmonisation of laws relating to WHS and to facilitate a consistent national approach to WHS in this jurisdiction.

Review Term of Reference

The National Compliance and Enforcement Policy adequately supports the object of the model WHS Act.

The Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA) included a commitment to develop a national compliance and enforcement policy to ensure a consistent regulatory approach across all jurisdictions implementing the model WHS laws. The NCEP was endorsed by WHS ministers in August 2011.³⁸⁷ As part of this Review I was asked to consider whether the NCEP adequately supports the object of the model WHS Act, which is to maintain and strengthen the national harmonisation of laws relating to WHS and to facilitate a consistent national approach to WHS.

The NCEP is a high-level document that sets out the principles underpinning how WHS regulators should approach, monitor and enforce compliance. In its introduction, the NCEP states that ‘to fully realise the benefits of harmonised work health and safety laws, the governments have recognised the need for harmonised work health and safety laws to be complemented by a nationally consistent approach to compliance and enforcement’. It goes on to say, ‘it (NCEP) operates alongside other nationally agreed policies and procedures governing the use of specific regulatory tools or policies that may be specific to each regulator where they relate to the regulator’s interface with the criminal justice system in their jurisdiction’.³⁸⁸

The NCEP establishes nationally agreed approaches under the following headings:

- aims of compliance and enforcement
- key principles underpinning compliance and enforcement activity
- strategic enforcement priorities
- monitoring and compliance approaches
- compliance and enforcement tools, and
- information about guidance, enforcement, investigation and prosecution criteria.

Current arrangements

Some jurisdictions have adopted the NCEP and associated approaches in full, while others have incorporated only some elements into their own compliance and enforcement policies.

In addition to the NCEP, all WHS regulators participate in the HWSA to develop common principles, frameworks, operational protocols and procedures (the common approaches) to support the compliance and enforcement of the model WHS legislation.

Similar to the NCEP, the common approaches have not been uniformly adopted or applied by jurisdictions operating under the model WHS laws.

Stakeholder responses—2018 Review of the model WHS laws

In written submissions and in meetings, most stakeholders expressed a view that WHS regulators across jurisdictions have inconsistent approaches for their enforcement and compliance

³⁸⁷ Section 3(1)(h) of the model WHS Act.

³⁸⁸ Safe Work Australia, *National Compliance and Enforcement Policy*, Safe Work Australia, Canberra, 2011, p 1.

methodologies and strategies. Some industry advocates stated that this inconsistency was making it difficult for PCBUs to comply with their WHS obligations.³⁸⁹

Many of those consulted were aware of the NCEP and its objective of supporting a consistent application of the model WHS laws across jurisdictions. Within this context, the Ai Group submission stated that the NCEP 'has not yet achieved, on its own, the desired outcomes of consistency in approach'.³⁹⁰

Both employer representatives and unions called for a comprehensive review of the NCEP. The Australian Chamber considers that 'The NCEP should be reviewed to ensure it is reflective of the Act's objectives, provides sufficient detail to ensure consistency across jurisdictions and is in line with current best regulatory delivery practices'.³⁹¹

The ACTU recommended an immediate, comprehensive review that included consideration of strategies, guidance and tools used to determine priorities, enforcement activities and effective consultation.³⁹²

Some submissions called for the NCEP to include more detail on how regulators and inspectors carry out compliance and enforcement activities in practice. For example, the HIA's submission stated:

'the NCEP would benefit from a clear articulation of the important role that key stakeholders can play at improving health and safety outcomes, and what the regulators should do to consult with and support workplace parties and stakeholder bodies to achieve sustainable health and safety improvements.'³⁹³

Similar comments were made during consultations for the Independent Review of Occupational Health and Safety Compliance and Enforcement in Victoria (2016). Roundtable participants in that review raised concerns about the NCEP not providing adequate guidance on how the model WHS laws' compliance and enforcement tools work in practice or the circumstances under which they should be used. As a result, it was highlighted that individual regulators were relying on their own methodologies.³⁹⁴

The need for the NCEP to be revised in the context of new and emerging technologies and the changing nature of work was emphasised by the NSW Government.³⁹⁵

Draft research conducted by the NSW Centre for Work Health and Safety suggests that the NCEP is missing a decision-making framework which would give regulators and inspectors practical guidance on how to interpret and enforce consistently the WHS laws while at the same time providing duty holders with some clarity about how and when the regulator will use its enforcement tools. The draft

³⁸⁹ For example, see Master Electricians Association Submission, p 1.

³⁹⁰ Ai Group Submission, p 37.

³⁹¹ Australian Chamber Submission, p 40. See also South Australian Wine Industry Association Submission, p 7; NSW Work Health and Safety Regulators Submission, p 24; Victorian Automotive Chamber of Commerce Submission, p 18; Australian Government Department of Jobs and Small Business Submission, pp 15–16.

³⁹² ACTU Submission, p 9.

³⁹³ HIA Submission, p 16.

³⁹⁴ Government of Victoria, *Independent review of occupational health and safety compliance and enforcement in Victoria*, report prepared by C Noone, M Donnan & C Butcher, Department of Treasury and Finance, Victoria, 2016.

³⁹⁵ NSW Work Health and Safety Regulators Submission, p 24.

report *Understanding effective enforcement tools in work health and safety* examined the decision-making frameworks and enforcement tools used by WHS regulators. It found that the NCEP helps regulators to assess the risks in the workplace, define the seriousness of the offence and decide the initial response. However, it provides less guidance for assessing the risk of reoffending, capability to comply and characteristics influencing encouragement and deterrence as well as how to link these to the use of specific tools.³⁹⁶

Discussion and recommendations

One of the strongest messages coming out of this Review is the importance of consistent approaches by regulators across jurisdictions to ensure that the harmonised laws are supported by a harmonised approach to their interpretation, application and enforcement.

Given each jurisdiction implements and regulates its own WHS laws, it is inevitable that there will be differences in how WHS regulators carry out their functions. I acknowledge that much depends on the local context within which WHS regulators are operating in terms of their structure, funding and resources and their political, geographic and demographic environments. This is particularly so given that enforcement of WHS laws interacts with the criminal law frameworks of each jurisdiction. I also acknowledge that there is no obligation on regulators to adhere to the NCEP, although it was developed for the purpose of achieving greater consistency. However, as the COAG Reform Council cautioned, ‘there is a significant risk that a nationally harmonised occupational health and safety system will not be achieved because of inconsistent enforcement approaches’.³⁹⁷

As intended, the NCEP is a high-level, principles-based document. However, it is clear from the consultations that business, unions, HSRs and workers are calling for more detailed information and transparency about how regulators and inspectors will perform their compliance and enforcement functions. It is also clear that a more detailed NCEP which includes information about the framework within which regulators and inspectors make their decisions would provide a foundation for greater consistency in enforcement approaches across the harmonised jurisdictions.

It is also timely for the content and regulatory approach within the NCEP to be reviewed, particularly as there are many industries and working arrangements that have emerged since the original policy was developed. I am therefore recommending that the NCEP be reviewed, and I offer in this discussion some suggestions about how such a review might be approached.

I suggest that the NCEP should be reworked to include supporting decision-making frameworks relevant to the key functions and powers of the regulator and inspectors under the model WHS laws. An NCEP which provides for decision-making frameworks linked to the selection of enforcement tools by inspectors and regulators (for example, whether to provide advice and information in a particular situation or issue a written direction or statutory notice) and supported by a range of practical examples of approaches to noncompliance could assist not just those inspectors who are enforcing compliance with the model WHS laws but also those who have duties under the model WHS laws. It

³⁹⁶ NSW Government Centre for Work Health and Safety, ‘Understanding effective enforcement tools in work health and safety’ (Draft report), unpublished, 2018, pp 2–4.

³⁹⁷ COAG Reform Council, *National partnership agreement to deliver a seamless national economy: Performance report for 2009–10*, Australian Government, Canberra, 2010, p 17.

would assist in providing transparency about how regulators make decisions as well as providing the authoritative 'voice' many are looking for when it comes to knowing how to comply with the model WHS laws. The use of case studies to demonstrate approaches to noncompliance from various industries and relating to a range of working arrangements would be useful in this context.³⁹⁸

Draft research from the NSW Centre for Work Health and Safety may be useful in supporting the development of decision-making frameworks. It highlights the importance of taking into account motivations of and influencing factors on the conduct of businesses, the likelihood of their complying with WHS laws and their response to specific regulator activity and enforcement tools. The report noted that:

'To use enforcement tools more effectively, regulators could expand the current decision-making frameworks to include guidance on assessment of factors relating to attitude, responsiveness and risk of reoffending ... Regulators could also consider specific risk factors, in addition to compliance history, to help link workplace risk, attitude and motivation to specific interventions. Example factors to consider include business size; the priority and responsibility decision-makers place on WHS, and the ability to absorb the cost of the sanction, if given. Moreover, industries may require differently designed interventions based on their differing WHS culture and level of risk ... Including these considerations as criteria in the NCEP would result in a more comprehensive framework for decision making and the use of enforcement tools.'³⁹⁹

While it is impossible for the NCEP to provide a panacea for all issues that have been raised throughout this Review, many of the uncertainties, confusion and concerns already highlighted in this report could be addressed in it. Within this context, there would be benefits in improving its readability, usability and applicability, particularly in relation to what PCBUs, officers, HSRs, entry permit holders and workers can reasonably expect to occur in specific situations.

There is also an opportunity in the longer term, as case law on the issue emerges, to consider including an outline of how WHS regulators will approach public safety and public health overlaps and how they will work with other regulators that have a safety aspect to their role. I note the Comcare suggestion that it would be 'beneficial for regulators if a boundary line, supported by clear principles, could be drawn between the scope of the model WHS laws and wider public protection'.⁴⁰⁰ These principles could be incorporated into a revised NCEP.

I have identified a number of specific activities and circumstances where stakeholders are seeking more transparency and consistency from WHS regulators. They are listed below. These should be considered as part of the review of the NCEP in the context of whether there is scope to provide supporting decision-making frameworks or practical examples of inspector/regulator approaches:

- **Emerging working arrangements:** How regulators approach new and emerging working arrangements, relationships, business models and technologies. This includes labour-hire, telework, franchising, gig and shared economy platforms.

³⁹⁸ See Fair Work Ombudsman, *Compliance and Enforcement Policy*, Fair Work Ombudsman, Canberra, 2018.

³⁹⁹ NSW Government Centre for Work Health and Safety, 'Understanding effective enforcement tools in work health and safety' (Draft report), unpublished, 2018, pp 3–4.

⁴⁰⁰ Comcare Submission, p 4.

- **Stakeholder engagement:** Reinforce that regulators will engage with stakeholders (including workers, HSRs, entry permit holders and families of victims) during enforcement and compliance activities.
- **Duty holders:** How regulators assess and identify relevant duty holders and their related duties during investigations. This should explicitly include circumstances where there are multiple duty holders, upstream duty holders and officers (discussed further in chapter 2, 'Duties of care').
- **Regulator powers:** How regulators determine which compliance and enforcement tool is appropriate in the circumstances—for example, whether 'agreed action' plans are an appropriate response—and how the regulator may determine and respond to vexatious or purposeful delays when it is exercising its power to request information and documents.
- **Inspector powers:** This includes the decision-making approach when inspectors:
 - are asked to assist in resolving disputes (discussed further in chapter 3, 'Consultation, representation and participation')
 - issue improvement notices, and the circumstances in which these notices could be used to address contraventions across multiple workplaces and activities undertaken by a PCBU, and
 - exercise their power to require production of information or documents and what is considered appropriate and inappropriate use of this information.
- **Notifiable incidents:** Actions that the regulator takes when a notifiable incident is reported (discussed further in chapter 4, 'Compliance and enforcement').

WorkSafe New Zealand's enforcement policies provide a useful example for consideration as part of the NCEP review. Its Enforcement Decision-making Model sits under broader prosecution and enforcement policies and provides a framework that guides its inspectors through the necessary thought process to decide an enforcement response appropriate to the circumstances.⁴⁰¹ A section of that decision-making model is extracted at the end of this chapter. There are other examples of regulator enforcement policies and decision-making frameworks which may also be useful in this context.⁴⁰²



Recommendation 21: Review the National Compliance and Enforcement Policy (NCEP)

Review the NCEP to include supporting decision-making frameworks relevant to the key functions and powers of the regulator to promote a nationally consistent approach to compliance and enforcement.

⁴⁰¹ WorkSafe New Zealand, *Enforcement decision-making model*, WorkSafe New Zealand, 2018, p 2.

⁴⁰² See, for example, Health and Safety Executive, *Enforcement Management Model*, Health and Safety Executive, United Kingdom, 2013 (a guide for inspectors to help them decide what enforcement action to take); and Health and Safety Executive, *Enforcement Policy Statement*, Health and Safety Executive, United Kingdom, 2015 (sets out the general principles and approach which HSE and local authorities are expected to follow). Also see the Fair Work Ombudsman, *Compliance and Enforcement Policy*, Fair Work Ombudsman, Canberra, 2018, which outlines the factors it takes into account when deciding how to respond to requests for assistance.

Enforcement Decision-making Model: A framework that guides inspectors through the thought process to decide on an enforcement response

WorkSafe New Zealand's Enforcement Decision-making Model is based on the United Kingdom Health and Safety Executive's Enforcement Management Model. The model supports inspectors to reach enforcement decisions that are consistent, proportionate, transparent, targeted and accountable.

The model is split into six steps:

1. Identify if the issue is a risk-based issue or a compliance issue. A compliance issue is one that does not directly create
2. A health and safety risk but is still a breach of the Act or regulations—for example, the failure to keep records of a notifiable event.
3. For risk-based issues, consider the 'risk gap': the difference between the actual risk observed onsite and the risk if the duty holder had complied—for example, if they were taking the reasonably practicable steps specified in guidance.
4. For risk-based issues, consider if there is a serious risk and an immediate or imminent exposure to a hazard. If this is the case then the inspector is expected to address this, either with a prohibition notice or by ensuring it is rectified while onsite.⁴⁰³
5. For compliance-based issues and risk-based issues not dealt in step 3, reach an 'initial enforcement expectation':
 - a. For compliance-based issues, consider the strength of the standard and the frequency with which the duty holder complies with this standard.
 - b. For risk-based issues, consider the strength of the standard and the size of the risk gap identified.
6. For all issues, enforcement expectation can be aggravated or mitigated depending on 'duty holder factors' that are relevant to that particular duty holder. For example, if a duty holder has extensive previous history of noncompliance and notices issued to them then the inspector may consider a prosecution as well as issuing another notice. On the other hand, if the duty holder has a good record and a good health and safety system then the inspector may consider a non-statutory letter to be appropriate instead of a notice.
7. Consider the level, focus and overall impact of the enforcement recommended by the model. If the inspector feels that the enforcement expectation is not appropriate then they are asked to discuss the expectation with their manager, who may approve enforcement that is different from the model's expectation.

⁴⁰³ Note that, in the context of the model WHS laws, an improvement notice may be required in these circumstances.

Chapter 6: Prosecutions and legal proceedings

This chapter considers whether the penalties contained in the model WHS laws are effective and sufficient to deter noncompliance with the model WHS laws. It discusses the nature and structure of offences relating to duties of care, who can initiate proceedings, penalties, industrial manslaughter and sentencing. It also examines enforceable undertakings (EUs) as an alternative to prosecution and the availability of insurance to cover the payment of penalties.

Object of the model WHS Act (see s 3(e))

Securing compliance with the model WHS Act through effective and appropriate compliance and enforcement measures.

Review Term of Reference

Whether the compliance and enforcement provisions, such as penalties and enforceable undertakings, are effective and sufficient to deter noncompliance with the WHS legislation.

6.1. Offences and penalties

Current arrangements

Contraventions of the model WHS laws are generally criminal offences. This reflects the broad community view that any person who has a work-related duty of care but does not observe that duty should be liable to a criminal sanction for placing another person's health and safety at risk.⁴⁰⁴

The model WHS Act provides for three categories of offence for failure to comply with a health and safety duty. Category 1 offences relate to the most serious cases of noncompliance, involving recklessness in exposing an individual to whom a duty of care is owed to the risk of death, serious illness or injury. Category 2 offences relate to a person who fails to comply with their health and safety duty (without the presence of recklessness) and in doing so exposes an individual to a risk of death or serious injury or illness. Category 3 offences relate to a person who fails to comply with their health and safety duty without the aggravating factors present in the first two categories.

The physical elements of these three offences are drafted consistently with strict liability, which means no proof of mental element is required and no defence of honest and reasonable mistake is allowed. However, it was left to jurisdictions to clarify where all or part of an offence attracts strict or absolute liability.⁴⁰⁵

Importantly, the offences are focused on the culpability of the offender and the level of risk and not the actual consequences/outcomes of the breach. This approach was considered by the 2008 National Review to be more effective for deterrence. It was recommended that the most serious offences be indictable offences consistent with the most serious breaches of the criminal law, the intention being to maintain public confidence in the administration of justice in the worker safety area.⁴⁰⁶ It was also intended that this approach would reinforce that offences against the model WHS laws are 'real offences' under the criminal law in order to strengthen their deterrence effect.

Under the model WHS laws the financial penalties for WHS offences increased for all jurisdictions, with the maximum penalty of \$3 million (for a Category 1 offence by a body corporate)—almost double the highest previously available.

Queensland and the ACT are the only jurisdictions that currently have an industrial manslaughter offence in addition to the Category 1–3 offences. The Queensland offence is in its WHS Act. It includes offences of industrial manslaughter by a PCBU and industrial manslaughter by a 'senior officer' of a PCBU as follows:

⁴⁰⁴ There are some exceptions for volunteer officers and unincorporated associations: s 34 of the model WHS Act.

⁴⁰⁵ See additional jurisdictional notes to the model WHS Act.

⁴⁰⁶ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: First report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2008, pp 234–235.

- a worker dies, or is injured and later dies, in the course of carrying out work for the business or undertaking
- the conduct of the PCBU or senior officer causes the death. The conduct ‘causes’ the death if it substantially contributes to the death, and
- the PCBU or senior officer is negligent about causing the death by their conduct.

The term ‘senior officer’ in this context is defined differently from the term ‘officer’ under the model WHS Act. A ‘senior officer’ of a PCBU that is a corporation is defined as an ‘executive officer’ of the corporation. An ‘executive officer’ of a corporation is a person who is concerned with, or takes part in, the corporation’s management.

The fault element of the offence is negligence. The Qld WHS Act does not set out the test of negligence to be used in the circumstances, although the 2017 Queensland Review report Recommendation 46 states that it is intended that the existing standard in Queensland criminal law of criminal negligence would apply.

The ACT introduced an industrial manslaughter offence in 2003. Unlike Queensland, the ACT offence is in the *Crimes Act 1900* (ACT) rather than its WHS Act. As the ACT offence was used as a reference for drafting the Queensland offence, the offences are similar. However, there are key differences. For example, the ACT offence includes reckless conduct causing death as an alternative to negligent conduct.

The model WHS laws also provide scope for jurisdictions to legislate for infringement notices (in effect, ‘on the spot’ fines) which inspectors can use as an alternative to prosecution in prescribed circumstances. The relevant requirements for their use is left to each jurisdiction.

The model WHS Regulations specify penalties for offences under the Regulations. The maximum penalty for an offence under the Regulations differs depending on the offence but does not exceed \$30,000. The model WHS Act caps the penalty that can be prescribed for an offence under the Regulations at \$30,000 (s 276(3)(h)).

Stakeholder responses—2018 Review of the model WHS laws

Those who participated in the public consultation had differing views about the current penalty levels. Some considered them to be sufficiently robust or even excessive, while others believed there is an opportunity to increase them to provide a more effective deterrent to noncompliance. I note that the 2017 Queensland Review did not recommend an increase in penalty levels, concluding that increases in maximum fines do not result in courts automatically imposing these maximum levels.

The Ai Group stated that the current regime is ‘more than capable of having a deterrent effect to poor health and safety practices in the workplace, and for providing an appropriate penalty for breaches of the legislation. There is no evidence that this is not the case’.⁴⁰⁷ The Australian Manufacturing Workers’ Union, on the other hand, suggested that advice from regulatory experts strongly suggests

⁴⁰⁷ Ai Group Submission, p 37. The NSW Minerals Council also considered that there was nothing to warrant the imposition of higher penalties in respect of offences under the model WHS Act—see its submission at p 30.

that the current available penalties fall very short of optimum levels.⁴⁰⁸ The Senate inquiry into industrial deaths recommended that the level of monetary penalties in the model WHS Act be reviewed with consideration of whether there should be increased penalties for larger businesses or offenders who repeatedly breach the laws.⁴⁰⁹

Strong and contrasting views were also held on the need for an industrial manslaughter offence in the model WHS Act. Union submissions were consistent on the need for these offences as both an effective deterrent and an appropriate punishment for corporations and individuals making high-level decisions within corporations,⁴¹⁰ while business and industry groups rejected the need for this offence.⁴¹¹ A common reason for rejecting an industrial manslaughter offence was that the current criminal law offences in each jurisdiction are sufficient for dealing with manslaughter prosecutions arising from workplace fatalities. Critics of change in the law pointed to the potential for ‘causing an unnecessary overlap with the state’s criminal laws if industrial manslaughter offences were introduced in the model WHS laws’.⁴¹² Advocates for a more cautious approach to law reform suggested there has not been sufficient time for laws to ‘bed down’ ahead of changing offences.⁴¹³

Advocates for the inclusion of an industrial manslaughter offence believe such change is long overdue and reflects strong public sentiment. The ACTU supports this view and submits that ‘the introduction of a new offence of industrial manslaughter will provide a strong incentive to businesses with poor practices to improve’.⁴¹⁴ The Senate inquiry into industrial deaths recommended that the model WHS laws be amended to provide for an industrial manslaughter offence. It considered serious consequences were warranted for organisations whose negligent actions result in the death of a worker or bystander and the offence would provide a strong and appropriate deterrent across the entire WHS regime.⁴¹⁵

Ms Andrea Madeley, writing on behalf of Victims of Industrial Death, supported the United Kingdom (UK) model, which takes a different approach to that proposed by the ACTU and the Senate inquiry into industrial deaths and instead relies on individual culpability falling under the common law offence of gross negligent manslaughter.⁴¹⁶

The Australian Government Department of Jobs and Small Business suggested that the model WHS Act is appropriately focused on culpability but that, if it was considered necessary to increase deterrence, gross negligence could be included within the Category 1 offence. In addition, the

⁴⁰⁸ Australian Manufacturing Workers’ Union Submission 2, p 43.

⁴⁰⁹ Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, Commonwealth of Australia, Canberra, 2018, p 70.

⁴¹⁰ ACTU Submission, p 6.

⁴¹¹ See, for example, the submissions from the Australian Energy Council, p 4; HIA, p 17; Victorian Automobile Chamber of Commerce, p 19; Chamber of Minerals and Energy, p 4; Ai Group, p 40; Australian Chamber, p 45; and Australian Federation of Employers & Industries, p 34.

⁴¹² Business SA Submission, p 5.

⁴¹³ Master Builders Australia Submission, pp 38–39.

⁴¹⁴ ACTU Submission, p 56.

⁴¹⁵ Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, Commonwealth of Australia, Canberra, 2018, p 58.

⁴¹⁶ Voice of Industrial Death Submission, pp 24–30.

department suggested that the Review could consider reviewing the penalties as a whole, including the use of penalty units rather than set amounts.⁴¹⁷

There was a view amongst inspectors and regulators that the use of infringement notices could be improved and expanded, with a call for amendments to provide greater powers for regulators to issue infringement notices in appropriate situations. Within this context, the NSW Work Health and Safety Regulators' submission suggested that consideration should be given to expanding the list of penalty notice offences to include additional offences, especially where the WHS Regulations provide for specific controls to be implemented.⁴¹⁸

Discussion and recommendations

Penalty levels

In considering the current penalty levels in the model WHS Act I noted that during the development of the model WHS laws there was some debate about whether penalties should be expressed in penalty units or monetary amounts. Jurisdictions agreed it would be less confusing to adopt a monetary figure given the jurisdictional differences in penalty unit levels and potential for further variations to occur over time.⁴¹⁹ Despite this, the Qld WHS Act uses penalty units rather than monetary levels.

Nevertheless, a penalty unit specifically for WHS offences was inserted into the legislation that sets out the value of penalty units in that state to ensure that the end result and maximum fines were the same as in other model WHS law jurisdictions.⁴²⁰ The fact that the Queensland penalty unit is pegged at a level consistent with other model law jurisdictions was a critical argument for consistency in penalties across model WHS law jurisdictions in the decision in *Williamson v VH & MG Imports Pty Ltd*⁴²¹ (*Williamson*). In this instance, the Queensland District Court increased the fine imposed for breach of a WHS duty after taking into account relevant decisions in other jurisdictions with harmonised WHS laws.

