



PERFORMANCE AUDIT

27 FEBRUARY 2024

Effectiveness of SafeWork NSW in exercising its compliance functions

NEW SOUTH WALES AUDITOR-GENERAL'S REPORT

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In accordance with section 38EC of the *Government Sector Audit Act 1983*, I present a report titled '**Effectiveness of SafeWork NSW in exercising its compliance functions**'.

A handwritten signature in black ink, appearing to read 'Margaret Crawford'.

Margaret Crawford PSM
Auditor-General for New South Wales
27 February 2024



RECONCILIATION COMMITMENT STATEMENT

The Audit Office of New South Wales pay our respect and recognise Aboriginal people as the traditional custodians of the land in NSW.

We recognise that Aboriginal people, as custodians, have a spiritual, social and cultural connection with their lands and waters, and have made and continue to make a rich, unique and lasting contribution to the State. We are committed to continue learning about Aboriginal and Torres Strait Islander peoples' history and culture.

We honour and thank the traditional owners of the land on which our office is located, the Gadigal people of the Eora nation, and the traditional owners of the lands on which our staff live and work. We pay our respects to their Elders past and present, and to the next generation of leaders.

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Section one

Effectiveness of SafeWork
NSW in exercising its
compliance functions

Executive summary

SafeWork NSW is the work health and safety regulator in New South Wales. It was established by the *State Insurance and Care Governance Act 2015*.

As the regulator, SafeWork NSW is responsible for, among other things, enforcing compliance with the *Work Health and Safety Act 2011* (the WHS Act) and the Work Health and Safety Regulation 2017. The regulator's full functions are set out in section 152 of the WHS Act.

SafeWork NSW's operations are guided by seven regulatory priorities for 2023, which contribute to three strategic outcomes:

- Workers understand their rights and responsibilities.
- Employers ensure that work is healthy and safe, with no advantage for cutting corners.
- Regulation is fair and efficient.

This audit assesses the effectiveness of SafeWork NSW in monitoring and enforcing compliance with the WHS Act, through the examination of three lines of inquiry:

1. Does SafeWork NSW have evidence-based processes to set its objectives and priorities for monitoring and enforcing compliance?
2. How effectively does SafeWork NSW measure and report its performance in monitoring and enforcing compliance against the WHS Act?
3. Are SafeWork NSW's policies and procedures for monitoring and enforcing compliance applied consistency across different sectors?

As SafeWork NSW is part of the NSW Department of Customer Service (DCS), the department is the auditee. Prior to 2019, SafeWork NSW was located in the former Department of Finance, Services and Innovation. Unless otherwise stated, any reference to SafeWork NSW should be read as including the broader department in which it sits.

Conclusion

An effective work health and safety regulator would, among other things, have a comprehensive performance measurement and reporting framework, and would use data strategically to inform risk-based decisions. SafeWork NSW does not demonstrate either of these.

It is constrained by its primary information management system. It lacks an effective strategic and data-driven approach to respond to emerging risks - such as exposure to respirable crystalline silica, to which it was slow to respond. It operates in silos with limited collaboration between teams, and it cannot demonstrate that it is making consistent and effective decisions to address non-compliance and workplace health and safety risks. This audit exposed non-compliance and integrity risks in the procurement and promotion of a real-time silica monitoring device sponsored by SafeWork NSW.

There is limited transparency about the performance of SafeWork NSW as a regulator. What performance information is available is activity-based and does not assess whether SafeWork NSW is meeting its statutory functions.

As the regulator, SafeWork NSW has an obligation to report to the Minister on its operations and effectiveness under the WHS Act. However, since SafeWork NSW became part of the Department of Customer Service (DCS) in 2019, there has been no standalone, consolidated reporting by the regulator on its performance, funding, and spending. Reporting is diluted and dispersed through the broader department's annual report, NSW Budget papers, the NSW Dust Disease Register Annual Reports, as well as industry specific sections of the SafeWork NSW website.

SafeWork NSW's financial statement is grouped into DCS's financial statements as a cost centre. The only publicly accessible detailed information on the regulator's total revenue and total spending is contained in the State Insurance Regulatory Authority's annual report (as it provides funding to SafeWork NSW).

SafeWork NSW reports on certain performance indicators through Safe Work Australia's annual national Comparative Performance Monitoring Report. The limited data included in these reports are the only long-term data series that are publicly available about SafeWork NSW. This data shows that serious injuries have been increasing since 2016–17 (although fatalities in the workplace have decreased), which suggests that SafeWork NSW might not be effectively achieving its outcomes. Further reliable performance measurement and reporting is necessary to clarify the regulator's performance.

SafeWork NSW now only sets annual regulatory priorities, which are aligned to three broadly defined strategic outcomes. When SafeWork NSW reports publicly, it does so on its activities, not on whether it has achieved its intended outcomes.

SafeWork NSW has extensive and detailed data, but it does not use it proactively to identify and assess risk, assess its performance, or to strategically target its response to emerging threats.