Part of the reason that the Workplace Relations Ministers' Council (WRMC) response to the 2008 National Review suggested penalty units instead of set monetary values was to make it easier to update the penalty levels by linking them to inflation or through regulatory amendments. Because the ultimate decision was to go with a monetary figure, it was made clear that 'the intention is to regularly review monetary fines and, if necessary, adjust them to be consistent with Safe Work Australia's determinations'.⁴²² Safe Work Australia later determined that penalties should be reviewed and, if necessary, changed as part of the process of reviewing the model WHS Act every five years. This Review is the first opportunity to reconsider the penalty levels.

⁴¹⁷ Australian Government Department of Jobs and Small Business Submission, pp 24–25.

⁴¹⁸ NSW Work Health and Safety Regulators Submission, p 20.

⁴¹⁹ Safe Work Australia, *Explanatory Memorandum—model Work Health and Safety Bill*, Safe Work Australia, Canberra, 2016, p 7.

⁴²⁰ Section 5(1)(d) of the *Penalties and Sentences Act 1992* (Qld).

⁴²¹ *Williamson v VH & MG Imports Pty Ltd* (2017) QDC 56.

⁴²² Safe Work Australia, *Explanatory Memorandum—model Work Health and Safety Bill*, Safe Work Australia, Canberra, 2016, p 2.

⁴²² Section 5(1)(d) of the *Penalties and Sentences Act 1992* (Qld).

I found the Australian Government Department of Jobs and Small Business submission helpful in this context. It highlighted that the penalty for a Category 1 offence of \$3,000,000 for a body corporate would now be around \$5,727,000 if the penalty was instead expressed as penalty units and indexed to the Commonwealth penalty unit value. This represents a 90.9 per cent increase over the 2011 penalty amount.⁴²³ However, I understand that penalty unit values have not increased in all jurisdictions by the same percentage as the Commonwealth penalty unit since 2011.

I recommend that penalty levels should be increased in order to retain their real value as a deterrent. The penalty levels in the model WHS Act could be increased by 50 per cent as an approximate halfway point to the 90.9 per cent increase in the Commonwealth penalty unit value since 2011. Penalty levels in the model WHS Regulations should also be increased proportionately to the increase in the penalties for offences against the model WHS Act. I also recommend that these penalty levels should be reviewed as part of the ongoing review cycle for the model WHS Act and model WHS Regulations to ensure they remain effective and appropriate.

I found that regulators are not consistent in their use of infringement/penalty notices. I note, for example, that New South Wales has expanded the list of penalty notice offences in its model WHS laws and is advocating expansion within the model WHS laws more generally.⁴²⁴ Greater consistency in the use and application of infringement/penalty notices is likely to be achieved as part of the review of the NCEP, but it is otherwise a matter that the model WHS Act leaves to jurisdictions to determine.



Recommendation 22: Increase penalty levels

- Amend the penalty levels in the model WHS Act to reflect increases in consumer price index and in the value of penalty units in participating jurisdictions since 2011, and
- Review the increased penalty levels as part of future reviews of the model WHS Act and model WHS Regulations to ensure they remain effective and appropriate.

Industrial manslaughter⁴²⁵

Recent developments

The introduction of an industrial manslaughter offence in the Qld WHS Act reignited the public debate about the advantages and disadvantages of including an offence of industrial manslaughter in the model WHS laws. This debate has formed a significant backdrop to this Review. This year also saw the release of the report of a Senate inquiry into industrial deaths which recommended, in October 2018, that Safe Work Australia work with the various Australian governments to 'introduce a

⁴²³ Australian Government Department of Jobs and Small Business Submission, p 25.

⁴²⁴ See the discussion of infringement notices in the NSW Work Health and Safety Regulators Submission, pp 18–21.

⁴²⁵ I acknowledge the assistance of Mr Peter Rozen in identifying the legal issues associated with the introduction of industrial manslaughter provisions within the model WHS laws.

nationally consistent industrial manslaughter offence into the model WHS laws using the Queensland laws as a starting point'.⁴²⁶

The ACT and now Queensland both have industrial manslaughter provisions in their jurisdiction. Although the ACT offence is included in its criminal statute, I note the ACT Government, in its submission to the Senate inquiry into industrial deaths, advocated 'the inclusion of an industrial manslaughter provision in model work health and safety laws that is based on the Queensland model'.⁴²⁷ Prior to its re-election on 24 November 2018, the Government of Victoria announced that it would enact an industrial manslaughter offence into Victorian laws if re-elected.⁴²⁸ A similar announcement was made by the opposition in New South Wales. Should each of the jurisdictions establish its own industrial manslaughter offence, they may take different approaches, further undermining harmonisation on this issue.

The 2008 National Review

Given the community debate and the move by some jurisdictions to adopt or consider adopting an industrial manslaughter offence, it is useful to revisit the reasons why there is no industrial manslaughter offence currently in the model WHS Act.

Under the model WHS laws, the seriousness of a contravention of a general duty provision is not measured by the seriousness of the consequences of that contravention. The 2008 National Review explained its recommended approach:

'Our approach in dealing with non-compliance with duties of care has been to ensure that the statutory responses are consistent with the graduated enforcement of the duties. We are concerned that the natural abhorrence felt towards work-related deaths should not lead to an inappropriate response. The seriousness of offences and sanctions should relate to the culpability of the offender and not solely to the outcome of the non-compliance. Otherwise, egregious, systemic failures to eliminate or control hazards and risks might not be adequately addressed.'⁴²⁹

It proposed that 'the provisions relating to penalties for non-compliance with duties of care can be expressed so that this relativity is recognised'. It ultimately recommended that the model WHS Act should 'provide that in a case of very high culpability (involving recklessness or gross negligence) in relation to non-compliance with a duty of care where there was serious harm (fatality or serious injury) to any person or a high risk of such harm, the highest penalties under the Act should apply, including imprisonment for up to five years' (Recommendation 56).⁴³⁰

⁴²⁶ Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, Commonwealth of Australia, Canberra, 2018, paras 5.2–5.54 and Recommendation 13.

⁴²⁷ ACT Government, *ACT Government submission to the inquiry into the prevention, investigation and prosecution of industrial deaths in Australia*, Commonwealth of Australia, Canberra, 2018, pp 51–54.

⁴²⁸ Victoria has not implemented the model WHS laws.

⁴²⁹ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: First report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2008, p 135.

⁴³⁰ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: First report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2008, p 135.

Importantly, the recommendation that the fault element for this high culpability offence in the model WHS Act be 'recklessness or gross negligence' was not accepted by the WRMC. The WRMC considered that 'gross negligence' offences should be dealt with outside of the model Act because to include them would 'otherwise cut across local criminal laws and manslaughter offences'.⁴³¹

I note that the issue of the model WHS Act cutting across local general criminal laws arises for reckless conduct in the same way as it arises for gross negligence.

Local criminal laws also deal with situations where an individual suffers serious injury or illness, or dies, as a result of a person's reckless conduct. For example, in the Northern Territory, a PCBU could face a charge under ss 19 and 31 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) and also face a charge of recklessly endangering life or serious harm under the *Criminal Code Act* (NT Criminal Code).⁴³² The WRMC did not raise concerns within this context. Also, gross negligence is currently punishable as a Category 2 offence, so there is crossover between the model WHS Act and gross negligence offences under local criminal laws in any event. It is common in the criminal law for conduct to amount to different offences sometimes found in different statutes.

The Category 1 offence under s 31 of the model WHS Act does not require proof that there 'was serious harm to any person' but applies where there is 'a risk of death or serious injury or illness'. The distinction is an important one. The Category 1 offence is risk-based.

There have been very few successful Category 1 prosecutions in any of the jurisdictions that have implemented the model WHS Act, which may in part be due to the difficulties associated with proving 'recklessness.' Recklessness in criminal law is intentional and requires the prosecution to prove a conscious choice to take an unjustified risk. Criminal negligence is, however, usually regarded as not requiring intent. Currently, if a PCBU knowingly endangers another person's health and safety, they may be charged with a Category 1 offence. By adding a threshold for prosecution of gross negligence, a prosecutor can prosecute an offender for failing to conduct themselves safely or provide a safe environment for others, without having to establish this failure as being intentional. Instead it requires proof of 'such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment'.⁴³³

The case for the status quo

During consultations for the Review, it became clear that many parties, particularly industry and business representatives and some legal commentators, opposed the introduction of an industrial manslaughter offence under the model WHS laws and continued to support the risk-based framework for offences (that is, proof of harm is not required and offences apply where there is exposure to the risk).

⁴³¹ Workplace Relations Ministers' Council, *WRMC response to recommendations of the national review into model OHS laws*, Safe Work Australia, Canberra, 2009, p 13.

⁴³² See ss 174C and 174D of the *Criminal Code Act* (NT) respectively.

⁴³³ *Patel v The Queen* [2012] 247 CLR 531, citing *Nydam v R* [1977] VR 430, 435. In the ACT and the Northern Territory, this definition of gross negligence has been given statutory effect—see s 21(a) of the *Criminal Code 2002* (ACT) and s 43AL(a) of the *Criminal Code Act* (NT).

I acknowledge in this context the recent paper 'Industrial manslaughter reform: The rise of a solution not fit for purpose', which highlights a number of reasons why the authors consider industrial manslaughter provisions to be an ineffective solution for the issues it is trying to address. These include that such offences interfere with the risk-based preventative framework of the WHS laws; the full extent of enforcement under the current offences in the WHS laws has not yet been realised; and just because an offence is on the books does not mean it will be used.⁴³⁴

I also acknowledge within this context the views of the South Australian Coroner, who dismissed calls for an industrial manslaughter offence in South Australia, suggesting that the current laws for prosecuting workplace injuries cause defensive litigious strategies on the part of employers and regulators and an industrial manslaughter offence will only add to that.⁴³⁵ However, the absence of an industrial manslaughter offence will not address the defensive litigious strategies highlighted by the South Australian Coroner.

The case for change

Consultations for this Review (mirrored in submissions to the Senate inquiry into industrial deaths) revealed a clear and increasing view amongst a great many in the community that there should be an outcome-based offence in the model WHS laws where the death of another person occurs as a result of the gross negligence of either an individual or an organisation. The strong community expectation is that it should be possible to prosecute for the death of a person under a statutory offence of industrial manslaughter in the model WHS laws.

As discussed, the most commonly cited reason for rejecting an industrial manslaughter offence during consultations was that the current criminal law offences in each jurisdiction are sufficient for dealing with workplace fatalities. Opponents of change pointed to the potential for a problematic overlap with a jurisdiction's criminal laws if an industrial manslaughter offence is introduced in the model WHS Act. This argument is less convincing given some states and territories either have or are exploring the introduction of an industrial manslaughter offence to reflect what they perceive as the community will and to deal with the limitations of the criminal law in prosecuting breaches resulting in workplace death. At a practical level, the absence of an industrial manslaughter offence in the model WHS Act also increases the potential for inconsistency as jurisdictions successively introduce their own offence into their WHS or other legislation.

Limitations of criminal manslaughter in dealing with workplace fatalities

While it is established law in both England⁴³⁶ and Australia⁴³⁷ that a corporation can commit the crime of negligent manslaughter,⁴³⁸ many legal experts point to significant hurdles for prosecutors to

⁴³⁴ Clyde & Co, 'Industrial manslaughter reform: The rise of a solution not fit for purpose', discussion paper, Clyde & Co, pp 10, 15 and 17. I note that many of my recommendations address issues raised in this paper—for example, the importance of sentencing guidelines.

⁴³⁵ South Australian Coroners Court, *Inquest into the death of Mr Jorge Castillo-Riffo*, 9/2018 (2071/2014), p 88.

⁴³⁶ *P&O European Ferries (Dover) Ltd* [1991] 93 Cr App Rep 72, 84.

⁴³⁷ *R v AC Hatrick Chemicals Pty Ltd* [1995] 140 IR 243.

⁴³⁸ Under the existing law, a corporation can even commit a crime of *intentional* violence such as assault: *Presidential Security Services Pty Ltd v Brilley* [2008] NSWCA 204, [160] (Ipp JA, with whom Allsop P and Beazley JA agreed).

overcome to secure a manslaughter conviction against a corporation. Prosecutors must identify a grossly negligent individual who is the embodiment of the company and whose conduct and state of mind may be attributed to the corporation (identification doctrine⁴³⁹).

Difficulties within the common law with regard to aggregating the negligence of more than one such individual (the prohibition on aggregation) have also been highlighted by UK legal experts—a prohibition which, they say, makes prosecutions of large companies for manslaughter almost impossible.⁴⁴⁰ The Queensland Government cited difficulties in its Criminal Code as a key reason for introducing its industrial manslaughter offence. Specifically, it said, ‘the need to identify an individual director or employee as the directing mind and will of the corporation ... ultimately means that manslaughter prosecutions under the Criminal Code are only successful against small businesses and that prosecutions against large corporations are unlikely to succeed’.⁴⁴¹ The identification of a grossly negligent individual who is the embodiment of a small company is not as problematic, as with small companies it is often the case that the director will be actively involved in day-to-day operations.⁴⁴²

The 2017 Queensland Review report highlighted the effect of ss 244, 245 and 251 of the Qld WHS Act (which are consistent with the model WHS Act) as a key reason for a new industrial manslaughter offence being part of the Qld WHS Act. These sections allow for the imputation to a corporation the conduct of any employee, agent or officer of the corporation and overcome the limitations identified in the criminal law.⁴⁴³ The Queensland Criminal Code does not include analogous provisions, so it relies on common law to deal with the aggregation issue. I have not investigated each jurisdiction’s criminal laws to assess the extent of their limitations in this regard, if any. The ability to aggregate the negligence of more than one individual to a corporation would need to be provided for in the development of an industrial manslaughter offence within the model WHS laws.

A further limitation of the criminal manslaughter offence concerns sanctions. Traditionally, the crime of manslaughter is only punishable by sentencing an offender to imprisonment. Courts have interpreted such provisions to mean that a corporation cannot commit the offence of manslaughter because there will be no sanction that can be imposed in the event of a guilty finding.⁴⁴⁴ In New South Wales, this has now been addressed so that a court may impose a fine as an alternative sanction where a corporation is found guilty of a crime punishable only by imprisonment.⁴⁴⁵ But this is not the case

⁴³⁹ *R v HM Coroner for East Kent; ex parte Spooner and Ors* [1987] 88 CR App R; and *R v AC Hatrick Chemicals Pty Ltd* [1995] 140 IR 243.

⁴⁴⁰ See, for example, V Roper, ‘The Corporate Manslaughter and Corporate Homicide Act 2007—A 10-year review’, *Journal of Criminal Law*, vol 82, no 1, 2018, pp 48–75.

⁴⁴¹ Workplace Health and Safety, Queensland, 2018, viewed 20 November 2018 <<https://www.worksafe.qld.gov.au/laws-and-compliance/compliance-and-enforcement/penalties/industrial-manslaughter-offence>>.

⁴⁴² See, for example, *R v Denbo Pty Ltd & Timothy Ian Nadenbousch* [1994] VicSC 326 (unreported, VSC, Teague J, 14 June 1994), discussed in S Chesterman, ‘The corporate veil, crime and punishment’, *Melbourne University Law Review*, vol 19, no 4, 1994.

⁴⁴³ T Lyons, *Best practice review of Workplace Health and Safety Queensland: Final report*, Workplace Health and Safety Queensland, Brisbane, 2017, pp 112–113.

⁴⁴⁴ *R v ICR Haulage Limited* [1944] 1 KB 551, 554. See also *Presidential Security Services Pty Ltd v Brilley* [2008] NSWCA 204, [141].

⁴⁴⁵ Section 16 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

throughout Australia, and the absence of such a provision in Queensland law was one reason cited by the 2017 Queensland Review as justifying the need for law reform.⁴⁴⁶

Introducing 'gross negligence' to Category 1 offences

The ongoing debate over an appropriate response to workplace deaths is linked to the fact that the model WHS Act categories of offences are based on the degree of culpability, risk and harm and not on the actual consequence or outcome of the breach. This approach ensures that a duty holder can be held to account for a breach even when it has not resulted in an injury, illness or death (although in reality most prosecutions follow an injury or fatality).

There are two key issues relevant to the current debate over penalties:

- whether 'gross negligence' as well as 'recklessness' should be contained in the Category 1 offence under the WHS Act, and
- whether all jurisdictions should reflect some version of the provisions in place in Queensland and the ACT⁴⁴⁷ to address gross negligence by corporations or senior officers resulting in a person's death.

Having carefully considered all of the views and issues in relation to the debate over penalties, I consider that both of these proposals should be adopted. First, I am recommending that, consistent with Recommendation 56 of the 2008 National Review, the highest penalties under s 31 of the model WHS Act (Category 1 offence) should be applied in cases where very high culpability can be shown involving gross negligence.

Currently, s 31 of the model WHS Act specifically references the fault element of 'recklessness' but not 'gross negligence'.⁴⁴⁸ Introducing 'gross negligence' as a fault element of the Category 1 offence will maintain the risk-based approach and will add that extra deterrent into the model WHS offence framework recommended by the 2008 National Review.

This change to the model WHS Act will assist prosecutors to secure convictions for the most egregious breaches of duties. This will assist in addressing community concerns that many PCBUs accused of serious WHS breaches are escaping punishment because the bar for conviction is set too high.

Introducing an industrial manslaughter offence

I consider there is merit to introducing an additional 'gross negligence' offence in the model WHS Act, specifically where the outcome of that gross negligence is the death of a person covered by the WHS laws.⁴⁴⁹ I consider that this response is required to address increasing community concerns that there should be a separate industrial manslaughter offence where there is a gross deviation from a

⁴⁴⁶ T Lyons, *Best practice review of Workplace Health and Safety Queensland: Final report*, Workplace Health and Safety Queensland, Brisbane, 2017, p 111.

⁴⁴⁷ Currently through ss 49A–49E of the *Crimes Act 1900* (ACT).

⁴⁴⁸ See discussion in Australian Government Department of Jobs and Small Business Submission, pp 26–27.

⁴⁴⁹ I note in this context that based on the history of OHS and WHS prosecutions to date it is likely to be rare for a Category 1 prosecution to be undertaken in the absence of a fatality.

reasonable standard of care that leads to a workplace death. I also consider it is required to address the limitations of the criminal law when dealing with breaches of WHS duties.

The Senate inquiry into industrial deaths recommended that an industrial manslaughter offence should be based on the provisions in the Qld WHS Act. I have, however, identified some issues with this approach that I consider need to be addressed. I note that some elements of the Queensland approach rely on provisions within the model WHS laws that would similarly need to be analysed if an industrial manslaughter offence is to be included.

First, while the Queensland offence broadens the range of individuals whose conduct and state of mind may be attributed to a corporation, it falls short of targeting organisational as well as individual aspects of a corporation's conduct.

In addition, the Qld WHS Act introduced a new concept of 'senior officer', which, although similar, differs from the definition of officer which generally applies to the model WHS Act. This could give rise to confusion, exacerbated by the use of another term—'executive officer'—as part of the definition of 'senior officer'.⁴⁵⁰ I consider that the current definition of 'officer' in the model WHS Act should continue to be relied on for any new offence under the model WHS Act.

Last, the Qld WHS Act is only relevant to the death of a 'worker' as defined in s 7 of the Act; it does not extend to third parties to the work relationship, such as clients, customers, visitors or neighbours—known as 'other persons' under the model WHS Act.⁴⁵¹ Many high-profile industrial incidents impact on such people (for example, the deaths of four visitors to the theme park at Dreamworld in 2016). An industrial manslaughter offence must include the death of other persons at the workplace as well as workers.

I note that the 2017 Queensland Review recommended an industrial manslaughter offence should be that of 'negligence' causing death as opposed to 'gross negligence' causing death.⁴⁵² Given I am recommending the threshold for conviction of Category 1 offences be amended consistent with the recommendations of the 2008 National Review, I consider gross negligence to be the appropriate legal benchmark. The introduction of an industrial manslaughter offence and the inclusion of 'gross negligence' within Category 1 are part of a package of measures I am recommending. They are intended to complement Recommendations 22 and 25:

- increase financial penalties for breaches of duty (Recommendation 22), and
- introduce national sentencing guidelines (Recommendation 25).

These measures are intended to increase the severity of penalties and thereby enhance deterrence under the model WHS laws. Collectively, they are aimed at meeting growing community expectations

⁴⁵⁰ See s 34A(1) of the Qld WHS Act.

⁴⁵¹ Section 19(2) of the model WHS Act extends the duty of a PCBU beyond workers to any 'other person' who may be put at risk from work carried out by a business or undertaking.

⁴⁵² T Lyons, *Best practice review of Workplace Health and Safety Queensland: Final report*, Workplace Health and Safety Queensland, Brisbane, 2017, p 13: 'The rationale for this view is that gross negligence has a particular legal meaning that requires more than negligence. The consequence of this is that it may make prosecutions more difficult to pursue and may be the reason minimal prosecutions have been pursued in jurisdictions who have industrial manslaughter provisions. Subsequently, proving negligence to the criminal standard of proof is considered to be the appropriate framing for the new offence.'

about the appropriate response to workplace fatalities; addressing the limitations of the criminal law when dealing with workplace deaths; and enhancing and maintaining harmonisation of WHS laws.

I acknowledge that this is a complex area of law which will require advice from legal experts regarding how best to implement the package of recommendations.

Recommendation 23a: Enhance Category 1 offence

Amend s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is grossly negligent in exposing an individual to a risk of serious harm or death.

Recommendation 23b: Industrial manslaughter

Amend the model WHS Act to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and include the following:

- The offence can be committed by a PCBU and an officer as defined under s 4 of the model WHS Act.
- The conduct engaged in on behalf of a body corporate is taken to be conduct engaged in by the body corporate.
- A body corporate's conduct includes the conduct of the body corporate when viewed as a whole by aggregating the conduct of its employees, agents or officers.
- The offence covers the death of an individual to whom a duty is owed.

Safe Work Australia should work with legal experts to draft the offence and include consideration of recommendations to increase penalty levels (Recommendation 22) and develop sentencing guidelines (Recommendation 25).

6.2. Legal proceedings

Current arrangements

The model WHS Act requires that legal proceedings can only be brought by a WHS regulator or an inspector acting with the written authorisation of the regulator or the DPP.⁴⁵³ Allowing only these parties to prosecute was seen as a means of improving the consistency of enforcement procedures and facilitating the process of graduated enforcement. However, s 231 of the model WHS Act does provide for a person to request that the regulator bring a prosecution in response to a Category 1 or Category 2 offence if no prosecution has been brought within six to 12 months of the occurrence.

Section 232 of the model WHS Act sets out the limitation periods for when proceedings for an offence may begin. Proceedings for a Category 1 offence can be brought after the end of the applicable limitation period if fresh evidence is discovered and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period.

Under the model WHS Act the burden of proof for WHS offences rests with the prosecutor, who must prove each and every element of an offence beyond reasonable doubt.

⁴⁵³ Section 230 of the model WHS Act.

Stakeholder responses—2018 Review of the model WHS laws

The Queensland Government recommended that the Review specifically consider reintroducing a reverse onus of proof and the effect that the removal of the reverse onus of proof has had nationally on patterns of enforcement, the success rates of prosecutions and safety outcomes.⁴⁵⁴

Business and industry representatives did not support a reverse onus of proof in the model WHS laws, and this was reflected in the meetings and forums conducted as part of this Review.⁴⁵⁵ The ACTU supported changing the law but recognised that ‘this [reverse onus of proof] is a contentious matter’. The ACTU argued the partial reverse onus is clearly necessary and justified in this case because of the public interest in ensuring the health and safety of people at work.⁴⁵⁶ Most union submissions called for the ability of unions to initiate prosecutions. This is currently available in New South Wales but not in any of the other model law jurisdictions.⁴⁵⁷ The New South Wales Teachers Federation provided case studies of where it had successfully prosecuted in the past and argued that limits on this ability in the model laws ‘is unfortunate as previous prosecutions conducted by the Federation [union] resulted in significant improvements in work health and safety’.⁴⁵⁸ Employer and industry associations opposed the union’s right to prosecute.⁴⁵⁹

Many stakeholders agreed that the ability of other parties to bring a prosecution if one was not brought by the regulator is a valuable and appropriate approach. Several, however, opposed the suggestion that third parties should be able to bring prosecutions.⁴⁶⁰ Ms Andrea Madeley suggested that the immediate family of the deceased worker should be able to bring a breach of statutory duty claim against alleged offenders if the DPP decides not to proceed with a prosecution.⁴⁶¹ The NSW Minerals Council considered that the DPP and not the regulator should have the power to initiate proceedings for an offence under the model WHS Act.⁴⁶²

Limitation period for initiating prosecutions

Regulators noted unintended consequences of s 231 of the model WHS Act,⁴⁶³ which provides for a person to request that the regulator bring a prosecution in response to a Category 1 or Category 2 offence if no prosecution has been brought within six to 12 months of the occurrence. Currently, however, the time frame for the requests to be made does not align with the amount of time provided to the regulator to finalise the investigation and make a decision on whether to prosecute or not. Accordingly, regulators suggested amendments to the section to provide greater clarity. Comcare

⁴⁵⁴ Queensland Government Submission, pp 13–14.

⁴⁵⁵ See the submissions from the Australian Federation of Employers & Industries and the National Road Transport Association.

⁴⁵⁶ ACTU Submission, p 65.

⁴⁵⁷ See the submissions from the Health Services Union and the CFMEU (Construction and General Division). This was also recommended in the Senate Education and Employment References Committee inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia.

⁴⁵⁸ New South Wales Teachers Federation Submission, pp 10–11.

⁴⁵⁹ Chamber of Minerals and Energy Submission, p 16.

⁴⁶⁰ For example, Chamber of Minerals and Energy Submission, p 16.

⁴⁶¹ Voice of Industrial Death Submission, pp 11–12.

⁴⁶² NSW Minerals Council Submission, p 31.

⁴⁶³ Procedure if prosecution is not brought.

advised that their concerns with s 231 of the model WHS Act include the fact that time frames can be difficult to meet, advising the person under investigation of a request made under s 231 can be problematic and the requirement to provide a brief of evidence to the DPP can fetter the regulator's discretion.⁴⁶⁴

The Senate inquiry into industrial deaths included a number of recommendations for regulators to be required to provide a published, written justification for not bringing forward a coronial inquest or prosecution following an industrial death, without a person having to write to the WHS regulator.⁴⁶⁵

Discussion and recommendations

I note that prior to the implementation of the model WHS laws only New South Wales and Queensland provided for a reverse onus of proof for offences relating to duties of care. In these two jurisdictions, duties were not subject to the qualifier of what was reasonably practicable, so it was appropriate that in a prosecution a defendant was required to show that they had done everything reasonably practicable to ensure safety. That is, having taken reasonably practicable steps was the basis of the defence. In all other jurisdictions, the burden of proof for duty of care offences was placed entirely on the prosecution. The 2008 National Review considered this issue carefully and recommended that in the model WHS Act the prosecution should bear the criminal standard of proof for all elements of a WHS offence.

The approach taken in the model WHS Act reflects the view that all duty of care offences are criminal offences and therefore it was considered appropriate that the burden of proof rest with the prosecutors, particularly given the substantial increase in the size and range of penalties for WHS offences, including imprisonment.

Given that I am recommending (a) a further increase in penalties; and (b) the introduction of a new industrial manslaughter offence, I consider that the current onus of proof is appropriate for the nature of the offences under the model WHS Act. I am therefore not recommending that the onus of proof be reversed. I have also considered the calls for union right to prosecute in this context and for the same reasons am not recommending a change in the current model WHS laws.

Limitation period for initiating prosecutions

With regard to limitation periods for initiating proceedings, I consider that the 12-month deadline imposed by s 231(1)(b) of the model WHS Act may have negative consequences where there is a long delay between the occurrence/incident and the regulator's decision on whether there is an offence to be prosecuted. I note the view of Comcare⁴⁶⁶ that the default two-year limitation period for commencing a prosecution under the model WHS Act does not start until the regulator is in possession of sufficient facts to make a determination on whether an offence may have been committed. If this interpretation is correct then the 12-month deadline imposed by s 231 of the model

⁴⁶⁴ Comcare Submission, pp 11–12.

⁴⁶⁵ Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, Commonwealth of Australia, Canberra, 2018, pp 60–61. See Recommendations 15 and 16.

⁴⁶⁶ Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, Commonwealth of Australia, Canberra, 2018, p 12.

WHS Act would mean that an accountability mechanism is unavailable in many cases, particularly where there has been a protracted investigation.

Accordingly, I recommend that s 231 of the model WHS Act be redrafted to remove the 12-month deadline for making requests. This would ensure that the Crown can still be held accountable for delay, inaction or indecision in cases where there has been a protracted investigation or significant delay in making a decision on prosecution.

It would also be prudent to amend the model WHS Act to make clear what is to happen if an investigation is not complete within three months of a request made under s 231. Under s 231, if an investigation is not complete within three months of receiving the request, the regulator must advise the person that it is not complete. But s 231 is silent on what the next steps are after that advice is issued. I recommend that a provision be inserted requiring regulators to provide regular updates on the investigation after the three-month notice is issued until a decision is made on whether a prosecution will be brought.



Recommendation 24: Improve WHS regulator accountability for investigation progress

Amend the model WHS Act to remove the 12-month deadline for a request under s 231 that the regulator bring a prosecution in response to a Category 1 or Category 2 offence and to ensure ongoing accountability to the person who made the request until a decision is made on whether a prosecution will be brought.

6.3. Sentencing

Current arrangements

The model WHS Act provides a range of sentencing options if a court convicts a person of an offence against the model WHS laws.⁴⁶⁷ Orders may be made in addition to any other penalty that may be imposed (s 235 of the model WHS Act). These include adverse publicity, restoration, project, WHS undertaking and training orders (ss 236–239 and s 241 of the model WHS Act). Sentencing is subject to the law, practices and procedures in each of the jurisdictions that have implemented the model WHS laws.⁴⁶⁸ In addition to sentencing legislation, the courts also take into account case law as relevant to the interpretation of the legislation and the circumstances of the case.

Stakeholder responses—2018 Review of the model WHS laws

A common theme of concern raised during the public consultations was that sentencing outcomes were not providing an effective deterrent and were at odds with what had been envisaged at the

⁴⁶⁷ Part 13, Division 2 of the model WHS Act.

⁴⁶⁸ For example, in Queensland, the court imposes sentence for a breach of the WHS Act in that jurisdiction in accordance with the *Penalties and Sentences Act 1992* (Qld) and in South Australia in accordance with the *Sentencing Act 2017* (SA).

introduction of the model WHS laws. However, there was a mixed response to the development of national sentencing guidelines to combat inconsistent sentencing between the jurisdictions.⁴⁶⁹

The Queensland Government specifically recommended that this Review consider the development of sentencing guidelines that outline 'suggested penalties' to apply in all jurisdictions.⁴⁷⁰ The Senate inquiry into industrial deaths also recommended national sentencing guidelines be developed to ensure consistent and appropriate sentencing for serious breaches across jurisdictions. It considered that the low level of penalties awarded by courts is not meeting community expectations about the gravity of workplace fatalities or effectively deterring others from disregarding the safety of workers.⁴⁷¹

The Ai Group suggested that 'the development of a nationally consistent sentencing guideline for work health and safety offenders would be a waste of time and resource ... it will not be endorsed by all Australian states and territories'.⁴⁷² But others supported any change that facilitates consistency of application of the model WHS laws across the country.⁴⁷³

Ms Andrea Madeley listed the mitigating factors that are commonly considered by judges and magistrates during WHS-related sentencing submissions. These included expressions of remorse, claims of financial hardship and incapacity to pay,⁴⁷⁴ co-operation with the regulator during investigation and discounts on penalties for early guilty pleas. She saw these as the reasons that outcomes have been inconsistent in direct conflict with the harmonisation object. She also highlighted the dissolution and subsequent 'phoenixing' of companies as a strategy often taken to absolve duty holders of liability.⁴⁷⁵ Her conclusion is that:

'there is scope for something more suitably directed at sentencing corporate offenders and that it should form part of the model WHS Act so that section 3 of the objects, being a primary purpose of the harmonisation, are not incessantly compromised.'⁴⁷⁶

⁴⁶⁹ Those who supported the concept in their written submissions included the HIA, the Australian Manufacturing Workers' Union, the ACTU and the National Road Transport Association. Those who opposed the concept in their written submissions included the Victorian Automobile Chamber of Commerce, the NSW Minerals Council and Master Builders Australia.

⁴⁷⁰ Queensland Government Submission, pp 14–15.

⁴⁷¹ Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, Commonwealth of Australia, Canberra, 2018, p 70.

⁴⁷² Victorian Automobile Chamber of Commerce Submission, pp 19–20.

⁴⁷³ See, for example, the NSW Work Health and Safety Regulators Submission, p 25.

⁴⁷⁴ James Nolan, in his submission, suggested penalties should be assessed on a 'capacity to pay' basis.

⁴⁷⁵ Voice of Industrial Death Submission, pp 35–39. See also The Australian Workers' Union Submission, p 2; and M Schmidt, 'Sentencing corporate offenders: Conundrums and areas of potential law reform', *Judicial Review: Selected Conference Papers*, journal of the Judicial Commission of New South Wales, vol 10, no 2, 2011, pp 201–219. In the latter, M Schmidt says that the 'Phoenix phenomena is well recognised—ie a company is wound up once criminal proceedings are concluded and the business then springs back into life under the guise of a new company without the fine imposed on the old company being paid and the new business not carrying the baggage of the old company's criminal record'.

⁴⁷⁶ Voice of Industrial Death Submission, p 38.

Discussion and recommendations

In considering the issue of sentencing for WHS offences and its role in supporting the object of the model WHS Act, I considered the 2008 National Review. It said:

‘we see a potential difficulty with [each jurisdiction’s general] sentencing guidelines in that they may not be appropriately framed for an OHS offence. There may be unintended limits on a court from the application of such guidelines where they are more directed at an ordinary criminal breach rather than that under an OHS Act. It would be better for such guidelines to be tailored to suit OHS prosecutions.’⁴⁷⁷

The First Report recommended that:

‘subject to wider criminal justice policy considerations, the model Act should provide for the promulgation of sentencing guidelines or, where there are applicable sentencing guidelines, they should be reviewed for national consistency and compatibility with the OHS regulatory regime.’⁴⁷⁸

The WRMC agreed in principle with this approach but noted that this issue should be dealt with outside the model OHS laws on the basis that the provisions for sentencing guidelines differ between jurisdictions and are generally dealt with in the general sentencing law or criminal procedure legislation.⁴⁷⁹ To date, there does not appear to have been any further comprehensive work done on this recommendation, and issues of inconsistency arising from sentencing outcomes remain.

I note that the issue is not just one of inconsistency. The interaction of the general criminal procedures and sentencing processes in each jurisdiction with the prosecution of WHS offences can also lead to significantly reduced sentences (for example, the deductions in fines for early guilty pleas and the ability in Queensland to have a guilty finding with no conviction recorded).

I considered the UK’s *Health and safety offences, corporate manslaughter and food safety and hygiene offences, definitive guideline*, issued by the Sentencing Council. This was introduced in 2016 and directs the courts to follow a step-by-step formula when sentencing offenders. The primary considerations are the offender’s culpability, the likelihood of harm arising from the contravention and how bad the harm could have been, how many people were exposed to the harm, and whether the OHS failing was a significant cause of actual harm. Once these assessments are completed, the court must take into account the business’s likely turnover in order to set a starting point in determining the level of penalty. A range of factors are then considered in order to increase or decrease the level of the fine—for example, remorse, early guilty pleas and co-operation with the investigators. This guideline applies across the UK.

I am aware that the situation in Australia is more complex than the UK, with each Australian jurisdiction administering its own WHS and sentencing legislation. Unless adopted by each jurisdiction, a national WHS sentencing guideline would not be binding on the relevant courts.

⁴⁷⁷ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: First report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2008, p 164.

⁴⁷⁸ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: First report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2008, p 164.

⁴⁷⁹ Workplace Relations Ministers’ Council, *WRMC response to recommendations of the national review into model OHS laws*, Safe Work Australia, Canberra, 2009.

I acknowledge in this context the comments of the Ai Group about the difficulties of achieving a nationally agreed sentencing guideline.⁴⁸⁰

There are other options to achieve consistency in sentencing outcomes. An approach similar to that of the NCEP, wherein jurisdictions agree to a nationally consistent approach to sentencing as a matter of policy, could be taken. However, there are then questions about how a policy-based national sentencing guideline would fit into jurisdictional sentencing procedures, such as whether the courts could lawfully take the guidelines into account under existing sentencing laws.

For example, s 21A of the *Crimes (Sentencing Procedures) Act 1999* (NSW) provides that, in sentencing, the court is to take into account:

- the listed aggravating and mitigating factors and any other objective or subjective factor that affects the relative seriousness of the offence, and
- any other matters that are required or permitted to be taken into account by the court under any Act or rule of law.⁴⁸¹

There is a question about whether this provision would allow consideration of a policy-based national guideline on sentencing WHS offences. It may allow a court to take into account guidelines on sentencing WHS offences that are contained in an Act (such as through an amendment to the model WHS Act as implemented in the jurisdictions).⁴⁸²

Another option is for guidelines to be agreed by regulators for the purposes of making submissions to the courts on sentencing. In this respect, it would be similar to the NCEP in that it could set out overarching principles to underpin a consistent approach to sentencing submissions by regulators across jurisdictions with harmonised WHS laws. It could be written in similar terms to the UK guideline by describing offence types, the types of sentences that are appropriate for varying degrees of seriousness within those types and the factors to be taken into account when calculating an appropriate sentence. It could also deal with non-pecuniary sanctions and how they should or might be raised before the courts. Each regulator could then take their jurisdictional approach to prosecutions and sentencing into account when applying the guidelines in practice. Unlike the UK guideline, they would not be legally binding but could be used by regulators as a way to ensure consistency in sentencing submissions considered by the courts across the jurisdictions. This approach is obviously not possible without the agreement and co-operation of the regulators.

Finally, there is the approach taken by Queensland prosecutors in *Williamson*.⁴⁸³ In *Williamson* the Queensland District Court increased the fine imposed for breach of a WHS duty after taking into account relevant decisions in other jurisdictions with harmonised WHS laws. It is unclear whether prosecutors in other jurisdictions are able or willing to make submissions on the need for consistency

⁴⁸⁰ Victorian Automobile Chamber of Commerce Submission, pp 19–20.

⁴⁸¹ The same applies in South Australia, or at least their *Sentencing Act 2017* (SA) is sufficiently broad that it would probably allow guidelines contained in other legislation to be considered. The same may apply in the ACT, or at least the *Crimes (Sentencing) Act 2005* (ACT) may not preclude such guidelines being considered. In Queensland it is possible that WHS sentencing guidelines could be considered under the *Penalties and Sentences Act 1992* (Qld) or could form part of any sentencing submission by the prosecution under s 15 of that Act. The situation is less clear in the remaining harmonised jurisdictions.

⁴⁸² That same question would need to be considered in respect of the sentencing legislation of each jurisdiction.

⁴⁸³ *Williamson v VH & MG Imports Pty Ltd* [2017] QDC 56.

in penalties under harmonised WHS laws and whether such submissions will be accepted by the courts more broadly.

I consider that consistency in sentencing outcomes is crucial to meeting the object of the model WHS Act, particularly s 3(1)(e) ('Securing compliance with this Act through effective and appropriate compliance and enforcement measures') and s 3(1)(h) ('Maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction'). I also consider that the interaction of criminal procedure and sentencing legislation in each jurisdiction may be having an unintentional negative impact on the credibility of WHS prosecutions to deliver strong specific and general deterrent outcomes.

I therefore recommend the development of sentencing guidelines consistent with Recommendation 68 of the 2008 National Review. Given the complexities associated with this issue, I am recommending that the approach to developing these guidelines should be considered by relevant experts. Among other things, this consideration should include whether the interaction of the model WHS laws with local criminal and sentencing laws is resulting in unintended consequences which may be impeding the policy intentions of the model WHS law framework.



Recommendation 25: Consistent approach to sentencing

Safe Work Australia work with relevant experts to develop sentencing guidelines to achieve the policy intention of Recommendation 68 of the 2008 National Review. As part of this process, any unintended consequences due to the interaction of local jurisdictional criminal procedure and sentencing legislation should also be considered. (I note that the work required by Recommendation 22 ('Increase penalty levels'), Recommendation 23a ('Enhance Category 1 offence') and Recommendation 23b ('Industrial manslaughter') could be combined with the work required by this recommendation).

6.4. Enforceable undertakings

Current arrangements

An EU is a legally binding agreement entered into as an alternative to having the matter decided through legal proceedings for contravention of a WHS law. Such undertakings are voluntary—a person cannot be compelled to make an undertaking and the regulator has discretion whether or not to accept the undertaking.

An EU cannot be made in relation to a Category 1 offence.⁴⁸⁴

Regulator guidelines in New South Wales and South Australia require exceptional circumstances before an EU will be made if an incident has involved a fatality or very serious injury,⁴⁸⁵ and

⁴⁸⁴ Section 216(2) of the model WHS Act.

⁴⁸⁵ SafeWork NSW, *SafeWork NSW enforceable undertakings guidelines*, SafeWork NSW, 2018, p 6. The guidelines state that 'a fatality or a serious injury may provide a clear indication of a failure to control risks and will be given significant attention in deciding whether an EU is an appropriate enforcement measure'.

Queensland has legislated to prevent the acceptance of EUs for a Category 2 offence where there has been a fatality.

The use of EUs has increased since the adoption of the model WHS laws, with a total of 35 EUs accepted by regulators covered by the model WHS laws in 2015–16 and 33 in 2016–17, compared with 10 in 2011–12.⁴⁸⁶

Stakeholder responses—2018 Review of the model WHS laws

There was broad support for the availability of EUs as an alternative to prosecution.⁴⁸⁷ However, some of those consulted raised a note of caution at what was perceived as an increased reliance on EUs. The Queensland Council of Unions echoed the sentiment of a number of other unions when it said, ‘enforceable undertakings are often seen as a “soft” option that will be readily agreed to by an employer and may be attractive to an agency that is under resourced’.⁴⁸⁸

The Australian Energy Council recommended clearer guidelines, transparency and consistency in terms (both within and across jurisdictions) and assurance that regulators are enforcing them. The NSW Work Health and Safety Regulators reflected these views, noting that:

‘there are refinements that should be considered across a number of areas to develop consistency between regulators, such as on the factors surrounding acceptance of an EU and the types of activities which might be considered suitable for an EU.’⁴⁸⁹

Most union submissions (and those of some regulators) were of the view that EUs should not be available where there has been a fatality, whereas many employer and industry associations (and some regulators) advocated the flexibility to consider them in all circumstances.⁴⁹⁰ The ACTU also considered that, except where exceptional circumstances exist, an EU should not be available where there has been reckless conduct, the applicant has a recent prior conviction connected to a work-related fatality or the applicant has more than two prior convictions arising from separate investigations.⁴⁹¹ Ms Andrea Madeley, on behalf of Victims of Industrial Death, said:

‘[There are] serious concerns for the use of EUs where someone has died or where a breach has caused catastrophic injuries...and recommended that...the family of the deceased or the catastrophically injured parties should be entitled to be a part of the decision-making process having been fully informed of all the facts ... and having been provided with independent legal advice in relation to the evidence.’⁴⁹²

⁴⁸⁶ Safe Work Australia, *Comparative performance monitoring report, 19th edition*, Safe Work Australia, Canberra, 2017.

⁴⁸⁷ See, for example, submissions of the Safety Institute of Australia and Victorian Automobile Chamber of Commerce.

⁴⁸⁸ Queensland Council of Unions Submission, p 15.

⁴⁸⁹ NSW Work Health and Safety Regulators Submission, p 25. For example, cost of investigations compared to negotiating an EU; national agreement on acceptance of EUs for Category 2 offences involving a fatality; imposing sureties against companies to prevent them selling/liquidating with an EU in force.

⁴⁹⁰ See, for example, submissions from Civil Contractors Queensland and the National Road Transport Association, which favour the ability to consider EUs for Category 2 offences where there has been a fatality; and that of the ACTU, which favours the exclusion of fatality-related matters from consideration of an EU, except where exceptional circumstances exist.

⁴⁹¹ ACTU Submission, p 69.

⁴⁹² Voice of Industrial Death Submission, p 34.

The submission from Ms Gabrielle Jess and Dr Robin Price, which provided an analysis of EUs in Queensland, recommended that consideration be given to embedding a restorative justice approach into the EU process by bringing multiple parties to the table to develop a mediated outcome establishing the terms of the EU.⁴⁹³

Discussion and recommendations

As noted above, available statistics demonstrate that regulators have been increasing their use of EUs since the implementation of the model WHS laws.⁴⁹⁴

I also note that the 2008 National Review recommended the establishment of an expert tripartite advisory panel, appointed by the minister, to advise the regulator about the suitability of applications and that the regulator be required to take account of the advice of the panel.⁴⁹⁵ Ministers responsible for WHS did not agree to this recommendation.⁴⁹⁶

The main issue emerging from the Review in relation to EUs is the question of whether they should be available as an alternative to prosecution for Category 2 offences where there has been a fatality.⁴⁹⁷ In most model WHS law jurisdictions, regulators retain the flexibility to consider applications for an EU as an alternative to prosecution for Category 2 offences.⁴⁹⁸

My discussions with regulators as part of Review consultations indicated that careful consideration is given to accepting an EU and that this is particularly the case where a serious injury or fatality is involved. The data relating to use of EUs supports the approach described to me by regulators. Between 2011–12 and 2017–18 there have been over 155 EUs entered into in those jurisdictions which have adopted the model WHS laws, with at least five of these involving a fatality.⁴⁹⁹

I am recommending that the current provisions of the model WHS Act are retained in relation to EUs. Within this context, I reinforce the importance, which has been echoed by regulators during this Review, of the consideration of family support (or not) for the acceptance of any EU where there has been a fatality.

⁴⁹³ Gabrielle Jess Submission, p 5.

⁴⁹⁴ See Appendix G, 'Overview of WHS in Australia'.

⁴⁹⁵ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009, p 262.

⁴⁹⁶ Workplace Relations Ministers' Council, *WRMC response to the recommendations of the national review into model OHS laws*, Safe Work Australia, Canberra, 2009.

⁴⁹⁷ NSW Work Health and Safety Regulators Submission, p 26, 'Acceptance of EUs for category 2 offences where there has been a fatality—regulators are taking different approaches to this aspect of EUs'.

⁴⁹⁸ Queensland has legislated to prevent the acceptance of EUs for a Category 2 offence where there has been a fatality.

⁴⁹⁹ See Appendix G, 'Overview of WHS in Australia'.

6.5. Insurance against fines and penalties

Current arrangements

There are currently insurance policies available which protect the insured company and its directors, principals, partners and employees for their liability to pay fines which may arise out of wrongful breaches of the many Acts which control their operations, including the relevant WHS Acts.⁵⁰⁰

There is currently nothing preventing a body corporate from entering into a contract of insurance to cover the body corporate for indemnifying a worker or officer for offences against the model WHS laws. Similarly, there is nothing preventing a body corporate or a sole trader from insuring themselves for their own liability for penalties for offences under the model WHS laws.

Such an insurance policy may be found by a court to be an illegal contract if challenged. The courts, however, have been willing to uphold a contract of insurance in relation to penalties for strict liability offences or offences that did not involve wilful or dishonest conduct. In practice, if an insurance company did not object to meeting a body corporate's claim in relation to such an indemnity, it would be unlikely that there would be scope for a court to consider such a matter.

Stakeholder responses—2018 Review of the model WHS laws

In my consultations, some WHS regulators were aware of instances where those who had been found guilty of a breach of the relevant WHS laws had their fines paid through an insurance policy. Other WHS regulators were not aware of this having happened in their jurisdiction, with one highlighting that it was not something that would necessarily be disclosed to the regulator by the offender.

Of the issues discussed in this chapter, this was the one on which opinion was most consistently in agreement.

The ability to obtain insurance to cover penalties and fines for breaches of the model WHS laws was largely unsupported by those consulted, with the majority of written submissions and face-to-face meetings reinforcing this position.⁵⁰¹ Comcare noted its concerns that 'the availability of insurance products which cover penalties is contrary to public policy in that the very nature of a penalty is to deter non-compliance with the legislation'. It suggests, among other things, that the issue should be dealt with through the Safe Work Australia tripartite process.⁵⁰²

The Victorian Automobile Chamber of Commerce noted its concern and disagreement with the selling of insurance to cover fines and penalties because it undermines the court's sentencing powers and diminishes the deterrent effect of the WHS penalties. It provided examples of some WHS practitioners promoting insurance as part of their advisory services.⁵⁰³

⁵⁰⁰ Examples were provided to the reviewer as part of the consideration of this issue and the Victorian Automobile Chamber of Commerce provided links to insurance products in its submission to this Review at pp 20–21.

⁵⁰¹ For example, submissions from The Australian Workers' Union and the National Road Transport Association.

⁵⁰² Comcare Submission, pp 13–14.

⁵⁰³ Victorian Automobile Chamber of Commerce Submission, pp 21–22. One example the Victorian Automobile Chamber of Commerce cited involved a small country mechanical business visited by a sales representative from a major firm who declared the business noncompliant and open to prosecution. Feeling exposed, the owner took out a three-year policy at a cost of \$15,000 but followed up with the Victorian Automobile Chamber of Commerce and cancelled the policy on its advice.

The Australian Government Department of Jobs and Small Business considers that the deterrent effect of the laws is likely to be reduced if businesses believe they are able to take out insurance policies to indemnify against WHS penalties and that the public interest is best served when liability for penalties rests with those culpable for breaches of the law. The department said that the 'availability and use of insurance in such circumstances may create the moral hazard that duty holders will become less vigilant in carrying out their duties under the WHS Act'.⁵⁰⁴

The Senate inquiry into industrial deaths called for urgent reform of the model WHS laws to make it unlawful to insure against a fine, investigation costs or defence costs where they apply to an alleged breach of WHS laws. It emphasised that the prospect of personal liability for WHS breaches is one of the core drivers for the improvement of corporate safety.⁵⁰⁵

There were some submissions which supported the continued availability and use of these policies if the market continued to offer them.⁵⁰⁶ The Australian Institute of Company Directors' submission referenced the *Corporations Act 2001* (Cth) and the common law approach to insurance for criminal acts, suggesting that the public policy reasons for disallowing insurance in relation to fines and penalties rests on there being some culpability on the part of the insured. It also claimed there were some benefits of insurers being involved in WHS by taking a proactive role with customers to assist with preventative WHS initiatives.⁵⁰⁷

The South Australian Wine Industry Association considered that whether such insurance should continue is a matter for the insurance industry. It suggested that if there is an appetite for considering legislative change, this should be considered by an expert body—for example, the Australian Law Reform Commission.⁵⁰⁸ Master Electricians Australia said:

[It] is imperative that companies can insure for risks and associated legal investigation costs including damages. There must be a clear delineation between the costs incurred for defending investigations and making good 'damages' that occur and the clear definition of fines and penalties. We agree that penalties must affect behaviour, however, insurance and associated foreseeable costs must be able to be provided by insurance.'⁵⁰⁹

The Chamber of Minerals and Energy suggested that insuring directors and officers in respect of liability associated with breaches of legislation is important for attracting and retaining quality leadership and management. It claimed that, without insurance, the increased cost and risk of doing business in Australia might drive some businesses to jurisdictions with lower costs and risks.⁵¹⁰

The Victorian Automobile Chamber of Commerce then carried out its own safety audit, found the business to be compliant and provided minor advice to improve safety practices.

⁵⁰⁴ Australian Government Department of Jobs and Small Business Submission, p 28.

⁵⁰⁵ Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, Commonwealth of Australia, Canberra, 2018, p 74.

⁵⁰⁶ See, for example, submissions from the HIA and the Ai Group.

⁵⁰⁷ Australian Institute of Company Directors Submission, pp 2–3.

⁵⁰⁸ South Australian Wine Industry Association Submission, p 9.

⁵⁰⁹ Master Electricians Australia Submission, p 6.

⁵¹⁰ Chamber of Minerals and Energy Submission, p 31.

Rather than prohibiting the use of these type of insurance policies, another alternative suggested was to ensure that courts were made aware of the existence of these policies prior to sentencing. In this way, the impact of them could be considered as part of the total penalty: 'during any legal proceeding there should be transparency on whether such a product is in existence, which can be taken into consideration for determining the outcome of the matter'.⁵¹¹

Ms Andrea Madeley, on behalf of the Voice of Industrial Death, highlighted the views of the Chief Justice of the New South Wales Supreme Court, the Hon TF Bathurst,⁵¹² and South Australian Employment Tribunal Industrial Magistrate Stephen Lieschke on the need to address the insurance issue in relation to coverage for criminal offences. She asked why, in 2018, this has not yet been remedied.⁵¹³

Discussion and recommendations

I found that it is by no means clear when a person who is required to pay a penalty for an offence under the WHS laws could recover that penalty under a contract of insurance or indemnification. It may be the case that such recovery would ordinarily be more likely for a strict liability offence, provided that, as a factual matter, the person did not intend to act unlawfully or intend to cause the loss. However, it is not certain that an insurance or indemnification arrangement would be unenforceable even if the person intentionally acted unlawfully. This would necessarily depend on the particular facts in each case.

I understand that there are insurance products in the market, and this suggests that insurance companies are paying out claims despite the legal uncertainty about their validity. This was further confirmed by regulator feedback.

Within this context, there has been some criticism of how s 272 of the model WHS Act—which provides that a term of a contract or agreement seeking to 'contract out' a duty owed under the model WHS Act or to transfer the duty to another person is of no effect—interacts with indemnification provided via insurance arrangements. That is, such arrangements can be seen to 'limit or modify the operation of this Act' contrary to s 272, since the insurer agrees to take on the penalty of a person in breach of their duty.

New Zealand has dealt with the issue by declaring contracts for insurance against the payment of fines and penalties to be void under s 29 of its *Health and Safety at Work Act 2015*. The relevant New Zealand provision makes it an offence to offer or enter into such a contract and to offer, give or receive an indemnity against liability to pay a fine for an infringement under the Act.

It appears clear that the most effective way to prevent a person required to pay a penalty under the WHS law from recovering that penalty under a contract of insurance or indemnification is to amend the model WHS laws in a similar way. The ultimate objective of such a provision would be to ensure

⁵¹¹ Australian Energy Council Submission, p 5.

⁵¹² The Hon T Bathurst, 'Insurance law: A view from the Bench', *New South Wales Judicial Scholarship* 35, Sydney, 2013, where he raised issues in relation to the availability of insurance to cover penalties for breaches of the model WHS Act.

⁵¹³ Voice of Industrial Death Submission, pp 40–41.

greater compliance with the model WHS laws by ensuring that monetary penalties act as an effective deterrent and are not nullified by being paid through insurance coverage or an indemnity.

I note that another approach to dealing with this issue is to empower the regulator to request that courts make a personal payment order that requires the offender to pay any fines themselves. This would ensure that an individual could not rely on their employer, business or any other party paying the penalty on their behalf.

However, given the overwhelming support for the option to specifically prohibit insurance arrangements within the model WHS laws, including the recommendation of the Senate inquiry into industrial deaths that urgent reform of the model WHS laws is needed to prevent insurance against fines arising from breaches of WHS duties, I favour that approach.

I stress that in contrast to the recommendation made by the Senate Committee⁵¹⁴ I am not suggesting that companies and officers should be precluded from accessing insurance or indemnity for legal costs incurred in defending a prosecution—this is purely about insurance for the payment of the penalties where there are court findings that the model WHS laws have been breached.

I am therefore recommending that a provision be inserted in the WHS law similar to that in the New Zealand *Health and Safety at Work Act 2015* that would prevent a person required to pay a penalty under the law from recovering that penalty under a contract of insurance or indemnification.⁵¹⁵



Recommendation 26: Prohibit insurance for WHS fines

Amend the model WHS Act to make it an offence to:

- enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the model WHS Act
- provide insurance or a grant of indemnity for liability for a monetary penalty under the model WHS Act, and
- take the benefit of such insurance or such an indemnity.

⁵¹⁴ Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, Commonwealth of Australia, Canberra, 2018, p 74.

⁵¹⁵ Note that other statutory schemes currently prevent indemnification of various people in connection for offences with those statutory schemes. These include s 12GBD of the *Australian Securities and Investments Commission Act 2001* (Cth); and s 77A of the *Competition and Consumer Act 2010* (Cth).

Chapter 7: Model Work Health and Safety Regulations

This chapter considers the technical and other issues raised during the Review in relation to the model WHS Regulations.

Review Term of Reference

Whether the model WHS Regulations, model Codes of Practice and National Compliance and Enforcement Policy adequately support the object of the model WHS Act.

A number of the issues raised by stakeholders have been considered on multiple occasions by Safe Work Australia or WHS regulators. Where this is the case I have not made specific recommendations to reopen settled issues. Instead, I have written separately to Safe Work Australia to inform Members of these issues. Notwithstanding Recommendation 1 to review the model WHS Regulations and Codes, I have identified some specific issues within the content of the model WHS Regulations that warrant earlier attention.

Current arrangements

The model WHS Regulations set out detailed requirements to support the duties in the model WHS Act. They also prescribe procedural or administrative requirements—for example, requiring licences for specific activities and keeping records.

The model WHS Regulations cover a wide range of matters relating to WHS, including:

- representation and participation (Chapter 2)
- general risk and workplace management (Chapter 3)
- hazardous work involving noise, hazardous manual tasks, confined spaces, falls, work requiring a high-risk work licence, demolition work, electrical safety and energised electrical work and diving work (Chapter 4)
- plant and structures (Chapter 5)
- construction work (Chapter 6)
- hazardous chemicals (Chapter 7)
- asbestos (Chapter 8)
- MHF (Chapter 9)
- mines (Chapter 10) [optional], and
- general (Chapter 11).

7.1. Managing risks to health and safety

Current arrangements

Part 3.1 of the model WHS Regulations imposes risk management duties on the persons described at reg 32. It requires duty holders to manage risks to health and safety by identifying hazards and applying a hierarchy of control measures. In specified circumstances it requires review of control measures.

Duty holders under Part 3.1 of the model WHS Regulations also have duties under the model WHS Act to manage risks; and duties under Part 5, Division 2, of the model WHS Act to consult with workers about matters in this Part. Section 27 of the model WHS Act applies to officers in respect of this Part.

Stakeholder responses—2018 Review of the model WHS laws

The Australian Manufacturing Workers' Union submission raised an issue with reg 32 ('Application of Part 3.1') as follows:

'WHS Regulation 32 provides that the risk management requirements of the WHS Regulations apply to those with a duty under these Regulations. The Risk Management requirements do not apply to all risks to health and safety.'⁵¹⁶

⁵¹⁶ Australian Manufacturing Workers' Union Submission 2, p 6.

The operation of reg 32 has been the subject of discussion by WHS academics and practitioners since the model WHS laws were enacted. It was raised again by them with me during consultations. Professor Richard Johnstone and Michael Tooma summarise the problem as they see it:

‘Chapter 3 (see in particular Part 3.1) of the model Regulations only requires any PCBU who has a duty under the regulations to “manage risks to health and safety” to implement a series of steps: to identify hazards, to eliminate risks so far as is reasonably practicable, or if it is not reasonably practicable to eliminate risks, to minimise the risks by applying a “hierarchy of control measures”; to maintain control measures; and to review and revise control measures ... there is no statutory requirement to take a generic approach to identify, assess and control hazards which fall outside the hazards specifically addressed in the model Regulations.’⁵¹⁷

They go on to recommend that the model WHS Act or WHS Regulations be amended to include a general requirement to identify all hazards and to implement controls following the appropriate hierarchy of hazard control.⁵¹⁸

Discussion and recommendations

I found that this issue of making the general risk management obligation and process clear within the model WHS laws is inextricably linked to answering the question that was raised consistently by small business throughout this Review: ‘just tell us what to do’. When I convened a roundtable of big business representatives, I asked them how they would ‘just tell small business what to do’. Their response was that all you need to do is understand your business (products or services) and your people (workers and customers) and regularly ask yourself and your workers a series of questions:

1. Given what I do, what could go wrong?
2. How wrong can it go?
3. What are the consequences of it going wrong?
4. How can I stop it going wrong?⁵¹⁹

In effect, this is the risk management process.

While steps 1–3 are addressed in the model WHS Act, there is no guidance about step 4.

I therefore recommend that the concepts underpinning the hierarchy of control measures (reg 36 of the model WHS Regulations) be moved from the model WHS Regulations to the model WHS Act and that it is made clear that the risk management process is not limited to the management of risks to health and safety from hazards identified in the WHS Regulations.

I note that, if a general risk management process is included in the model WHS Act, there may need to be consequential amendments, including amendments to s 17 of the model WHS Act, which concerns the management of risks. This section does not contain a risk management process of the

⁵¹⁷ R Johnstone & M Tooma, *Work health & safety regulation in Australia: The model Act*, The Federation Press, Sydney, 2012, p 94.

⁵¹⁸ R Johnstone & M Tooma, *Work health & safety regulation in Australia: The model Act*, The Federation Press, Sydney, 2012, p 95.

⁵¹⁹ Business Roundtable Consultation Forum, Sydney, May 2018.

type contained in Part 3.1 of the model WHS Regulations (specifically the hierarchy of control). Further, there may be necessary consequential amendments to the definition of 'reasonably practicable' in s 18 of the model WHS Act with the effect that the definition would make reference to a risk management process.



Recommendation 27: Clarify the risk management process in the model WHS Act

Amend the model WHS Act to clarify the risk management process by including a hierarchy of controls (consistent with reg 36) and making any corresponding amendments necessary to the model WHS Regulations.

7.2. Amusement devices

Current arrangements

The model WHS Regulations impose a number of requirements on the person with management or control of an amusement device or passenger ropeway, including that:

- the operators have been provided with instruction and training
- the amusement device or passenger ropeway is checked before it is operated on each day on which it is to be operated
- daily checks and operation of the amusement device or passenger ropeway without passengers are properly and accurately recorded in the log book for the amusement device
- a competent person carries out the maintenance, repair, inspection and, if necessary, testing of the amusement device or ropeway, and
- a detailed inspection of the device is carried out at least once every 12 months by a competent person.⁵²⁰

Recent regulatory change has followed tragic fatal incidents. In response to the 2014 Royal Adelaide Show fatality, SafeWork SA now requires amusement device owners to provide information verifying that inspection activities undertaken by a competent person direct the necessary attention to critical safety features. In particular, a suitably competent person must validate that all minimum safety standards prescribed by relevant Australian Standards have been achieved.

In response to the 2016 Dreamworld tragedy, the Queensland Government announced in August 2018 that it would amend the Queensland WHS Regulations to introduce major changes for the theme park and amusement ride industry centred on four key areas identified by the 2017 Queensland Review:

- mandatory requirements for ride operators to be fully trained and competent
- mandatory major inspections of all amusement and theme park rides

⁵²⁰ Chapter 5, Division 4, Subdivision 2 of the model WHS Regulations.

- major theme parks to develop and implement a comprehensive and integrated safety management system, and
- additional record keeping through detailed log books.

The Queensland Government is also considering a code of practice to support the regulations. This code may include provisions relating to training delivery, identification cards for ride operators and publicly displayed certificates on rides. The amended regulations are expected to be in place by the end of the year or as soon as practically possible.

Stakeholder responses—2018 Review of the model WHS laws

As noted above, the Queensland WHS Regulations for amusement devices, which are based on Part 5.2 of the model WHS Regulations, were considered as part of the 2017 Queensland Review, which was commissioned in part as a response to the fatalities of four people when a Dreamworld amusement device failed.⁵²¹ It recommended, among other things, that the Queensland WHS Regulations be amended to require that:

- a. mandatory major inspections of amusement devices, by competent persons, are conducted
- b. competent persons are nominated to operate specified amusement devices, and
- c. details of statutory notices are recorded in the amusement device log book and made available to the competent person inspecting the amusement device.⁵²²

The Queensland Government submission to this Review noted that it is actively considering, in consultation with the amusement device industry, a regulation amendment to the Qld WHS Act in response to the recommendations made by the 2017 Queensland Review (see above). The aim of this amendment is ‘to provide confidence to show organisers, school parents and citizens committees, and parents (at home parties), by ensuring log books contain sufficient information so that a third party can satisfy themselves that the ride is safe and the operator competent to operate it’.⁵²³

The Agricultural Shows of Australia (ASA) submission also recommended that statutory notices issued by WHS regulators be recorded in the amusement device log book and made available to the competent person inspecting the amusement device to avoid situations where a device is ‘subject of an improvement or prohibition notice in one State and [can] travel or potentially operate in another without declaration or remedy of the safety matter’.⁵²⁴

ASA also raised issues around variations in the approach to plant design registrations across jurisdictions and recommended the development of a common regulatory process to verify the design of high-risk plant. It also supported the introduction of mandatory major inspections of amusement

⁵²¹ The Hon G Grace MP, ‘Expert panel to put work health and safety laws under the spotlight’, media statement, 5 April 2017.

⁵²² T Lyons, *Best practice review of Workplace Health and Safety Queensland: Final report*, Workplace Health and Safety Queensland, Brisbane, 2017, p 13.

⁵²³ Queensland Government Submission, p 13.

⁵²⁴ Agricultural Shows of Australia Submission, p 1.

devices at prescribed intervals, minimum competencies for operators and a mandatory requirement to have evidence of training and instruction available to third parties.⁵²⁵

Discussion and recommendations

The Coroner's Court of Queensland Inquest into the 2016 Dreamworld River Rapids Fatalities has been running throughout 2018. It was tasked with considering a number of matters, including:

- the regulatory environment and applicable standards by which amusement park rides operate in Queensland and Australia, and whether changes need to be made to ensure a similar incident does not happen in the future, and
- further actions and safety measures that could prevent a similar future incident from occurring.

It is likely that the Queensland Coroner will make recommendations relating to the regulatory approach to amusement device safety as part of its findings in the Dreamworld inquest. Safe Work Australia and WHS ministers will consider the findings of the Coroner when they are available in the normal course of their work, and that is appropriate.

In the interim, I note that amusement device regulations have been closely considered by the 2017 Queensland Review and its findings largely supported by the Queensland Government. My consideration of the review and the written submissions of the Queensland Government and ASA suggest that amendments in this area should proceed ahead of any additional findings of the Queensland Coroner on this topic. Therefore, I recommend that reg 242 of the model WHS Regulations be amended to ensure that details of statutory notices issued by any WHS Regulator are included in the device's log book. I also recommend that evidence of operator training and instruction is included in the device's log book. I note that work undertaken to date by the Queensland Government in considering this amendment to its WHS Regulations may be useful to consider in progressing this recommendation.

This recommendation will ensure that third parties are provided with relevant information to assess whether a ride is safe and the operator is competent to operate it. This measure is particularly important to ensure the safety of amusement devices which move within and across jurisdictions.



Recommendation 28: Improved recording of amusement device infringements and operator training

Amend reg 242 of the model WHS Regulations to ensure that details of statutory notices issued by any WHS regulator and evidence of operator training and instruction are included in the device's log book.

⁵²⁵ Agricultural Shows of Australia Submission, p 2.

7.3. Construction work—Safe Work Method Statements

Current arrangements

Chapter 6 of the WHS Regulations imposes duties relating to ‘construction work’⁵²⁶ and ‘high risk construction work’.⁵²⁷ The WHS Regulations also require PCBUs that commission construction work in relation to a structure to consult with the designer and require designers of structures to provide a written report regarding health and safety.⁵²⁸

The WHS Regulations also require PCBUs to control risks associated with construction work and high-risk construction work and imposes duties in respect to SWMS, excavation work and trenches.⁵²⁹ There are also duties imposed on principal contractors (for construction projects valued at \$250,000 or above), including preparation of a written WHS management plan, signage obligations and requirements to ensure compliance with other regulations at the workplace.⁵³⁰ Last, there are duties in relation to general construction induction training.⁵³¹

In relation to SWMS, the model WHS Regulations require that:

- a PCBU that carries out high-risk construction work must prepare, or ensure that another person prepares, a SWMS before the high-risk construction work is carried out (reg 299)
- a SWMS must contain certain information prescribed in the regulation (reg 299(2))
- a SWMS must be written in a way that can be accessed and understood by the people who will use it (reg 299(3))
- a PCBU that carries out high-risk construction work must put in place arrangements to ensure that the high-risk construction work is carried out in accordance with the SWMS (reg 300)
- if the high-risk construction work is not carried out in accordance with the SWMS, the PCBU must ensure that the work is stopped immediately, or as soon as it is safe to do so, and is resumed only in accordance with the SWMS (reg 300(2))
- a PCBU must ensure a SWMS is reviewed and revised as necessary if any of the control measures under reg 38 (‘General risk management obligations’) are revised (reg 302)
- a PCBU must keep a copy of the SWMS until the high-risk construction work to which it relates is completed (reg 303), and
- a copy of the SWMS must be readily accessible to any worker engaged by the PCBU to carry out the high-risk construction work (reg 303(3)).

The model Code of Practice: *Construction work* provides information on the content, preparation, implementation and review of SWMS. A SWMS template is provided in Appendix E of that Code,

⁵²⁶ Regulation 289 of the model WHS Regulations.

⁵²⁷ Regulation 291 of the model WHS Regulations.

⁵²⁸ Regulations 294–296 of the model WHS Regulations.

⁵²⁹ Part 6.3 of the model WHS Regulations.

⁵³⁰ Part 6.4 of the model WHS Regulations.

⁵³¹ Part 6.5 of the model WHS Regulations.

together with guidelines for completing the template. Appendix F of the Code also provides a sample of a completed SWMS.

Stakeholder responses—2018 Review of the model WHS laws

All construction industry participants raised numerous concerns relating to the efficacy and value of SWMS, including that:

- many PCBUs do not understand when a SWMS is required—that is, only for high-risk construction work as defined in the WHS Regulations
- when they are produced, SWMS are often not fit for purpose, and often information is filled into a template or proforma document rather than being developed to deal with the specific issue relevant to a particular worksite, and
- once completed, the SWMS are often shelved and not reviewed, maintained or used onsite.

There was also feedback that there is inconsistency amongst WHS regulators regarding what is required to be included in a SWMS.

Many perceive that SWMS are only being used to provide evidence of compliance in the event of an incident, so they become a paperwork burden without providing any safety benefits. The Australian Federation of Employers and Industries noted that SWMS are often written for unnecessary activities, citing an example of a SWMS produced for working on a cold day (including the risk control as ‘wear a jumper’).⁵³²

The HIA noted ‘considerable confusion and many different interpretations about what hazards and risks are required in a SWMS, as evidenced by the many problems identified by stakeholders in relation to the requirements for Federal Safety Commissioner (FSC) accreditation, which are seen to have made SWMS unnecessarily complex’.⁵³³

The *Review of the work health and safety regulatory framework in the building and construction industry* also received feedback that the use of SWMS in practice has proven to be problematic and counterproductive. Many of the stakeholder criticisms relate to the application of the SWMS in practice as opposed to the requirement to develop SWMS. Some suggested that problems potentially arise from a lack of guidance and template documentation. However, others suggested it may also be indicative of a lack of commitment to WHS.⁵³⁴

The Australian Federation of Employers and Industries submission to this Review considers that the use of SWMS should continue to be confined to high-risk work; be reviewed for relevance, as required in the WHS Regulations; and be adapted to the actual workplace conditions.⁵³⁵

⁵³² Australian Federation of Employers & Industries Submission, p 9.

⁵³³ HIA Submission, p 23.

⁵³⁴ Seyfarth Shaw Australia, *Review of the work health and safety regulatory framework in the building and construction industry*, Department of Jobs and Small Business, Canberra, 2018, p 49.

⁵³⁵ Australian Federation of Employers & Industries Submission, p 9.

In its submission, the CFMEU cited and agreed with an Australian National University (ANU) study⁵³⁶ which called on regulators to 'establish specific procedures for inspecting and investigating matters involving SWMS and safety plans, and writing constructive notices which focus on the efficacy of risk control measures and processes in SWMS and plans'.⁵³⁷

The CFMEU also pointed to the unpublished research conducted by the ANU (referred to above) on the efficacy of SWMS, supporting findings for:⁵³⁸

- more education about preparation of SWMS
- regulators to develop procedures to investigate SWMS matters, and
- Safe Work Australia to evaluate the effectiveness of SWMS.

The use of SWMS was extensively discussed in the online discussion forums for the Review, with similar issues raised as those discussed above.

A number of stakeholders also commented on the need for added clarity around consultation requirements when preparing SWMS.

Master Builders Australia reinforced the issue of inconsistencies in format and content in SWMS templates. It praised the utility of the SWMS template in the model Code of Practice: *Construction work* and recommended this template be adopted under the model WHS Regulations for use as a standard template:

'Such an approach would not only ensure that hazards and risks on site have been addressed clearly and appropriately but would eliminate the broad inconsistencies that currently exist in relation to SWMS.'⁵³⁹

Discussion and recommendations

A number of stakeholders, including those who participated in the online discussion forums, were clearly frustrated by the lack of a consistent approach to, and understanding of, requirements for SWMS. The primary purpose of a SWMS is to assist PCBUs, supervisors and workers to implement and monitor the control measures established at the workplace (site-specific) to ensure high-risk construction work is carried out safely. However, it is clear that this is an area of the model WHS Regulations which is not operating as intended. This appears to be largely a result of misunderstanding of the requirements of the model WHS Regulations rather than a result of an unintended consequence or an ambiguity arising from the Regulations themselves.

For example, there was feedback that suggested PCBUs are being asked by other PCBUs (such as subcontractors) to provide SWMS in situations where they are not required by the model WHS Regulations. This demonstrates to me that there is a lack of understanding about the information

⁵³⁶ Safe Work Australia, 'Project 6: The efficacy of Safe Work Method Statements (SWMS) and WHS Management Plans in construction', project undertaken by C Gallagher & E Bluff of the National Research Centre for Occupational Health and Safety Regulation, unpublished, 2016.

⁵³⁷ CFMEU (Construction and General Division) Submission, p 24.

⁵³⁸ CFMEU (Construction and General Division) Submission, pp 5–6.

⁵³⁹ Master Builders Australia Submission, p 34.

required on a SWMS and what is required to meet the compliance standards of different WHS regulators.

In order to assist duty holders in the construction industry to understand the format and the type of information to be included in a SWMS, I recommend the model WHS Regulations be amended to prescribe a 'basic' SWMS template. Prescribing the template in the model WHS Regulations will complement the existing provisions which prescribe their content. The 'basic' template could, and should, be added to by a duty holder where site-specific hazards are identified.

Separate to but complementing the SWMS template, I recommend that an intuitive, interactive tool be developed that provides clear guidance on what information and actions are required to complete each section of the SWMS template. This tool would signpost and reinforce requirements, like consulting with workers when preparing SWMS, and increase knowledge and understanding of the practical purpose of SWMS amongst PCBUs and workers (including apprentices). Ideally, the tool will provide information and guidance as a PCBU completes the template SWMS. A possible model is the online e-tax tool that assists the user to accurately complete each step of the tax return by clearly articulating what is required, providing some autofill options and links to more specific information where relevant.



Recommendation 29a: Add a SWMS template to the WHS Regulations

Amend the model WHS Regulations to prescribe a SWMS template.



Recommendation 29b: Develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS

Safe Work Australia develop an intuitive, interactive tool to assist in the effective and efficient completion of fit-for-purpose SWMS.

7.4. General construction induction training cards (White Cards)

Current arrangements

Regulation 316 of the model WHS Regulations provides that a PCBU must ensure that general construction induction training (White Card training) is provided to a worker engaged by the person who is to carry out construction work if the worker has:

- not successfully completed general construction induction training, or
- successfully completed general construction induction training more than two years previously and has not carried out construction work in the preceding two years.

Training is conducted by a Registered Training Organisation (RTO), and once a person has completed training they may apply to a WHS regulator for a White Card. A White Card issued in one state or territory or by the Commonwealth is recognised Australia wide.

A person in control of a construction site may ask a worker to undertake refresher training if they consider it necessary.

Stakeholder responses—2018 Review of the model WHS laws

In its submission, SafeWork SA highlighted the Australian Skills Quality Authority (ASQA) review findings which it believes potentially compromise the safety objectives of the White Card. It also suggested that regulators should be able to cancel, refuse to recognise, replace or direct retraining for a White Card issued in another state or territory if the regulator is of the view that either the training assessment or the general conditions under which the card was issued were inadequate or unsafe.⁵⁴⁰

The Civil Contractors Federation—Queensland noted that experts have indicated that a four- to six-hour interactive training course using both theoretical and practical methods is considered the base standard required for the delivery of training and preparation of individuals seeking to work within a civil construction environment. It stated there is a ‘disconnect between the material delivered in the White Card courses and the training requirements identified in the law such as manual handling, hazardous substances, safe use of hand-tools, working safely around operating plant etc’. It called for a review of the quality, content and delivery of White Card training and supported minimum duration, practical content, expiry dates for cards, tracking of qualifications and prohibition of online courses.⁵⁴¹

Unions NSW raised concerns about inconsistent photo identification requirements between safety licences (for example, high-risk work licences require photo ID), suggesting all licensed qualifications be combined to a single card.⁵⁴²

It was suggested that the Blue Card training for the transport industry was a more effective model with its face-to-face training delivery.⁵⁴³

Discussion and recommendations

I found that industry and regulator confidence in the value of the White Card continues to diminish, due in part to concerns about the duration and content of the training, poor training methods used by some training organisations, assessment practices, and validation of the identity of the card holder.

Online training delivery facilitates the objectives of participants by speeding up the acquisition of the White Card so they can gain employment, and it is also supported by those in remote and regional locations who find it difficult and costly to attend face-to-face training. However, the emergence of online training appears to have exacerbated difficulties in validating the identity of participants. Feedback provided to WHS regulators also suggests that workers who have undertaken face-to-face training appear to have higher levels of skills and knowledge than those completing online training.

This is a complex area to address, due in part to the fact that the definition of ‘general construction induction training’ means training delivered in Australia by an RTO for the specified VET course. Therefore, the quality of training is a VET sector issue overseen by the Australian Industry Skills Committee and regulated by the ASQA. It is clear from the various ASQA reviews that work continues to be done on trying to improve the quality of the training and restore industry confidence. I am also

⁵⁴⁰ SafeWork SA Submission 1, p 32.

⁵⁴¹ Civil Contractors Federation—Queensland Submission, p 4.

⁵⁴² Unions NSW Submission 2, pp 40–41.

⁵⁴³ CQ First Aid & Safety Training Submission, p 1.

aware that Safe Work Australia and ASQA are working together to consider maintaining and improving the standards of WHS-related VET training consistently across the jurisdictions.

It is difficult to ignore industry and regulator frustrations in relation to the White Card. To alleviate some of the concerns raised regarding assurance that training has been completed by the relevant White Card holder, I recommend that photographic ID is required on White Cards consistent with high-risk work licences. The issues around quality of training are outside the scope of this Review; however, I note that there are significant issues which I have highlighted separately to Safe Work Australia.



Recommendation 30: Photographic ID on White Cards

Amend the model WHS Regulations to require photographic ID on White Cards consistent with high-risk work licences.

7.5. Australian Standards

Current arrangements

Standards are published documents that are designed to provide guidance to help ensure safety, performance and reliability through the specifications of goods, services and systems.

There are Australian and International Standards, as well as Standards developed by certain regulators, and industry Standards developed by professional industry associations for the purpose of maintaining a standard in performance for the particular activities within the industries.

There is no automatic requirement to comply with an Australian Standard. However, laws can require compliance with a Standard. The model WHS laws require compliance with a number of Australian Standards.

Further, there are model Codes that refer readers to Australian Standards for further information. This is intended to provide additional guidance to PCBUs on how they may meet their obligations under the model WHS laws.

Stakeholder responses—2018 Review of the model WHS laws

There were consistent concerns raised by businesses and their representatives relating to the referencing of Australian Standards within the model WHS laws. The two key concerns were the status of Australian Standards when they were not referenced and the cost of accessing Standards.

Some stakeholders were concerned that the model WHS laws do not always align with or correctly or appropriately reference the Australian Standards. In its submission, the HIA considered that there should be no referencing of Australian Standards in the model WHS laws. The HIA suggests any referencing of Standards should be in guidance only and should not be mandated in regulations.⁵⁴⁴

⁵⁴⁴ HIA Submission, p 6.

Business SA noted that following Standards is generally voluntary but, if they are referred to in legislation, these Standards become mandatory (depending on how they are referred to).⁵⁴⁵

Industry standards are administered by Standards Australia and are required to be purchased. This leads to additional costs for businesses. Several stakeholders called for the standards to be provided without cost⁵⁴⁶ and to be freely available,⁵⁴⁷ especially if a model Code or model WHS Regulation references them. The Australian Small Business and Family Enterprise Ombudsman argued that businesses should not be expected to purchase the entire range of Australian Standards, especially given the high volume of cross-referencing between Standards.⁵⁴⁸

The *Review of the work health and safety regulatory framework in the building and construction industry* reinforced these concerns, noting that industry associations raised concerns about the cost of obtaining Australian Standards, the complexity in cross-referencing them and the difficulties with accessing them. In particular, 'the cost of purchasing Australian Standards is significant and may be an impediment for SMEs in identifying, eliminating or minimising risks'.⁵⁴⁹ However, this review also noted that regulators and unions support specific references to Australian Standards to provide detailed guidance to duty holders.

Discussion and recommendations

Only when Standards are prescribed in the model WHS Act or Regulations is compliance with them required for the purposes of the model WHS laws. For example, reg 163 of the model WHS Regulations requires compliance with AS/NZS 3012:2010 relating to electrical installations on construction sites.

Standards are referenced more widely in model Codes and other guidance material. I acknowledge concerns that, because these Standards are 'called up' in the model Codes, consistent with s 275 of the model WHS Act, a court could have regard to them in determining what is reasonably practicable in the circumstances.

This concern is heightened because s 275(4) of the model WHS Act provides that, unless a duty holder follows a code of practice, it will need to demonstrate compliance by another means which is *equivalent* to or *higher* than the code of practice. This would mean that, if a Standard is called up in a model Code as a means of achieving compliance, the duty holder not following the Standard would need to demonstrate that they have discharged their duty by some other means.

Industry bodies noted concerns with references to Standards in the model Codes resulting in a lack of clarity for the PCBU in identifying whether they need to purchase the Standard or not. They suggested the addition of notes in the model Codes, perhaps in an appendix, clarifying who would be expected to have access to the Standard and for what purpose. In cases where multiple PCBUs need to consult, co-operate and co-ordinate with each other, the note could define which PCBU is expected

⁵⁴⁵ Business SA Submission, p 4.

⁵⁴⁶ Business SA Submission, p 4.

⁵⁴⁷ Australian Chamber Submission, p 24.

⁵⁴⁸ Australian Small Business and Family Enterprise Ombudsman Submission, p 2.

⁵⁴⁹ Seyfarth Shaw Australia, *Review of the work health and safety regulatory framework in the building and construction industry*, Department of Jobs and Small Business, Canberra, 2018, p 42.

to have or access the Standard for a particular task. This would be appropriately considered as part of the process I have suggested under Recommendation 1 ('Review the model WHS Regulations and model Codes') and Recommendation 5 ('Develop a new model Code on the principles that apply to duties'). The issue of making referenced Standards freely available was regularly raised in the development of the model WHS laws. Within this context, I note that WHS regulators provide free access to Standards at their premises, and they are available at public libraries. The cost of Standards is a matter for Standards Australia and it is not open to Safe Work Australia or regulators to publish Standards on their websites.

COAG has also given consideration to the implications of national standards being referenced in regulatory instruments. In its guide to best-practice regulation, practical considerations such as ensuring referenced Standards are kept up to date, accessibility barriers that may be imposed due to the cost of obtaining a Standard and ensuring consistency with international trade obligations are all highlighted as factors to consider in determining whether the inclusion of a Standard is appropriate.

There are 16 Standards prescribed in the model WHS Regulations.⁵⁵⁰ I recommend Safe Work Australia review these requirements and consider whether they could be removed and if necessary replaced with an alternative approach. Instead of referencing Standards, the requirements contained in them that are relevant to compliance with the model WHS laws could be included in the model WHS laws. However, if this course of action is taken, it will be important that it is seen and accepted for what it is—not adding red tape and not reducing safety standards but a response and proposed solution to concerns about cost, accessibility and complexity arising from the interaction of the model WHS laws and Standards.

While it may be redundant depending on the outcome of Recommendation 31a, I recommend amending the WHS laws to make it clear on the face of the legislation that compliance with Standards is not mandatory unless otherwise stated in the model WHS laws. This is to provide clarity concerning compliance with Standards, noting that it would not prevent a court from determining their relevance as industry knowledge when assessing what is reasonably practicable.



Recommendation 31a: Consider removing references to Standards in model WHS Regulations

Review the references to Standards in the model WHS laws with a view to their removal and replacement with the relevant obligations prescribed within the model WHS Regulations.



Recommendation 31b: Compliance with Standards not mandatory unless specified

Amend reg 15 of the model WHS Regulations ('Reference to Standards') to make it clear that compliance with Standards is not mandatory under the model WHS laws unless this is specifically stated.

⁵⁵⁰ Safe Work Australia, *Information sheet—Australian and other standards*, Safe Work Australia, Canberra, 2016, Appendix A.

7.6. Major Hazard Facilities

Current arrangements

Chapter 9 of the WHS Regulations deals with the operation of MHF. The model WHS Regulations impose a duty on operators of a determined MHF during the determination period to prepare safety case outlines, undertake hazard identification and risk control, develop emergency plans and safety management systems, consult with workers and determine a safety role for workers. The WHS Regulations also impose a complementary duty on operators and workers at a licensed MHF. The WHS Regulations are supported by nine guides, including guides on preparation of a safety case outline and preparation of a safety case.

Prior to the development of the WHS Regulations, there were significant differences in jurisdictional regulation of MHF. Amendments to MHF Regulations to support unique issues and policy decisions in jurisdictions has resulted in inconsistencies, generally in relation to scope, of MHF Regulations.

For instance, the South Australian and Queensland implementation of the model WHS Regulations disapplies the MHF chapter to explosives magazines (storages) where there is no processing activity and the magazine is licensed under the *Explosives Act 1936* (SA) and the *Explosives Act 1999* (Qld) respectively. The South Australian regulations also do not apply to temporary port storage facilities controlled by a port operator or to pipelines regulated under jurisdictional legislation. The Commonwealth regulator has applied a condition to all MHF licences requiring operators to submit an annual report to the regulator outlining any changes to the safety case or changes to Schedule 15 quantities.

The model MHF Regulations have been implemented by all jurisdictions aside from the ACT, as it has no MHF within their jurisdiction.

Stakeholder responses—2018 Review of the model WHS laws

Stakeholders around the country raised concerns about the regulation of MHF.⁵⁵¹ These mainly centred on the regulatory complexity for MHF, inconsistent application of the model WHS Regulations across jurisdictions and exclusion of Class 1 explosives from the model WHS Regulations.

Common issues raised in business forums during the consultation process related to the many layers of regulation which are considered to create duplication, inconsistency, confusion and frustration. This was particularly the case where businesses have facilities in multiple jurisdictions.

It was highlighted that regulators have different expectations of what should be contained in a safety case and often perceive it to be a product developed for the regulator rather than for the business operating the MHF and its workers and the safety of the workplace. Various technical issues were raised by regulators and the industry in relation to the WHS Regulations dealing with MHF. Many suggested that a separate comprehensive review should be undertaken.⁵⁵²

⁵⁵¹ Also see, for example, NSW Work Health and Safety Regulators Submission, p 24; Chemistry Australia Submission, p 1; Ai Group Submission, p 11; Australian Explosives Industry and Safety Group Inc Submission, p 1.

⁵⁵² Ai Group Submission, p 11; Australian Chamber Submission, p 52.

Chemistry Australia proposes that a comprehensive review of the MHF Regulations is needed,⁵⁵³ suggesting reforms are needed to reduce costs, improve safety outcomes and remove regulatory duplication for MHF operators that must address MHF and WHS Regulations and environmental legislation.

Another issue of concern is how explosives are treated in the model WHS Regulations. The Australian Explosives Industry and Safety Group called for the removal of explosives from the Schedule 15 hazardous chemicals list as it pertains to MHF. Industry groups in the sector contended that explosives are already subject to jurisdiction-based regulation and that the duplication of licensing requirements creates a compliance overlap with existing legislative frameworks.⁵⁵⁴ It was also noted that there have been significant changes in explosives technology over the years and that within this context the threshold for applying the WHS Regulations to storage of Ammonium Nitrate Emulsion, Suspension or Gel (ANE) should be raised.⁵⁵⁵ Many of these issues, particularly in relation to duplication, were also raised in the context of the mining sector.⁵⁵⁶

Discussion and recommendations

A nationally consistent regulatory framework for MHF has been implemented through the model WHS laws, with the intention of removing many of the jurisdictional inconsistencies that existed previously. While some differences still exist, these are generally minor or administrative in nature.

Some jurisdictions have also amended the model MHF Regulations to suit their own regulatory requirements.

In relation to explosives, I note that, while it might be possible to exclude Class 1 explosives from the MHF provisions of the model WHS laws, there are complex issues arising from the crossover between explosives laws and WHS laws with regard to MHF and explosives manufacturing and storage licensing. This is further exacerbated by inconsistencies in explosives laws between jurisdictions. As a result, in the absence of a nationally consistent explosives law, it is unlikely that exclusion of Class 1 explosives from the model WHS laws would lead to the same coverage under explosives laws in all jurisdictions and may lead to other unintended consequences.

I suggest that the extensive feedback about the inconsistent expectations from WHS regulators about what should be included in a safety case could be addressed through WHS regulators developing additional guidance to improve consistency in the application of the decision-making framework in relation to assessment of safety cases. This could be addressed as part of Recommendation 21 ('Review the National Compliance and Enforcement Policy (NCEP)') discussed at chapter 5.

I also recommend that the model WHS Regulations dealing with MHF be reviewed with a focus on administrative or technical amendments to support improved application and consistency across jurisdictions. As part of this review the technical issues raised in submissions could be considered.

⁵⁵³ Chemistry Australia Submission, p 1.

⁵⁵⁴ See, for example, Australian Explosives Industry and Safety Group Inc Submission, p 1; Kenneth Price Submission, p 1.

⁵⁵⁵ Kenneth Price Submission, p 1.

⁵⁵⁶ Ai Group Submission, p 11.



Recommendation 32: Review MHF Regulations

Review the model WHS Regulations dealing with MHF, with a focus on administrative or technical amendments to ensure they meet the intended policy objective.

7.7. Cranes (high-risk work)

Current arrangements

The operation of certain types of cranes, including mobile cranes, is considered high-risk work under the model WHS Regulations and, as such, a person must not operate a (relevant) crane unless he or she has the appropriate high-risk work licence.⁵⁵⁷ There are a range of licence classes for the use of mobile cranes. Under the model WHS Regulations, the classes of mobile crane licence are set out in a hierarchy. That is, a person who holds a licence for a mobile crane higher in the hierarchy may also operate all other cranes below it in the hierarchy. For example, the holder of a high-risk work licence of Class C0 (slewing mobile crane—over 100 tonnes capacity) is also licensed to operate cranes in Class C1, C6, C2, CN and CV. Similarly, the holder of a high-risk work licence of Class C6 may also operate cranes in the ‘lower’ Classes of C2, CN and CV but cannot operate cranes included in the ‘higher’ Classes C1 and C0.

All jurisdictions that have implemented the model WHS laws include these licensing arrangements in their high-risk work licensing provisions for mobile cranes.

In addition, both dogging and rigging work are prescribed as high-risk work activities under the model WHS Regulations. There is one high-risk work licence for dogging work and three classes of high-risk work licence for rigging work: ‘Basic rigging’, ‘Intermediate rigging’ and ‘Advanced rigging’.⁵⁵⁸ All classes of rigging licence allow the holder to perform rigging work on precast concrete members of a structure and, among other things, the ‘Advanced rigging’ and ‘Intermediate rigging’ licence classes allow the holder to perform rigging work on cranes.

Stakeholder responses—2018 Review of the model WHS laws

The Crane Industry Council of Australia (CICA) raised concerns that current high-risk work licensing requirements are outdated. Specifically, it suggested that the definitions associated with dogging, rigging and crane operator licences be revised to reflect contemporary work practices and equipment being used within the industry.⁵⁵⁹

CICA is also seeking the introduction of a trade certificate pathway into crane operation via a traineeship or apprenticeship that incorporates an on-the-job training component instead of obtaining a high-risk work licence that allows crane operation.⁵⁶⁰

⁵⁵⁷ Regulation 81 of the model WHS Regulations.

⁵⁵⁸ Schedule 3 (Table 3.1, Items 4 to 7) to the model WHS Regulations.

⁵⁵⁹ The Crane Industry Council of Australia Submission, p 1.

⁵⁶⁰ The Crane Industry Council of Australia Submission, p 2.

Discussion and recommendations

I note that the creation of new licence classes may require the creation of new VET courses to provide training.

With regard to CICA's proposal for a trade certificate for crane operation, I understand that Safe Work Australia has successfully facilitated CICA's participation in the VET sector's review of the high-risk work unit of competency for cranes, and I would encourage CICA to continue to share its concerns in those forums.

Given the concerns that licences may not be reflecting modern requirements, I recommend that Safe Work Australia review the crane licence classes to ensure that they remain relevant to contemporary work practices and equipment.



Recommendation 33: Review crane licence classes

Review the high-risk work licence classes for cranes to ensure that they remain relevant to contemporary work practices and equipment.

7.8. Asbestos

Current arrangements

The model WHS Regulations prohibit a PCBU from carrying out, or directing or allowing a worker to carry out, work involving asbestos other than in circumstances permitted under the WHS Regulations.⁵⁶¹ A prohibition on the importation of asbestos has been in place under customs laws since 2004.

The model WHS Regulations impose duties upon a person with management or control of a workplace to identify asbestos or asbestos-containing material (ACM) at the workplace, to prepare and keep an asbestos register and an asbestos management plan and, prior to demolition or refurbishment, to identify and remove asbestos and ensure emergency procedures are developed.

It imposes duties upon a PCBU about training workers and health monitoring. It also requires asbestos removal work to be licensed and requires notification of that work to the regulator and other persons by the person with management or control of the workplace and licensed asbestos removalists.

Stakeholder responses—2018 Review of the model WHS laws

Concerns about the use of the term 'competent person' have been raised in asbestos and other WHS forums. The development of national training materials to address the lack of suitable training to support 'competent persons' has been suggested.⁵⁶²

⁵⁶¹ Chapter 8 of the model WHS Regulations.

⁵⁶² Australian Manufacturing Workers' Union Submission 3, p 5; Carolyn Davis Submission, p 49.

The Asbestos Safety and Eradication Agency (ASEA) submission raised the following issues in relation to the term ‘competent person’ in the asbestos chapter of the model WHS Regulations.⁵⁶³

- The current definition of ‘competent person’ is not clear with regard to who should or must perform certain asbestos-related tasks.
- There is lack of suitable, quality training to support the competent person role and the development of model national training should be considered to improve the standard and consistency of practice.
- Current practice with regard to how asbestos registers are prepared and used is varied— inconsistencies in how the condition of ACMs are described and rated has resulted in different registers rating the same/similar ACMs differently and recommending different actions/outcomes.

In meetings, WHS regulators have raised a concern that there is some legal doubt in certain circumstances where compliance notices could be issued to deal with asbestos that has been illegally installed at workplaces where the asbestos is not currently being worked on and does not pose an immediate risk to health and safety.⁵⁶⁴

Discussion and recommendations

Currently, the model WHS Regulations only define specific requirements for a competent person for clearance inspections following non-friable (Class B) asbestos removal. That is, the competent person must have relevant industry experience in removal practices and hold VET sector certification for an asbestos assessor or a relevant tertiary qualification. A licensed asbestos assessor is required to undertake clearance following friable (Class A) removal.

For all other asbestos-related activities, including asbestos identification, sampling and air monitoring, the general definition of ‘competent person’ applies—that is, ‘a person who has acquired through training, qualification or experience the knowledge and skills to carry out the task’.

Guidance on appropriate experience and qualifications for a person undertaking asbestos identification and air monitoring is provided in the model Code of Practice: *How to manage and control asbestos in the workplace*.

While the person with management and control of the workplace rightly has responsibility for the creation and maintenance of the asbestos register, I note there is no requirement in the model WHS Regulations for this activity to be undertaken by a competent person. An asbestos register is a key document in ensuring workers at the workplace know where asbestos is located and what its condition or rating is in terms of damage and risks to health. The register also forms an important part of the asbestos management plan for the workplace. Given issues raised with quality and consistency of registers, I recommend that the person with management or control of a workplace should be required to engage someone with the appropriate skills and experience to create the asbestos register for the workplace. To support these competent persons with more information on how to

⁵⁶³ Asbestos Safety and Eradication Agency Submission, p 1.

⁵⁶⁴ See also Australian Manufacturing Workers’ Union Submission 3, p 6.

create an effective register, I recommend that more information be added to existing guidance material or in the model Codes.

The broader issue of the skills and experience of competent persons for asbestos-related tasks also warrants further consideration given the key roles competent persons play in workplace safety where asbestos is present. I understand that licensing was considered for some additional roles of competent persons in the development of the WHS Regulations, including air monitoring, but it was dismissed as being a significant regulatory burden. However, given the issues raised with me in this Review, I recommend that consideration be given to providing further guidance around the training, skills and experience needed to undertake tasks required of a competent person and that for some tasks specific competencies should be considered.

Since 2003, despite the ban on the importation of asbestos, asbestos and ACMs have been detected in imported products which have made their way into Australian workplaces—for example, in building products, vehicles and vehicle parts, gas cylinders and items of plant. I note that, while in most cases regulators are able to use existing powers to deal with illegally imported asbestos, Safe Work Australia Members have agreed to progress work to ensure that any doubt about regulators' ability to take action in relation to illegally installed asbestos present in a workplace is removed.



Recommendation 34a: Improving the quality of asbestos registers

Amend the model WHS Regulations to require that asbestos registers are created by a competent person and update the model Codes to provide more information on the development of asbestos registers.



Recommendation 34b: Competent persons in relation to asbestos

Review existing requirements for competent persons, including consideration of amendments to the model WHS Regulations to provide specific competencies for asbestos-related tasks or requirements for further guidance on the skills and experience required for all asbestos-related tasks.

Appendix A: Key terms

Term	Description
2008 National Review	National Review into Model Occupational Health and Safety Laws: First report released in October 2008; Second report released in January 2009.
2014 COAG Review	Review of the model work health and safety laws. The final report, <i>Improving the model WHS laws: Report</i> , was completed in 2014.
2014 South Australian Review	Review of the operation of the <i>Work Health and Safety Act 2012</i> (2014)
2016 South Australian Review	Review of the <i>Work Health and Safety Act 2012</i> (2016)
2017 Queensland Review	Best Practice Review of Workplace Health and Safety Queensland (2017)
ACT	Australian Capital Territory
ACT WHS Act	<i>Work Health and Safety Act 2011</i> (ACT)
COAG	Council of Australian Governments
Cth	Commonwealth
Cth WHS Act	<i>Work Health and Safety Act 2011</i> (Cth)
Duty holder	A duty holder refers to any person who has a WHS duty under the model WHS laws, including a PCBU, designer, manufacturer, importer, supplier, installer of plant or structures, officer and worker.
HSC	Health and safety committee, which is a consultative body established under the model WHS Act. The committee's functions include facilitating co-operation between workers and the PCBU to ensure workers' health and safety at work; and assisting to develop WHS standards, rules and procedures for the workplace.
HSR	Health and safety representative, which is a worker who has been elected by a work group under the model WHS Act to represent them on health and safety issues.
IGA	Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety

Term	Description
Model Codes	Model Codes of Practice, which are practical guides to achieving the standards of health and safety required under the model WHS laws and identifying and managing risks. Under the model WHS Act, courts may regard a code of practice as evidence of what is known about a hazard or risk, risk assessment or risk control (s 275(3)(a) of the model WHS Act) and may rely on the code of practice in determining what is reasonably practicable in the circumstances to which the Code relates (s 275(3)(b) of the model WHS Act).
Model WHS Act	The model WHS Act refers to the model Work Health and Safety Bill. It forms the basis of the WHS Acts that have been implemented in most jurisdictions across Australia.
Model WHS laws	The model WHS laws comprise the model WHS Act, model WHS Regulations and model Codes.
Model WHS Regulations	The model WHS Regulations form the basis of the WHS Regulations that have been implemented in most jurisdictions across Australia. They set out detailed requirements to support the duties in the model WHS Act
NCEP	National Compliance and Enforcement Policy
NSW	New South Wales
NSW WHS Act	<i>Work Health and Safety Act 2011 (NSW)</i>
NT	Northern Territory
OHS	Occupational health and safety
PCBU	Person conducting a business or undertaking, as defined under s 5 of the model WHS Act. A PCBU can be a company; an unincorporated body or association; a sole trader or self-employed person; a not-for-profit organisation; a local council; a government department or agency; a school; a franchise; or in some circumstances a volunteer organisation. Individuals who are in a partnership that is conducting a business will individually and collectively be a PCBU.

Term	Description
PIN	Provisional improvement notice, which is a written notice from an HSR to a duty holder requiring the duty holder to remedy a contravention, prevent a likely contravention, or remedy the things or operations causing the contravention or likely contravention (see Division 7 of Part 5 of the model WHS Act).
Psychological injury	<p>A disorder diagnosed by a medical practitioner which includes a range of recognised cognitive, emotional, physical and behavioural symptoms. These may be short-term or occur over many months or years and can significantly affect how a person feels, thinks, behaves and interacts with others. These are sometimes also known as mental health conditions or disorders.</p> <p>This term, rather than mental health conditions or disorders, is used throughout this report to be consistent with the WHS and workers' compensation laws and with the Safe Work Australia guide <i>Work-related psychological health and safety: A systematic approach to meeting your duties</i>.</p>
Psychosocial hazard	Factors in the design or management of work that increase the risk of work-related stress which can then lead to psychological or physical harm. This term is used throughout the report and is used in the Safe Work Australia guide <i>Work-related psychological health and safety: A systematic approach to meeting your duties</i> .
Qld	Queensland
Qld WHS Act	<i>Work Health and Safety Act 2011 (Qld)</i>
Qld WHS Regulations	Work Health and Safety Regulation 2011
Review	Review of the model WHS laws (2018)
Regulator	The relevant WHS regulator for each jurisdiction. The regulator manages compliance and enforcement of WHS laws and has enforcement and arbitration powers. The regulators are Comcare (Cth), WorkSafe ACT, SafeWork NSW, NT WorkSafe, Workplace Health and Safety Queensland, SafeWork SA, WorkSafe Tasmania, WorkSafe Victoria and WorkSafe WA.

Term	Description
Robens model	A common term used to describe an approach to regulating WHS established under Lord Robens' Report of the Committee on Safety and Health at Work, HSMO, London, 1972. Key features of the Robens model include a unified and integrated system of general duties and self-regulation through greater consultation between workers and PCBUs.
SA	South Australia
SA WHS Act	<i>Work Health and Safety Act 2012 (SA)</i>
Tas	Tasmania
Tas WHS Act	<i>Work Health and Safety Act 2012 (Tas)</i>
Vic	Victoria
Vic OHS Act	<i>Occupational Health and Safety Act 2004 (Vic)</i>
WA	Western Australia
WA OSH Act	<i>Occupational Safety and Health Act 1984 (WA)</i>
WHS	Work health and safety
WHS ministers	Commonwealth, state and territory ministers with responsibility for WHS.
Worker	Any person who carries out work in any capacity for a PCBU, as defined under s 7 of the model WHS Act. This includes work as an employee, contractor, subcontractor, self-employed person, outworker, apprentice or trainee, work experience student, employee of a labour hire company placed with a 'host employer' and volunteer.
Workplace	Any place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work, as defined under s 8 of the model WHS Act. This may include offices, factories, shops, construction sites, vehicles, ships, aircraft or other mobile structures on land or water.

Appendix B: Terms of Reference

Background

1. In February 2008, the then Workplace Relations Ministers Council agreed that model legislation was the most effective way to achieve harmonisation of Work Health and Safety (WHS) laws.
2. Safe Work Australia (SWA) was established by the *Safe Work Australia Act 2008* with primary responsibility to lead the development of policy to improve WHS and workers' compensation arrangements across Australia. One of SWA's statutory functions is to prepare, and if necessary revise, model WHS laws for approval by ministers with responsibility for WHS (WHS ministers), and for adoption as laws of the Commonwealth, each of the States and each of the Territories.
3. The model laws comprise the model WHS Act, model WHS Regulations and model Codes of Practice. These elements are supported by the *National compliance and enforcement policy* which sets out principles of how WHS regulators monitor and enforce compliance with WHS laws.
4. Seven of the nine jurisdictions have implemented the model WHS laws. The Commonwealth, Australian Capital Territory, New South Wales, Northern Territory and Queensland implemented the model WHS laws on 1 January 2012; South Australia and Tasmania implemented the laws on 1 January 2013. Western Australia and Victoria have not implemented the model WHS laws in their jurisdictions.

Scope of the Review

5. As agreed by WHS ministers, SWA is asked to examine and report on the content and operation of the model WHS laws.
6. The Review will be evidence-based and propose actions that may be taken by WHS ministers to improve the model WHS laws, or identify areas of the model WHS laws that require further assessment and analysis following the Review.
7. In undertaking the Review, SWA will have regard to the object of the model WHS Act (section 3).
8. The Review will consider whether:
 - a. the model WHS laws are operating as intended
 - b. any areas of the model WHS laws have resulted in unintended consequences
 - c. the framework of duties is effective at protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships
 - d. the compliance and enforcement provisions, such as penalties and enforceable undertakings, are effective and sufficient to deter non-compliance with the legislation
 - e. the consultation, representation and issue resolution provisions are effective and used by duty holders; and workers are protected where they participate in these processes, and
 - f. the model WHS Regulations, model Codes of Practice and *National compliance and enforcement policy* adequately support the object of the model WHS Act.
9. The Review will be finalised by the end of 2018.
10. SWA will provide a written report for the consideration of WHS ministers.

Appendix C: Review methodology

On 19 February 2018, I published a discussion paper on the Safe Work Australia website and called for written submissions from the public over an eight-week period to 13 April 2018.

The discussion paper was developed based on desktop research including case law, coroners' findings, WHS data, jurisdictional reviews of the model WHS laws, research undertaken for Safe Work Australia since the introduction of the model WHS laws, academic papers and other publicly available documents and information.

The discussion paper, consistent with the Terms of Reference, focused on key provisions in the model WHS laws which were new to one or more jurisdictions and posed a series of questions under the broad headings of: Legislative framework; Duties of care; Consultation, representation and participation; Compliance and enforcement; the National Compliance and Enforcement Policy; and Prosecutions and legal proceedings.

Parallel to the release of the discussion paper, I also opened four public online discussion forums posing the following questions:

- What areas in the model WHS laws are working well for you?
- Do you have examples of existing or emerging gaps in the model WHS laws?
- Are any provisions in the model WHS laws especially difficult for organisations and workers in remote or regional areas to comply with?
- Are there areas in the model WHS laws where the balance between flexibility in the model Codes of Practice and prescription of the model Regulations could be improved?

Participants in these discussions could provide a short comment as an alternative to providing a written submission.

On 23 March 2018, I opened a further two discussion forums dealing with two key questions that were emerging from face-to-face meetings. These were:

- Do the model WHS laws make it clear that PCBUs must consult, co-operate and co-ordinate where they have shared duties? If not, do you have a view on how this responsibility could be made clearer?
- Do the model WHS laws make it clear how consultation with workers and participation of workers in WHS matters should occur? If not, do you have a view on how this could be made clearer?

The discussion forums remained opened until 31 May 2018.

During the discussion paper public comment period I travelled to every capital city as well as two regional centres—Tamworth in New South Wales and Cairns in Queensland. I met with a broad range of stakeholders, including WHS and other safety regulators; businesses; unions; industry organisations; HSRs; WHS and legal practitioners; researchers; and community groups.

The format of the face-to-face consultations was tailored to suit the background and special interests of the participants and the numbers involved in each session. The sessions included individual one-

on-one meetings, small group meetings, larger forums and roundtable discussions with health and safety representatives and business leaders. In each jurisdiction I met with staff from the WHS regulator, including from the policy, operational and legal teams, to discuss their particular concerns and issues. I also met with business associations, industry organisations and union representatives in each state and territory. In total throughout the Review process, I held over 80 meetings and met with over 400 people.

The discussion paper drew 136 written submissions from a range of stakeholders, including regulators, businesses and their advocates, local government agencies, industry associations, academics, safety research bodies, legal practitioners, unions and others. Some submissions chose to answer all or some of the questions posed in the discussion paper and others chose to comment on areas of particular interest to them without necessarily referencing the questions.

Where permission was granted, submissions and comments were published on the Safe Work Australia website. Of the submissions I received, 16 gave permission to publish anonymously and 17 asked that their submissions not be published. These requests were respected and I was still able to draw on the information and experiences they offered. See Appendix D for a list of published submissions.

The six discussion forums received 127 comments, which are all publicly available on the Safe Work Australia website.

In August 2018, I released a summary of the issues arising from the public consultation which was published on the Safe Work Australia website.

Throughout 2018 I continued to consider new research and relevant information as it became available. For example, new case law and coroners' findings, Safe Work Australia and other jurisdictional research as well as the recommendations of various reviews touching on WHS matters, including the:

- Senate Education and Employment References Committee inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia
- Senate Select Committee inquiry into the future of work and workers
- Review of Work Health and Safety Regulatory Framework in the Building and Construction Industry conducted by Seyfarth Shaw Australia with assistance from the Australian Government Department of Jobs and Small Business
- NSW Legal Affairs Committee inquiry into emergency services agencies
- Senate Education and Employment References Committee inquiry into the work health and safety of workers in the offshore petroleum industry, and
- NSW Manufactured Stone Industry Taskforce review of safety standards for silica dust exposure.

I also considered the jurisdictional inquiries into the WHS regulators in the Northern Territory (underway), the Australian Capital Territory, South Australia, Queensland and New South Wales. I also examined submissions to the Western Australian consultation on the development of its

modernised WHS Bill and reconsidered the outstanding recommendations from the 2008 National Review.⁵⁶⁵

During the Review I was supported by a reference group comprising five Safe Work Australia Members who acted as a formal channel for the broader Safe Work Australia membership to provide advice throughout the Review process.

⁵⁶⁵ Department of Education, Employment and Workplace Relations, *National review into model occupational health and safety laws: First report*, prepared R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2008; *National review into model occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009.

Appendix D: Submissions to the Review

The Review received 136 written submissions. Safe Work Australia had permission to publish the following 120 submissions:

Agricultural Shows of Australia
Airservices Australia
Andrew Mayer
Andrew Moon
Anonymous (Submission 1221406)
Anonymous (Submission 1227993)
Anonymous (Submission 1235456)
Anonymous (Submission 1235945)
Anonymous (Submission 1237947)
Anonymous (Submission 1240468)
Anonymous (Submission 1246326)
Anonymous (Submission 1247761)
Anonymous (Submission 1249999)
Anonymous (Submission 1258463)
Anonymous (Submission 1271689)
Anonymous (Submission 1272998)
Anonymous (Submission 1274342)
Anonymous (Submission 1274792)
Anonymous (Submission 1275392)
Anonymous (Submission 1276377)
Asbestos Safety and Eradication Agency
Association of Tourist and Heritage Rail Australia
Australasian University Safety Association
Australian Chamber of Commerce and Industry (Australian Chamber)
Australian Construction Industry Forum
Australian Council of Trade Unions
Australian Diver Accreditation Scheme (ADAS)
Australian Education Union New South Wales Teachers Federation Branch
Australian Energy Council
Australian Explosives Industry and Safety Group Inc (AEISG)
Australian Federation of Employers & Industries
Australian Government Department of Jobs and Small Business
Australian Hearts
Australian Hotels Association
Australian Industry Group (Ai Group)
Australian Institute of Company Directors
Australian Institute of Occupational Hygienists, Inc
Australian Manufacturing Workers' Union
Australian Maritime Safety Authority
Australian Nuclear Science and Technology Organisation (ANSTO)
Australian Small Business and Family Enterprise Ombudsman
Bernard Corden
Business SA
Cancer Council Australia
Carlo Caponecchia
Carolyn Davis
Cement Concrete & Aggregates Australia
Chemistry Australia Ltd
Civil Contractors Federation—Queensland
Comcare
Construction, Forestry, Maritime, Mining and Energy Union (Construction & General Division) (CFMEU)
CQ First Aid & Safety Training
Craig Marshall
Daryl
David J Dempsey
Deb Drew
Dennis Burke
Department of Defence
Elevating Work Platform Association of Australia Inc
Engineering. Systems. Management.

Appendices

Envirofluid
Finance Sector Union
Frank
Gabrielle Jess
Graham Burton
Health Services Union NSW–ACT–Qld Branch
Housing Industry Association (HIA)
HRB Consulting
James Nolan
Jason Murray
Kate Cole MAIOH COH
Kenneth Price
Mark Lenzo
Master Builders Australia
Master Electricians Australia
Michael Shellshear
Minerals Council of Australia
Monit
National Disability Services
National Mental Health Commission
National Road Transport Association
Non-smokers' Movement of Australia Inc
Northern Territory Government
NSW Business Chamber
NSW Work Health and Safety Regulators
NSW Department of Planning and Environment, Resources Regulator
NSW Minerals Council
NSW Nurses & Midwives Association
Owen Thomas
Paramedics Australasia Ltd
Peter Moylan
Phil Hammond 1
Pumps United
Qenos
Qld Council of Unions
Queensland Government
Queensland Law Society
Queensland Nurses and Midwives' Union
Restaurant & Catering Australia
Robert Walker
Safety Institute of Australia
SafeWork SA
SANE Australia
Shop Distributive and Allied Employees' Association
Silve Germano
Soula Christopoulos
South Australian Wine Industry Association
St John Ambulance WA
Stephen Sasse
The Australian Workers' Union
The Chamber of Minerals and Energy
The Crane Industry of Australia
Tom Bourne
Unions NSW
Unions NT
United Firefighters' Union Queensland
Victorian Automobile Chamber of Commerce
Voice of Industrial Death (VOID)
Western Australian Fishing Industry Council (Inc)
WorkSafe Victoria

Appendix E: Research and reviews

Summary of reviews of work health and safety laws since 2008

Below is a brief description of research projects conducted since the development of the model Work Health and Safety (WHS) laws. Where relevant, the findings from the research have been used to inform the Review.

Previous national reviews

2008 national review into model occupational health and safety laws

In 2007, the Australian Government committed to achieving a harmonised occupational health and safety (OHS) regime within five years. All state and territory governments agreed to work with the Commonwealth to develop and implement model OHS legislation as the most effective way to achieve harmonisation. As the first step in this process, the Australian Government appointed a three-person panel to conduct a national review of OHS legislation and make recommendations for the optimal content and structure of a model OHS Act.

The panel made 232 recommendations across two reports. The first report was provided to ministers in October 2008.⁵⁶⁶ It establishes the framework for the model WHS Act covering the duties of care and reasonably practicable, offences and defences relating to those duties.

The second report was provided to ministers in January 2009.⁵⁶⁷ It covers arrangements for:

- the scope, structure, objects and definitions of key terms for the model WHS laws
- workplace consultation
- the regulator and others in securing compliance, and
- broadly, regulation-making powers, codes of practice and other matters.

On 18 May 2009, ministers agreed to a framework for uniform WHS laws through their response to the review's 232 recommendations.⁵⁶⁸ Ministers asked Safe Work Australia to develop the model WHS laws in accordance with their decisions.

2014 COAG Review: Improving the model WHS laws

In 2014, COAG agreed that all governments would investigate ways the model WHS laws could be improved, with a particular focus on reducing regulatory burden. The review also specifically considered whether:

- officers' duties created a disincentive to take up officer roles

⁵⁶⁶ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: First report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2008.

⁵⁶⁷ Department of Employment and Workplace Relations, *National review into model occupational health and safety laws: Second report*, prepared by R Stewart-Crompton, S Mayman & B Sherriff, Australian Government, Canberra, 2009.

⁵⁶⁸ Workplace Relations Ministers' Council, *WRMC response to recommendations of the national review into model OHS laws*, Safe Work Australia, Canberra, 2009.

- right of entry provisions and the powers of HSRs should be subject to further limitations model Codes can be simplified, and
- whether the current WHS system reflects best practice.

The review produced a report and regulation impact statement (RIS),⁵⁶⁹ which recommended changes to:

- make HSR training more effective
- bring right of entry provisions in line with the Fair Work Act and increase penalties for breaching the provisions
- make model Codes clearer and easier to use.

Agreed amendments were made to the model WHS Act and Regulations during 2015 and 2016.

As part of the response to this review, COAG tasked WHS ministers with reviewing the WHS Regulations to identify and address any areas that are overly prescriptive, unnecessary, duplicative or created enforcement difficulties. Safe Work Australia provided a report and Decision RIS to ministers recommending 18 amendments and identifying 10 areas for further policy work. Ministers agreed to 16 of the recommendations.⁵⁷⁰ These, along with the 10 areas for additional examination, are being progressed by Safe Work Australia.

Jurisdictional reviews

New South Wales

The NSW WHS laws commenced on 1 January 2012. These included a statutory requirement for the NSW WHS laws to be reviewed five years after commencement to determine whether its policy objects remain valid and whether the terms remain appropriate for securing those objectives. This review focused primarily on the provisions unique to the NSW WHS Act.

The NSW WHS Act statutory review report was provided to the NSW minister in June 2017.⁵⁷¹ The review found a general (though not uniform) view that national harmonisation remains a valid object and that the harmonised terms of the NSW WHS Act are securing that objective. Review recommendations included:

- new penalty notice offences related to requirements for authorisation of work and falls from heights
- a review to consider the adequacy of penalty notice amounts and whether any other penalty notice offences should be introduced

⁵⁶⁹ Safe Work Australia, *Decision Regulation Impact Statement: Improving the model Work Health and Safety laws*, Department of the Prime Minister and Cabinet, Canberra, 2014.

⁵⁷⁰ Safe Work Australia, 'Decision Regulation Impact Statement: Reducing regulatory burden in the model Work Health and Safety Regulations', unpublished, 2016.

⁵⁷¹ NSW Government, *Work Health and Safety Act 2011: Statutory review report*, SafeWork NSW, 2017.

- amending the NSW WHS Act to permit recording of interviews by the regulators without consent, subject to the interviewee being given notice that his or her interview is being recorded, and
- amending the NSW WHS Act to authorise extraterritorial application, to the extent the state's legislative power allows, including to obtain records and issue notices outside of New South Wales in relation to health and safety matters arising in New South Wales.

Comments related to the model WHS laws were summarised in an appendix to the report, for consideration in this Review.

Queensland

A best practice review of Workplace Health and Safety Queensland (WHSQ) was conducted following fatalities at Dreamworld and at Eagle Farm racecourse. The review also considered the need for further measures to discourage unsafe work practices and, specifically, the introduction of a new offence of gross negligence causing death as well as increasing existing penalties for work-related death and serious injury.

The review was conducted by an independent reviewer, Mr Tim Lyons. His report was provided to the Queensland Government in July 2017.⁵⁷²

The review found some of the changes to Queensland WHS laws that occurred as a result of harmonisation were not positive and recommended these be reintroduced. The Queensland WHS laws have been amended to adopt the agreed recommendations. Amendments included:

- introduction of an industrial manslaughter offence with fines of up to \$10 million and jail terms of up to 20 years
- prohibiting EUs for alleged offences involving a fatality
- prohibiting insurance to cover the cost of WHS penalties and fines
- reinstatement of repealed provisions relating to:
 - the requirement for a PCBU to provide to the regulator with a list of HSRs and deputy HSRs for each work group
 - requiring mandatory training for HSRs within six months of being elected and refreshed at three-yearly intervals
 - requiring PCBUs to forward to the regulator a copy of all provisional improvement notices issued by HSRs
 - appointment of Work Health and Safety Officers, and
 - codes of practice as setting a minimum standard for compliance
- requiring codes of practice to be reviewed every five years, and

⁵⁷² T Lyons, *Best practice review of Workplace Health and Safety Queensland: Final report*, Workplace Health and Safety Queensland, Brisbane, 2017.

- mandatory major inspections of amusement devices by competent persons, operators of amusement devices to prepare a safety case, including a WHS management system, and introduction of a licensing regime.

The following issues were highlighted for consideration in this Review:

- a reverse onus of proof for contraventions of WHS laws
- development of sentencing guidelines that outline 'suggested penalties' to apply in all jurisdictions, and
- prohibiting EUs for alleged offences involving a fatality.

South Australia

The South Australian WHS laws commenced on 1 January 2013. These included a statutory requirement under s 277(1) of the SA WHS Act to be reviewed one year and again three years after commencement.

The first review was completed in February 2015 by independent reviewer, Mr Robin Stewart-Crompton.⁵⁷³ The review found the legislation was working as intended. It presented 23 suggested options to improve understanding of South Australia's WHS legislation through guidance, legislative and operational changes. The Government of South Australia actioned a number of these suggestions through guidance and awareness campaigns and improving administration of the regulator. The South Australian WHS Regulations were amended to increase the threshold amount at which a construction project becomes high-risk construction work from \$250,000 to \$450,000.

The second review was completed in November 2017.⁵⁷⁴ It examined the operation of the South Australian provisions that differ from the model WHS laws. The review found South Australia's WHS performance has continued to improve since the introduction of the WHS Act, with consistent reductions in work-related death, injury and illness. It also found the education and regulator roles should be separated to strike a better balance across compliance and enforcement activities.

Western Australia

Western Australia has not implemented the model WHS laws, although the Government of Western Australia has green-lit the development of a Work Health and Safety Bill, which will bring Western Australia's WHS legislation further into line with the model WHS laws. The previous government tabled the first Western Australian version of the model WHS laws (known as 'the Green Bill') in Parliament in 2014 and released the Bill for public comment.

Following the March 2017 Western Australian election, in July 2017 the new Government of Western Australia announced the development of a modernised Work Health and Safety Act for Western Australia based on the model WHS laws. This Act will replace three acts: the *Occupational Safety and Health Act 1984*, *Mines Safety and Inspection Act 1994* and *Petroleum and Geothermal Energy Safety Levies Act 2011*.

⁵⁷³ R Stewart-Crompton, *Review of the operation of Work Health and Safety Act 2012: Report*, SafeWork SA, Adelaide, 2014.

⁵⁷⁴ SafeWork SA, *Second review of the Work Health and Safety Act 2012 (SA): Report*, SafeWork SA, Adelaide, 2017.

The Government of Western Australia established the Ministerial Advisory Panel on Work Health and Safety Reform to provide advice on adopting the model WHS laws in Western Australia. The panel has prepared a report that has been released for public comment.

The Government of Western Australia has already moved towards increasing penalties under its WHS legislation to align with other jurisdictions through amendments to the *Occupational Safety and Health Act 1984* (WA), which received Royal Assent on September 2018. The maximum fine for the most serious WHS offence will increase from:

- \$500,000 to \$2.7 million for a first offence and maximum jail terms from two to five years, and
- \$625,000 to \$3.5 million for repeat offences and maximum jail terms from two to five years.

Australian Capital Territory

In May 2018, the ACT Government commissioned an independent review to evaluate the appropriateness and effectiveness of WorkSafe ACT's compliance and enforcement framework. The review findings were released on 30 October 2018.

Key recommendations include the need for a change to WorkSafe ACT's organisational structure to support the independence of the regulator and greater clarity about the roles of the regulator and Work Safety Commissioner.

The report said that there should be more clarity and consistency in the WHS compliance framework and supporting documents; and better and more strategic use of data.

Northern Territory

The Best Practice Review of Workplace Health and Safety in the Northern Territory is, like the 2016 Queensland Review, being undertaken by Mr Tim Lyons as independent reviewer. Mr Lyons released the review discussion paper in July 2018 and is working towards an expected completion in December 2018. Mr Lyons has been asked to consider NT WorkSafe's effectiveness in light of contemporary regulatory practice.

Concurrent national reviews

A number of inquiries and reviews related to WHS have been conducted during 2018. Wherever possible, the findings of these projects have been considered as this Review's report was compiled; however, reporting dates and public release of material has necessarily limited this endeavour.

The reports of the following completed national reviews have been considered:

1. Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia* (reported 17 October 2018):
 - The committee made 34 recommendations, including amending the model WHS Act to include a new industrial manslaughter offence and establishing a dedicated WHS prosecutor

in each jurisdiction, similar to recent amendments adopted in Queensland (Recommendations 13–14).⁵⁷⁵

- The committee also recommended the following amendments to the model WHS laws:
 - Enable the sharing of information across jurisdictions (Recommendation 11).
 - Require the new WHS prosecutor to justify why it chose not to bring a prosecution following an industrial death or why a coronial inquest was not conducted following an industrial death (Recommendations 15–16).
 - Enable unions, injured workers and their families to bring private prosecutions (Recommendation 17).
 - Expand the definition of ‘officer’ to better reflect the capacity of a person to significantly affect WHS outcomes (Recommendation 18).
 - Expand the limitation period for prosecutions in relation to industrial manslaughter (Recommendation 19).
2. Senate Select Committee on the Future of Work and Workers, *Hope is not a strategy—our shared responsibility for the future of work and workers* (reported 19 September 2018):
 - The committee made 24 recommendations.
 - Recommendation 8 called for the Australian Government to ensure legislated workplace health and safety and improved superannuation rights for workers who are not classified as employees and/or perform non-standard work.⁵⁷⁶
 3. The Senate Education and Employment References Committee inquiry into work health and safety of workers in the offshore petroleum industry (reported August 2018):
 - The committee expressed great concern that workers’ WHS rights and protections in the offshore petroleum industry are inferior to those of onshore workers.
 - The committee accordingly recommended a number of legislative changes designed to bring the rights and protections for offshore workers in line with those afforded to onshore workers.⁵⁷⁷
 4. The Final Report of Commonwealth Government, *Review of the work health and safety regulatory framework in the building and construction industry*, undertaken by Seyfarth Shaw Australia, was received by the Australian Government Department of Jobs and Small Business in October 2018.

⁵⁷⁵ Senate Education and Employment References Committee, *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, Commonwealth of Australia, Canberra, 2018, pp 58–61.

⁵⁷⁶ Senate Select Committee on the Future of Work and Workers, *Hope is not a strategy—our shared responsibility for the future of work and workers*, Commonwealth of Australia, Canberra, 2018, p 92.

⁵⁷⁷ Senate Education and Employment References Committee, *Work health and safety of workers in the offshore petroleum industry*, Commonwealth of Australia, Canberra, 2018, p 22. One area where this inconsistency was found to be particularly acute was the involvement and treatment of HSRs.

- The Terms of Reference provide for the outcomes of the review to inform this Review of the model WHS laws. Accordingly, the Review considered the building and construction industry review report in finalising this report and recommendations.
5. The progress of the following reviews was also monitored:
- Senate inquiry into the role of Commonwealth, state and territory governments in addressing the high rates of mental health conditions experienced by first responders, emergency service workers and volunteers, to report by 5 December 2018.
 - National inquiry into sexual harassment in Australian workplaces by the Australian Human Rights Commission. The commission will be accepting submissions until 31 January 2019.
 - Quad Bike Safety Taskforce, led by the Australian Competition and Consumer Commission, which is expected to report in the second half of 2018.
 - The Manufactured Stone Industry Taskforce convened by SafeWork NSW which will run from July 2018 to 30 June 2019. The taskforce will review safety standards and consider safety improvements to better protect workers from crystalline silica dust exposure which can lead to the lung disease silicosis.

Evaluation of the model WHS laws since 2008—Summary

The *Safe Work Australia Act 2008* (Cth) and the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA) both require Safe Work Australia to monitor and evaluate implementation and ongoing operation of the model WHS laws. In 2011, Safe Work Australia Members agreed to an evaluation plan. Under this plan, Safe Work Australia has conducted periodic surveys on regulatory burden for businesses and perceptions of compliance with duties under the model WHS laws.

Health and safety at work survey

In late 2016 and early 2017, Safe Work Australia conducted the Health and Safety at Work Survey among owners and senior managers. This research compared awareness of their WHS responsibilities and changes to WHS laws in small, medium and large businesses. This included examining the proportion of employers that relied on government sources (legislation, publications, and inspectors) for WHS information as opposed to industry as the main source of information.

In May 2018, Safe Work Australia commissioned in-depth interviews with 10 survey respondents, comprising two groups: those 'aware and knowledgeable' who tended to be larger businesses who had been operating for many years; and those who were 'unaware or not well informed'.⁵⁷⁸

Australian National University—School of Regulation and Global Governance

In 2013, Safe Work Australia entered into a funding agreement with the ANU for seven research projects on WHS. The seven projects were as follows.

⁵⁷⁸ Safe Work Australia, 'Evaluation of model work health and safety (WHS) laws: Non-employing, small and medium business interviews', report prepared by Instinct and Reason, unpublished, 2014.

Project 1: Legal construction of key sections of the model WHS Act

The aim was to gain an understanding of how the courts have interpreted key sections of the enacted model WHS laws. The research included a search for and analysis of all written decisions made by all courts interpreting the WHS Acts and Regulations in the seven model WHS laws jurisdictions.

Project 2: Sentencing of WHS offenders

The aim was to gain a comprehensive understanding of how the courts have been sentencing defendants prosecuted successfully under the model WHS Acts. The research included a total of 22 interviews with officers responsible for investigations and prosecutions in each of the model WHS laws regulators and the gathering and analysis of basic information about each prosecution.

Project 3: Regulator compliance support, inspection and enforcement

The aim was to examine how WHS regulators support duty holder compliance, undertake inspections and enforce the model WHS Act and Regulations in model WHS laws jurisdictions. The research included a literature review, document analysis and interviews with senior WHS regulators and inspectors in each of the study jurisdictions.

Project 4: The efficacy of model Codes and guidance material

The aim was to consider how model Codes and guidance materials have actually played out under the model WHS laws framework. The research involved a systematic review of policy information available on the WHS regulators' websites, interviews with WHS regulators and users of codes of practice and guidance material, and an updated literature review from previous School of Regulation and Global Governance research.

Project 5: Risk-based regulation

The aim was to investigate whether and how WHS regulation implements the principles of risk-based regulation. The research included a literature review and interviews with a total of 31 senior managers and field officers from regulators in the seven model WHS laws jurisdictions.

Project 6: The efficacy of SWMS and WHS management plans in construction

The aim was to examine the use and effectiveness of SWMS and WHS management plans in construction. The research included interviews with representatives of employer associations, unions, the Federal Safety Commissioner and WHS regulators; a survey of head contractors, subcontractors and workers; and a review of a sample of SWMS and plans in the harmonised jurisdictions.

Project 7: The effectiveness of the Australian model WHS Act, Regulations, Codes and guidance material in addressing psychosocial risks

The aim was to examine the effectiveness of the model WHS laws for addressing psychosocial risks. The research included an examination of the different regulatory and advisory frameworks for managing psychosocial risks in Australia and other countries, a review of the literature relating to these frameworks, and interviews with experts in the regulation and management of psychosocial risks.

Understanding effective enforcement tools in work health and safety (2018)

The NSW Government Centre for Work Health and Safety is undertaking research on the impact of enforcement tools in the implementation of WHS law. The aim is to assist WHS regulators in identifying motivational drivers in the duty holder and in designing tailored interventions that effectively deter reoffending and encourage compliance. This research project sought to better understand:

- the decision-making frameworks guiding the use of enforcement tools in WHS
- the use of WHS enforcement tools by Australian WHS regulators
- the characteristics, mechanisms and evidence of the enforcement tools causing behavioural change, and
- the effectiveness of the tools as perceived by the inspectors who use them and the businesses that receive them and as reflected by the rate of reoffending.

The methodology included literature reviews, a survey of WHS regulators, interviews with key staff at SafeWork NSW and interviews with 11 businesses that had been subject to enforcement action by the WHS regulator.

Appendix F: Case law

A number of court cases are referenced throughout this report. A summary of these cases is outlined below, presented in the order they appear.

Chapter 1

Safework NSW v Universal Property Group [2018] NSWDC 64

In this case, the court took into account the Safe Work Australia *Guide to formwork* in sentencing a company for breach of a health and safety duty after a worker fell from a formwork deck. The guide made recommendations about fall prevention measures, which the court used to support a finding that the risk of falls was well known and control measures were simple and readily available. The court's use of the guide in this way was similar to the way in which codes of practice may be used in legal proceedings under s 275 of the model WHS Act—that is, as evidence of hazards and risks and what actions a PCBU should have taken in a particular case to manage those risks. However, in this case, the guide was used in considering factors in sentencing rather than whether a health and safety duty or obligation under the WHS Act had been complied with.

Boland v Safe is Safe Pty Ltd & Munro [2017] SAIRC 17

This case in the South Australian Industrial Relations Court concerned a young girl dying when she was ejected from an amusement ride at the Royal Adelaide Show. The engineering company that certified the ride complied with relevant standards was charged with a Category 1 offence. The defendants unsuccessfully argued that the primary duty to other persons under s 19(2) of the model WHS Act only exists while the work is being carried out and does not extend to the consequences or product of work after the work has been carried out or completed. The court held that the health and safety duty to other persons is not limited to the time and place at which work is carried out. Rather, it creates a wider duty to protect the public at large from the adverse health and safety consequences of work.

Chapter 3

NSW Rural Fire Service v SafeWork NSW [2016] NSWIRComm 4

The Industrial Relations Commission of NSW reviewed a decision by SafeWork NSW to require the Rural Fire Service (RFS) to consult, implement work groups and facilitate election of HSRs as requested by a volunteer member. During this case, the Commissioner raised issues with the drafting of s 52(1) of the NSW WHS Act, which is based on the model WHS Act. This section provides that a work group is to be determined by negotiation and agreement between the PCBU and the workers who will form the work group or their representatives. The Commissioner noted some circularity in that the negotiations must involve a group of workers (or their representatives), but the identity of this group is the subject of the negotiations. Similarly, if negotiations fail, there is an issue about who may apply to the regulator to appoint an inspector. The Commissioner saw this issue as particularly difficult for large organisations like the RFS.

***Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89**

This case was an appeal to the Full Court of the Federal Court of Australia from a decision that a union official could enter a construction workplace in Victoria as an assistant to an HSR under the Vic OHS Act, without holding an entry permit under the Fair Work Act. The Full Court held that a person accessing a workplace as an assistant to an HSR is exercising a state or territory OHS right. Under s 494 of the Fair Work Act, a union official must not exercise a state or territory OHS right unless they hold an entry permit under that Act. A union official accessing a workplace as an assistant to an HSR under the Vic OHS Act is therefore required to hold an entry permit under the Fair Work Act. The High Court subsequently refused special leave to appeal this decision. This case may have implications for the model WHS Act given the assistant entry provisions are similar to those in the Victorian legislation.

***Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bruce Highway Caloundra to Sunshine Upgrade Case)* [2018] FCA 553**

This case involves CFMMEU officials entering or seeking to enter a worksite on the Bruce Highway upgrade under s 81 of the Qld WHS Act (to attend discussions with a view to resolving a work health and safety issue). Two of the officials did not hold valid entry permits issued under the Fair Work Act, and the others held permits but refused to show these when asked. The CFMMEU officials are arguing entry to the workplace under s 81 of the WHS Act is not a 'State or Territory OHS right' under the Fair Work Act, so they did not need to hold or show entry permits under that Act.

The Federal Court considered an application for interlocutory relief to prevent further entry to the workplace under s 81 of the Qld WHS Act by officials of the CFMMEU unless they hold and show a valid entry permit under the Fair Work Act. In granting relief, Justice Collier stated, 'there is a *prima facie* case before the Court that the production of an entry permit in the circumstances contemplated by the proposed relief may be *necessary* under the relevant Queensland legislation in light of the decision of the Full Court of the Federal Court in *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89'.⁵⁷⁹ At the time of publication, the Federal Court has not yet decided the substantive issue of whether entry to a workplace under s 81 is a 'State or Territory OHS right' under the Fair Work Act, which would mean production of a valid entry permit under the Fair Work Act would be required.

A further case involving some of the same respondents allegedly entering the worksite of a different company under similar circumstances was brought in November 2018 but adjourned pending the outcome of above case.⁵⁸⁰

***Sydney Trains v SafeWork NSW* [2017] NSWIRComm 1009**

This case involved a review by the Industrial Relations Commission of NSW of a decision by SafeWork NSW to direct Sydney Trains to facilitate and pay for HSR training that had been chosen by

⁵⁷⁹ *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (The Bruce Highway Caloundra to Sunshine Upgrade Case)* [2018] FCA 553, para 18.

⁵⁸⁰ *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union & Ors* [2018] QUD 785.

some HSRs. The regulator made the decision on the understanding that an HSR had the right to decide which HSR training course to attend and the PCBU could do no more than agree to a specific course or disagree with it. The *Worker representation and participation guide* published by SafeWork NSW and Safe Work Australia also stated this was the case. The Commissioner raised inconsistencies between the wording in s 72 of the NSW WHS Act (which is based on the model WHS Act) and the guidance material on HSR training. The Commissioner held that s 72 of the NSW WHS Act did not give the HSR or the PCBU a unilateral right to enforce their preferred training course, and the NSW and Safe Work Australia guides misstated its effect.

***Ramsay & Anor v Menso & Anor* [2017] FCCA 1416**

This case in the Federal Circuit Court of Australia concerned a WHS right of entry dispute between union officials and a construction site manager and builder. A WHS inspector was called to the construction site to assist with the dispute when the manager refused the union officials entry to the construction site. The inspector found the officials held valid WHS entry permits and advised the site manager she must allow the officials entry unless she had a reasonable excuse. She refused entry and provided an excuse, but the inspector did not accept that excuse was reasonable. While not essential to the court's decision, the judge expressed the view that it is not the role of an inspector to determine the proper interpretation of the legislation. It is for the industrial commission to decide whether there is a reasonable excuse to refuse entry under the WHS Act.

***Thorburn v SafeWork SA* [2014] SAIRC 29**

This case in the South Australian Industrial Relations Court concerned a former employee of SafeWork SA seeking a declaration that the conduct of a colleague was discriminatory or coercive. However, the court held that it only has jurisdiction to make a declaratory order if Parliament expressly confers that power. Section 112 of the SA WHS Act (and the equivalent in the model WHS Act) does not expressly confer such a power. As a result, the court found it did not have jurisdiction to make the declaration and, as the employee had not provided any particulars of loss, there was also no basis on which the court could order compensation. Effectively, the court decided it could not rule on whether there was discriminatory conduct without the person also seeking another remedy that the court had power to provide, such as compensation.

***CFMEU v Bechtel Construction (Australia) Pty Ltd* [2013] FCA 667**

This case in the Federal Court of Australia concerned the dismissal of six employees of Bechtel Construction and the issuing of a warning to a number of other employees on the basis they had participated in unlawful industrial action by stopping work to meet a union official. The CFMEU sought reinstatement orders and a declaration that the terminations and warnings were null and void, because each of the employees had exercised a workplace right in meeting a union official to consult on a safety issue. The court considered there was a serious question about the operation of s 117 of the Qld WHS Act in circumstances where a suspected contravention is noticed by a WHS entry permit holder who has already lawfully entered the site under the Fair Work Act. In this scenario, the court considered the WHS permit holder 'might not need to leave the site and then exercise a right of entry on the basis of a reasonably held suspicion, in place, before then re-entering the worksite'. This was '[e]ven though s 117 of the WHS Act contemplates that the permit holder must reasonably suspect

before entering the workplace that a contravention has occurred or is occurring'.⁵⁸¹ The observations in this case relate to WHS entry provisions in the Qld WHS Act that do not require the entry permit holder to give prior notice of entry to inquire into suspected contraventions, as is currently required by the model WHS laws.

Chapter 4

Hunter Quarries Pty Ltd v State of New South Wales (Department of Trade & Investment) [2014] NSWSC 1580

This case in the Supreme Court of New South Wales concerned a dispute about the inspector's powers to investigate possible breaches of the NSW WHS Act related to the death of an employee at the quarry. The case examined the relationship between the regulator's power to obtain information (s 155 of the NSW WHS Act) and the inspector's power to require production of documents and answers to questions (s 171 of the NSW WHS Act). The Supreme Court confirmed that an inspector is entitled to use the powers in s 171 of the NSW WHS Act whenever entering a workplace, including investigating an incident notified to the regulator. The separate operation of ss 155 and 171 of the NSW WHS Act reflects that the provisions are likely to be exercised at different times and in different circumstances. A key difference is that s 155 presupposes that the regulator already has information on which to base the 'reasonable belief' required to seek the production of documents or information, whereas s 171 does not depend on the inspector forming any such belief. The only limitation on the inspector's powers is that they be exercised on entry to a workplace. An inspector who has exercised their powers under s 171 is an obvious source of information for the regulator. For example, an inspector may enter a workplace and gather information or documents under s 171 of the WHS Act, which results in the regulator later being able to form the reasonable belief required to issue notices under s 155.

Perilya Limited v Nash [2015] NSWSC 706

This case was an appeal to the Supreme Court of New South Wales from a decision that a company failed to comply with two notices issued under s 155 of the NSW WHS Act. The notices related to the death of a worker at a mine at Broken Hill in New South Wales that was operated by Perilya. The notices sought production of documents from Perilya's head office in Perth. The Supreme Court held that the s 155 notices issued by the New South Wales regulator were valid. In the circumstances, the regulator's power to issue a notice to obtain information under s 155 the NSW WHS Act was not limited by state borders. In deciding whether the regulator could issue the notice, the court did not consider the fact that the company is registered and has its head office in Western Australia as decisive considerations. The documents being sought in the notice were relevant to compliance with the NSW WHS Act.

⁵⁸¹ *CFMEU v Bechtel Construction (Australia) Pty Ltd* [2013] FCA 667, para 34.

Chapter 6

Williamson v VH & MG Imports Pty Ltd [2017] QDC 56

This case was an appeal to the Queensland District Court concerning a penalty imposed on a trailer company for failing to ensure the safety of a worker who was fatally injured while constructing a boat trailer. The Queensland Magistrates Court had found the company committed a Category 2 offence under the Qld WHS Act and imposed a fine of \$90,000 with no conviction recorded. The regulator, Work Health and Safety Queensland, appealed this decision on the ground that the penalty was manifestly inadequate and well out of line with sentences imposed for similar offences under the harmonised WHS laws in other jurisdictions. The Queensland District Court agreed and increased the fine imposed for a breach of a WHS duty after taking into account relevant decisions in other jurisdictions with harmonised WHS laws. The District Court accepted the regulator's submission that the objects of the WHS Act are facilitated by consideration of sentencing practices across the harmonised jurisdictions, similar to sentencing of federal offences.

R v AC Hatrick Chemicals Pty Ltd [1995] 140 IR 243

This case involved an explosion which killed one contractor and seriously burned another. The contractors caused the explosion when they used welding equipment on or near a tank used to store flammable liquid.

Proceedings were brought against the company on the basis that the conduct of the plant manager and the plant engineer amounted to gross negligence that could be attributed to the company because of their functions in fulfilling a duty of care on behalf of the company. The Supreme Court of Victoria directed an acquittal verdict because the actions of each of the two managers fell short of criminal negligence, and the prosecution could not rely on aggregation of the conduct of the individuals to prove criminal negligence of the corporation. Even if it could be shown that actions of one of the managers amounted to criminal negligence, neither of them were acting 'as the company'. The outcome of this case is often cited as a failure of the laws when applied to larger organisations.

Presidential Security Services Pty Ltd v Brilley [2008] NSWCA 204

This case confirmed that a corporation can be charged with a broad range of offences, with some exceptions depending on the nature, elements and terms of the offence. In this case, Mr David Bingle was a security guard and the managing director and sole employee of Presidential Security Services of Australia Pty Ltd. Mr Bingle was guarding a sports club when he shot and wounded an intruder, Mr Clinton Brilley. Mr Brilley claimed damages for personal injuries from the company based on the actions of Mr Bingle.

The question in this case was whether the company could be liable for assault, which involved an intention to inflict harm. The NSW Court of Appeal held the conduct and state of mind of Mr Bingle had been correctly attributed to the company, because he was the directing mind and embodiment of the company. However, the appeal was upheld because the primary judge had failed to properly consider whether the company could not be liable on the basis that Mr Bingle had acted in self-defence.

R v HM Coroner for East Kent; ex parte Spooner and Ors [1989] 88 Cr App R 10

This case was heard in the United Kingdom. It involved the capsizing of a roll-on, roll-off ferry, the *Herald of Free Enterprise*, in the English Channel on 6 March 1987 killing 193 people. The ferry capsized because vehicle access doors on the ferry bow were not closed before departure. The coroner ruled that the corporation which owned the ferry was not guilty of manslaughter. The Court of Appeal (England and Wales) upheld this ruling on the basis that the actions of the employees could not be aggregated into a single act of corporate negligence. The mental element ('mens rea') needed to establish manslaughter (that is, what the person intended) was not established for those who were identified to embody the corporation.

R v Denbo Pty Ltd & Nadenbousch (unreported, VSC, Teague J, 14 June 1994)

R v Denbo Pty Ltd & Timothy Ian Nadenbousch was Australia's first conviction of a corporation for manslaughter. Denbo Pty Ltd, a Victorian earth-moving company, was prosecuted when one of its drivers, Mr Anthony Krog, was killed in 1991 when the defective brakes on the truck failed. The Supreme Court of Victoria found there was criminal negligence on the part of the company in failing to establish adequate systems of maintenance, failing to train employees and permitting unsafe vehicles to be used. The company (through its directors) pleaded guilty and was fined \$120,000.

R v ICR Haulage Ltd [1944] 1 KB 551, 554

This case was heard in the United Kingdom. A haulage company was convicted of conspiracy to defraud through the actions of the managing director. The High Court of England and Wales (King's Bench Division) followed precedent to find that the acts of a company's officers can be taken to be the acts of the company, provided the officer can be regarded as the company for that purpose. The factors for deciding whether the acts of a person constitute those of the company include the nature of the criminal charge and the relative position of the officer in the company.

Appendix G: Overview of WHS in Australia

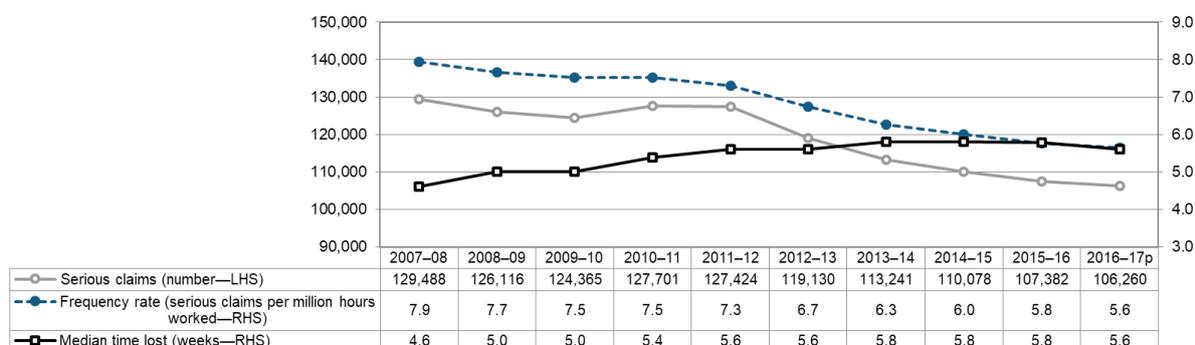
Trends in workplace injuries and fatalities

Work health and safety outcomes in Australia have improved considerably over the last decade, with both the rate of serious workers' compensation claims and the rate of worker fatalities falling significantly over this time.

Serious workers' compensation claims

As shown in figure 1 below, the frequency rate of serious claims has fallen by 27 per cent since 2007–08 and by 21 per cent in the five years since the introduction of the model WHS laws. Of particular note is that, while the number of serious claims remained relatively constant between 2007–08 and 2011–12, since the introduction of the model WHS laws, the number of claims have reduced dramatically—by 16 per cent since 2011–12. Similarly, following a general upward trend over time, the median time lost for serious claims has levelled out at around five and a half weeks since 2011–12. While the number, rate and time lost from claims can be influenced by a range of factors, particularly changes to jurisdictional workers' compensation schemes, the changing trends evident in figure 1 suggest that the model WHS laws may have had at least some positive impact on WHS outcomes.

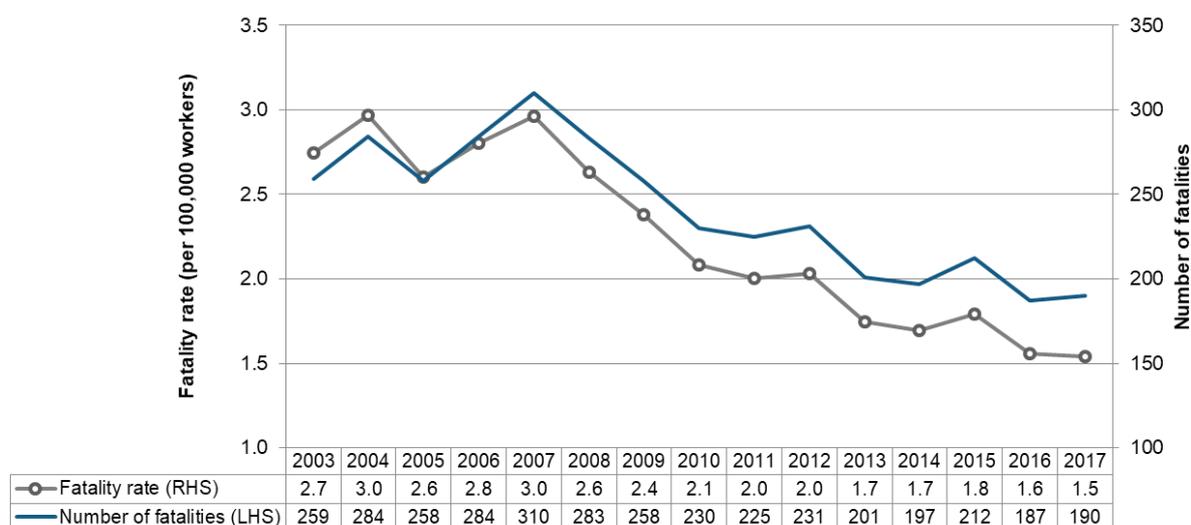
Figure 1: Serious workers' compensation claims—number, frequency rate and median time lost, 2007–08 to 2016–17



Worker fatalities

Similar to serious workers' compensation claims, figure 2 below shows that both the number and rate of worker fatalities have been trending down over the last decade. Since the peak in 2007, the number of worker fatalities has fallen by 39 per cent to 190 fatalities in 2017, while the fatality rate has halved from 3.0 fatalities per 100,000 workers in 2007 to 1.5 fatalities per 100,000 workers in 2017.

Figure 2: Worker fatalities—number and fatality rate (fatalities per 100,000 workers), 2003 to 2016



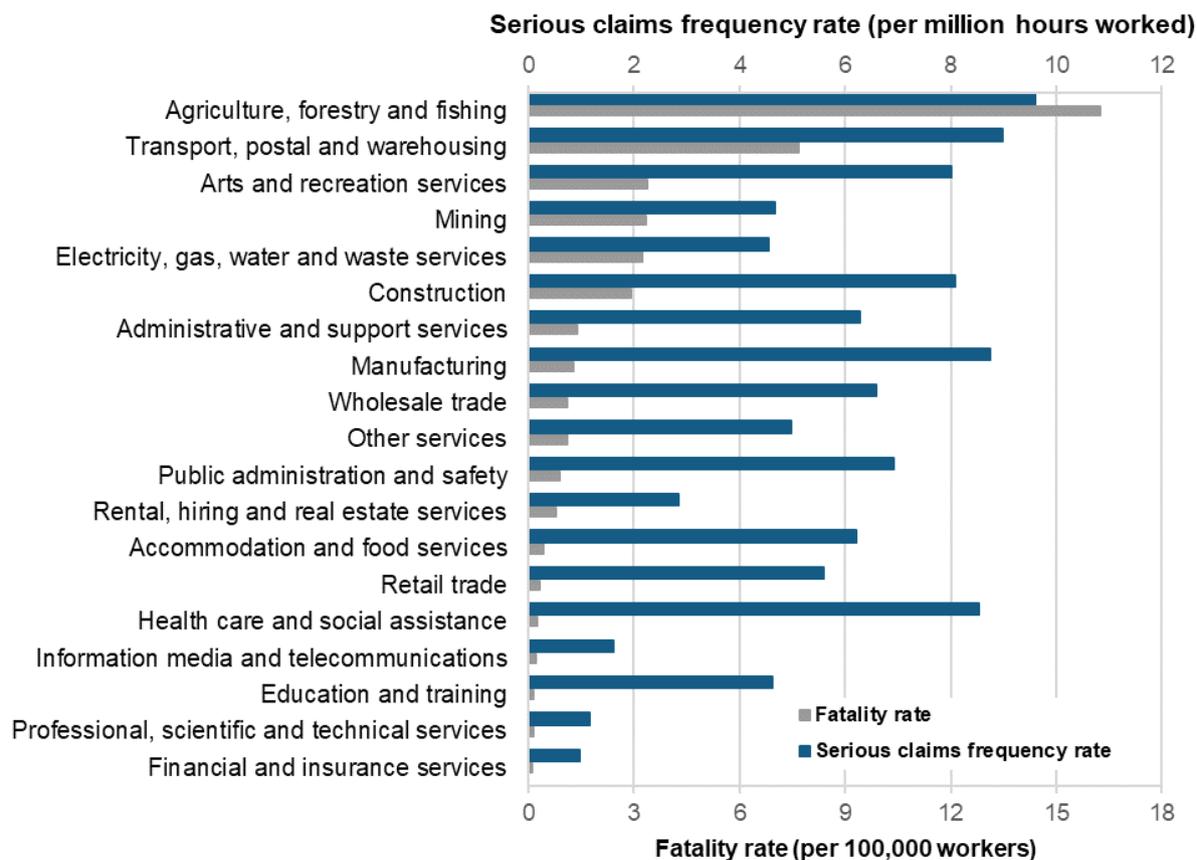
Industry profiles

In relation to workplace injuries and diseases, the health care and social assistance industry accounted for the highest number of serious claims on average between 2012–13 and 2016–17⁵⁸² (15 per cent), followed by manufacturing (13 per cent) and construction (11 per cent). Together, these industries accounted for 40 per cent of all serious claims but less than 30 per cent of the workforce. Controlling for workforce size, however, the frequency rate of serious claims (figure 3) was highest in the agriculture, forestry and fishing industry (9.6 serious claims per million hours worked), followed by transport, postal and warehousing (9.0 serious claims per million hours worked), manufacturing (8.7 serious claims per million hours worked) and health care and social assistance (8.5 serious claims per million hours worked).

With respect to worker fatalities, the vast majority (65 per cent) of fatalities on average between 2013 and 2017 occur in just three industries. During this period, the agriculture, forestry and fishing industry (51 fatalities) accounted for almost a quarter of fatalities, followed closely by the transport, postal and warehousing industries (47 fatalities) and the construction industry (31 fatalities). The agriculture, forestry and fishing industry and the transport, postal and warehousing industry also recorded the highest fatality rates (figure 3) between 2013 and 2017 (16.3 fatalities per 100,000 workers and 7.7 fatalities per 100,000 workers respectively).

⁵⁸² Data for 2016–17 is preliminary (denoted by suffix 'p'). Workers' compensation claims from the preliminary year are likely to be open and claimants may accrue more compensation payments and time lost in subsequent years.

Figure 3: Worker fatality rates and serious claim frequency rates, by industry of employer, average# of last five years



Average of 2013 to 2017 for fatalities and 2012–13 to 2016–17 for serious claims.

Workforce overview and trends

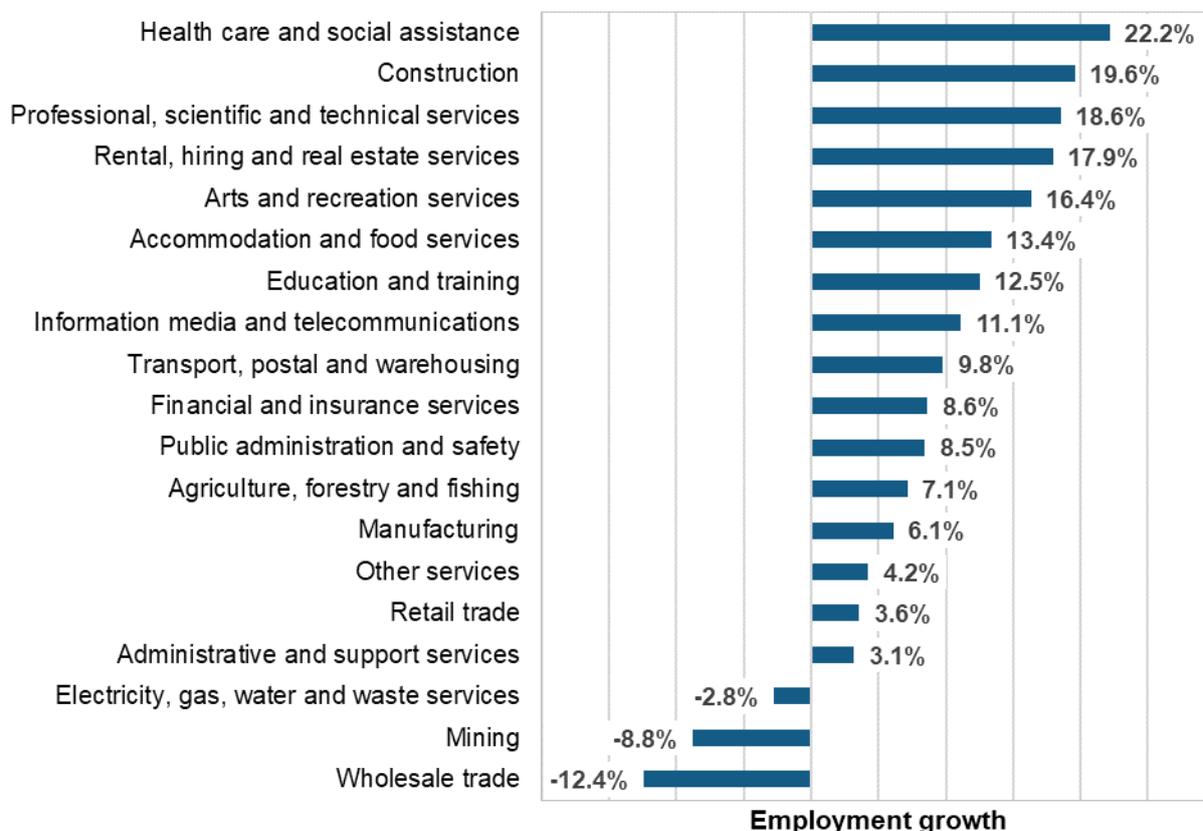
Labour market conditions in Australia over the period since the introduction of the model WHS laws have been mixed, with periods of both weakness and strength. Over the five years to August 2018, employment has increased by 1,188,600 or 10.4 per cent over the period at a rate of 2.1 per cent per annum. Employment growth has been particularly strong over the last two years, increasing by 340,000 (or 2.8 per cent) and 306,100 (or 2.5 per cent) over the year to August 2017 and August 2018, respectively. The employment figure in Australia currently stands at 12,645,900 in August 2018.⁵⁸³

As shown in figure 4, employment growth has been particularly strong in a number of service industries and in construction over the five years to August 2018. The health care and social assistance industry recorded the highest growth (up by 22.2 per cent), followed by the construction industry (up by 19.6 per cent), the professional, scientific and technical services industry (up by 18.6 per cent) and the rental hiring and real estate services industry (up by 17.9 per cent). By contrast employment has contracted significantly in the wholesale trade industry over the five years, down by

⁵⁸³ Australian Bureau of Statistics, *Labour force, Australia, detailed, quarterly, Aug 2018*, cat no 6291.0.55.03, ABS, Canberra, 2018, Table 4, Trend data.

12.4 per cent, as well as in the mining industry (down by 8.8 per cent) and the electricity, gas, water and waste services industry (down by 2.8 per cent).⁵⁸⁴

Figure 4: Employment growth by industry, August 2013 to August 2018



Looking forward, the Australian Government Department of Jobs and Small Business projects employment to grow by 7.1 per cent, or 1.4 per cent per annum, over the five years to May 2023, with the health care and social assistance industry estimated to make the largest contribution.⁵⁸⁵

Employment in this industry is projected to increase by 14.9 per cent over the five years, driven largely by the full implementation of the NDIS, the ongoing ageing of the population and increasing demand for childcare and home-based care services.

The construction industry (up by 10.0 per cent), the education and training industry (up by 11.2 per cent) and the professional, scientific and technical services industry (up by 10.2 per cent) are also projected to make significant contributions to total employment growth to May 2023. By contrast, further contractions are projected in the wholesale trade industry over the five years to May 2023, with employment estimated to fall by 2.7 per cent, alongside the agriculture, forestry and fishing industry (down by 0.4 per cent).

⁵⁸⁴ Australian Bureau of Statistics, *Labour force, Australia, detailed, quarterly, Aug 2018*, cat no 6291.0.55.03, ABS, Canberra, 2018, Table 4, Trend data.

⁵⁸⁵ Department of Jobs and Small Business, *Employment outlook to May 2023*, Department of Jobs and Small Business, Canberra, 2018.

The projected employment growth in industries such as health care and social assistance and construction have the potential to present some ongoing WHS challenges noting the relatively high rates of workplace injuries in both industries and relatively high rate of worker fatalities in construction. Similarly, while the employment contractions expected in the wholesale trade and agriculture, forestry and fishing industries could lead to reductions in the number of injuries and fatalities in these industries, it may also present WHS challenges stemming from potential increased expectations that remaining employees take on additional work tasks.

Workforce and business profile

According to the latest labour force statistics from the Australian Bureau of Statistics, there were 10,488,000 employees and 2,045,900 owner managers in the workforce as at August 2018. Of the employees, 68.7 per cent worked full-time and 31.3 per cent worked part-time. About one-quarter of employees (24.6 per cent) in August 2018 reported that they were not entitled to paid leave entitlements and were therefore considered as casuals.⁵⁸⁶

As at 2017, small businesses (one to 19 employees) employed 43.8 per cent of employees, while medium-sized businesses (20 to 99 employees) employed about a quarter (24.0 per cent) of employees. About a third (32.1 per cent) were employed by larger businesses with 100 or more employees.⁵⁸⁷

In terms of number of businesses, as at June 2017, 61 per cent of businesses (1,370,051) were non-employing businesses. The remaining 39 per cent (868,248) of businesses were employing businesses, with the vast majority of these being small businesses—70 per cent (608,733) employing one to four employees and 23 per cent (203,351) employing five to 19 employees.⁵⁸⁸

Work health and safety compliance and enforcement activities in Australia

Shaded areas in figures 5, 6 and 7 represent the implementation of the model WHS laws in the jurisdictions, which resulted in some changes to enforcement tools used by jurisdictions. The data is sourced from Safe Work Australia's annual Comparative Performance Monitoring data set for the period 2007–08 to 2016–17, based on information provided by each jurisdiction.

Each year regulators conduct thousands of workplace interventions to promote WHS compliance and respond to WHS incidents. In 2016–17, overall regulators undertook over 230,000 workplace interventions, of which around 85,000 were proactive workplace visits (visits not related to an incident or complaint) and around 70,000 were reactive workplace visits (visits related to an incident or complaint). In addition, on the education front, regulators gave over 8,000 proactive workshops, presentations or seminars and undertook over 75,000 other reactive activities such as desk-based audits, meetings, telephone advice and written correspondence required to resolve an incident or complaint.

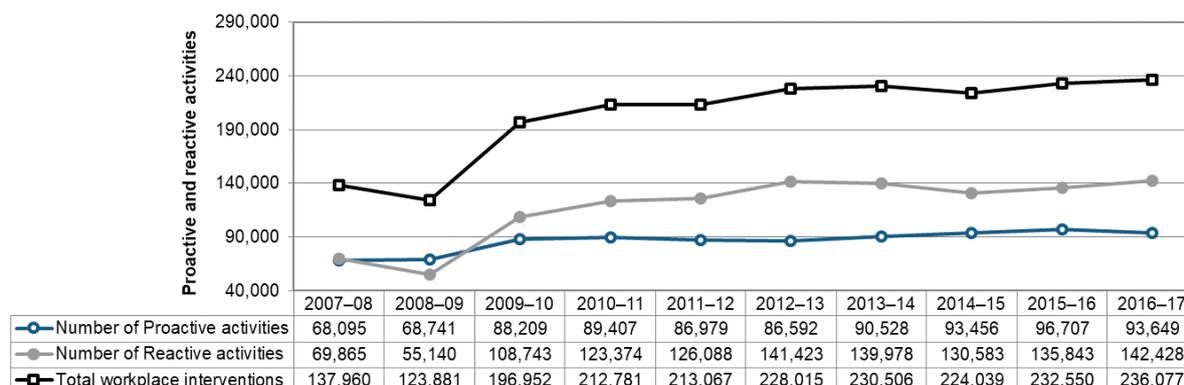
⁵⁸⁶ Australian Bureau of Statistics, *Labour force, Australia, detailed, quarterly, Aug 2018*, cat no 6291.0.55.03, ABS, Canberra, 2018, Table 13, Original data.

⁵⁸⁷ Australian Bureau of Statistics, *Australian industry, 2016–17*, cat no 8155.0, ABS, Canberra, 2018, Table 5.

⁵⁸⁸ Australian Bureau of Statistics, *Counts of Australian businesses including entries and exits, June 2013 – June 2017*, cat no 8165.0, ABS, Canberra, 2018, Table 13.

As shown in figure 5 below, the total number of workplace interventions has increased slightly over the last six years.

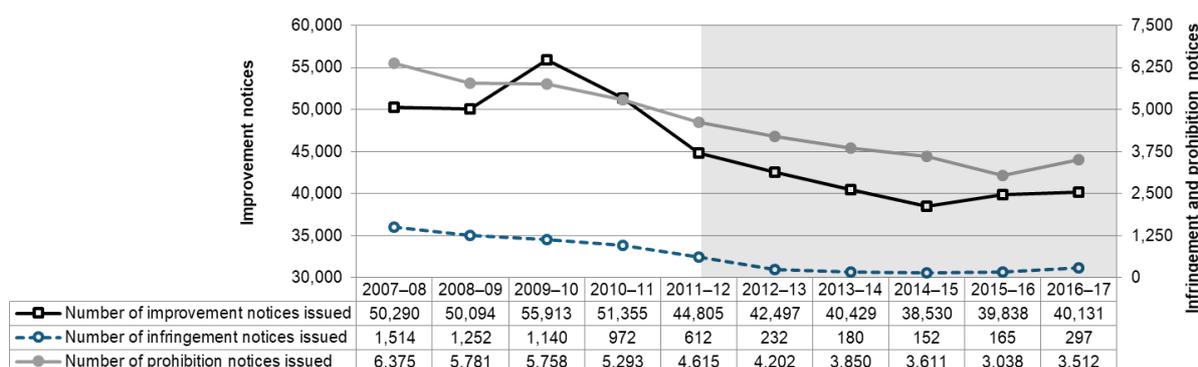
Figure 5: Number of workplace WHS regulator interventions, proactive and reactive,⁵⁸⁹ Australia, 2007–08 to 2016–17



Where inspectors identify a breach under their WHS laws, a notice may be issued. In 2016–17, jurisdictional WHS authorities issued 43,940 notices, comprising 297 infringement notices, 3,512 prohibition notices and 40,131 improvement notices.

It is difficult to compare data on notices across jurisdictions, as notices are issued differently in each. For example, in some instances a single notice may be issued for multiple breaches of the laws, while in other instances separate notices are issued for each identified breach. At the national level, figure 6 below shows that over the last 10 years there has been a general decline in the number of each type of notice issued.

Figure 6: Notices issued by type of notice, Australia, 2007–08 to 2016–17

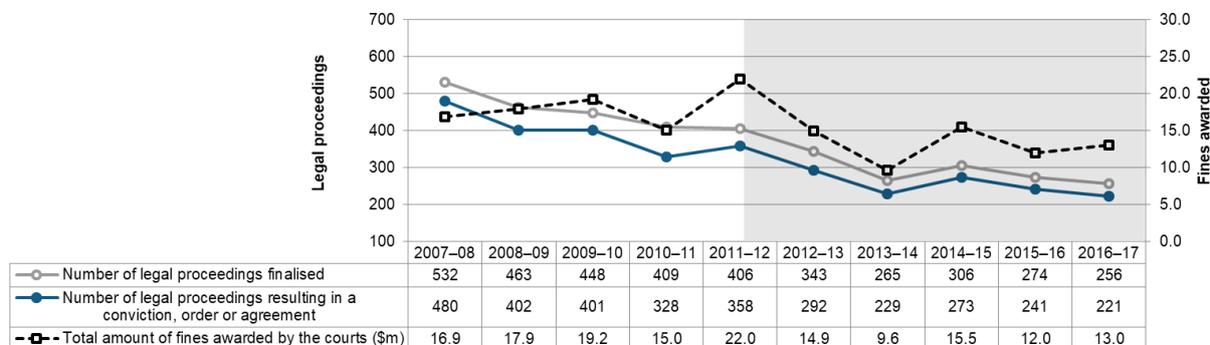


A conviction, order or agreement is defined (with or without penalty) once it has been recorded against a company or an individual in the judicial system. All legal proceedings recorded in the reference year are counted regardless of when the initial legal action commenced. Figure 7 shows that across Australia there has been a general downward trend in the number of legal proceedings

⁵⁸⁹ 'Proactive activity' includes number of workplace visits and number of proactive workshops/presentations/seminars/ forums. 'Reactive activity' includes number of workplace visits and other reactive interventions.

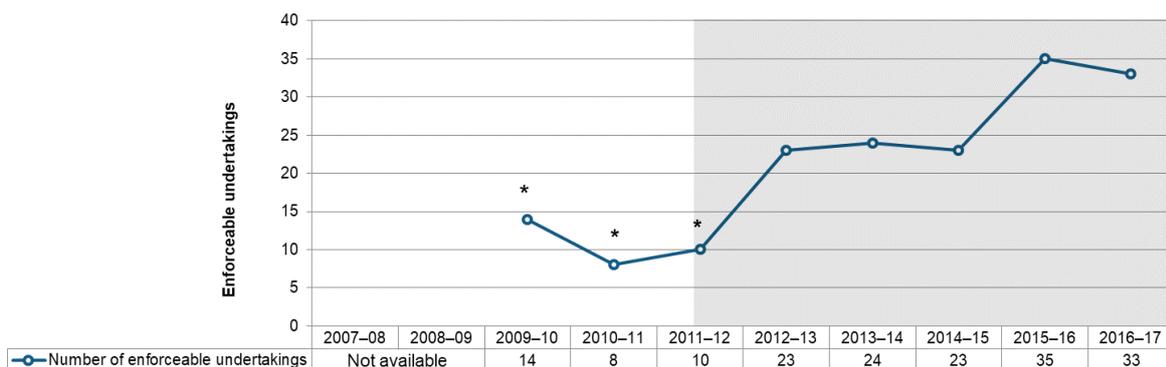
over the last 10 years. Similarly, while there has been some variation year-on-year, the total amount of fines awarded have also fallen over the period.

Figure 7: WHS prosecutions—number of legal proceedings and fines issued, Australia, 2007–08 to 2016–17



An enforceable undertaking (EU) is a legally binding agreement entered into as an alternative to having the matter decided through legal proceedings for contravention of a WHS law. As shown in figure 8, over the last six years there has been a substantial increase in EUs accepted by regulators in Australia.

Figure 8: Number of enforceable undertakings, Australia, 2007–08 to 2016–17



* Only Queensland supplied data for EUs prior to 2011–12.

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Crimes (Sentencing Procedure) Act 1999 (NSW)

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Sentencing Act 2017 (SA)

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Work Health and Safety Act 2011 (Cth)

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⁵⁹⁰ Note that this includes the key publications referred to in the report. It does not include all articles, books and other material read by the reviewer throughout 2018.

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