DCS (and its predecessor department) has not invested in upgrading SafeWork NSW's work health and safety information management system (WSMS). WSMS is over 20 years old and is approaching its effective end of life. It is known to have data quality issues that need to be addressed and does not have the functionality required to efficiently extract and analyse data. Furthermore, a lack of data governance and corporate knowledge about the system means that there are risks that data may be misinterpreted. This has restricted SafeWork NSW's ability to use data strategically to inform decision-making.

SafeWork NSW and the broader department took around eight years to actively and sufficiently respond to the emerging work health and safety risk of silica in manufactured stone.

The heightened health risk posed by respirable crystalline silica derived specifically from manufactured (or 'engineered') stone was known internationally by at least 2010.

From the early 2000s, the use of manufactured stone increased significantly in Australia, particularly in kitchen and bathroom applications. From the early to mid-2010s, there was also a dramatic increase (from a low base) in the number of workers in the manufactured stone industry developing silicosis.

It was not until 2018–19 that SafeWork NSW commenced a substantial program of active compliance and awareness building in the manufactured stone industry. A new compliance regime commenced in 2020 as a result of legislative and regulatory reforms (between July–October 2020), and SafeWork NSW has continued a program of auditing worksites through to 2023.

Inconsistency in decision-making and operational practice is a core issue for SafeWork NSW that has affected its ability to enforce compliance as an efficient and fair regulator.

Under the WHS Act, before issuing compliance notices, a SafeWork NSW inspector must personally form a 'reasonable belief' that a contravention of the Act has occurred. While a manager may question an inspector about their decision, if the inspector does not personally hold a reasonable belief that a breach has occurred, then the manager cannot direct the inspector to issue a notice. There is a risk of inconsistency in regulatory outcomes, where inspectors may assess similar matters differently, including because of differences in experience and knowledge between individual inspectors, as well as different attitudes about how to achieve effective compliance. This risk also extends to decisions about how matters are initially triaged when received by SafeWork NSW and how they are escalated for possible prosecution.

SafeWork NSW has worked to promote consistency in regulatory decision-making, including introducing a compliance policy that is intended to ensure that inspectors' actions are consistent in similar circumstances, and a 12-month training program for all new inspectors. However, it does not have a continuous improvement policy or procedure, or an overarching quality assurance process to review decisions made at both the individual inspector level, and the broader corporate level.

The common practice of single inspectors routinely attending complex workplaces alone also poses the risk of creating gaps in personal safety, consistency, assurance and accountability.

This audit also identified inconsistent practices across several operational areas, such as the performance management of inspectors, review of decision-making, development of individual directorate data capabilities, the use of formal performance agreements and assessment, and the extent to which available data is used to inform decision-making.

SafeWork NSW and DCS have promoted the use of a real-time silica monitoring device even though the process to develop the device through procuring a research partner was significantly flawed, and importantly there were known concerns about its efficacy.

This report includes a case study on a respirable crystalline silica monitoring project managed by the Centre for Work Health and Safety within SafeWork NSW. This flagship research project won a DCS Secretary's award in December 2022.

The case study on the procurement of a research partner to deliver a real-time respirable crystalline silica monitoring device (called the 'Air XS') to the market identified potential maladministration due to significant flaws in procurement, project governance and risk management. Delegations, including for the award of the contract, were not adhered to. There were gaps in key documentation. Testing issues were raised early on by technical staff in SafeWork NSW and later by an external user of the device, but these risks were not properly escalated or responded to. Only as a result of the Audit Office raising these issues with the Head of SafeWork NSW, did SafeWork NSW undertake to enter into discussions with the CSIRO to conduct further testing of the real-time silica monitoring device. The department and the Audit Office have made separate referrals to the NSW Independent Commission Against Corruption regarding the procurement process for the Air XS.

1. Key findings

SafeWork NSW reports activity-based performance information in multiple sources but it does not provide a single collated report on both corporate and performance information, resulting in a lack of transparency about its performance and outcomes

SafeWork NSW lacks effective mechanisms to transparently report on its overall performance. The extent of its public reporting has reduced since it became a part of the Better Regulation Division of the newly formed Department of Customer Service in 2019. Reporting is dispersed across multiple state and federal reporting regimes. For example, the regulator's financial statements are grouped into the broader department's financial statements. Details on the regulator's total revenue and spending is contained in the State Insurance Regulatory Authority's annual reports. SafeWork NSW reports on certain performance indicators through Safe Work Australia's national Comparative Performance Monitoring Report.

In addition, the effectiveness of SafeWork NSW in performing its compliance functions is unclear because of the focus on reporting activities rather than outcomes. SafeWork NSW does not have an overarching continuous improvement framework and does not effectively use its data to assess performance and outcomes.

For example:

- As a proportion of all notices issued, there have been relative increases over time in the issue of prohibition notices (directions to stop a particular work practice) and penalty notices (fines), while the relative use of improvement notices has reduced. However, the impact of different compliance tools in affecting behavioural change has not been assessed by the regulator.
- While the audit found strong support among managers and inspectors for the proactive work undertaken by the regulator, there is minimal evaluation conducted to demonstrate that these activities are effective in addressing risks to workplace health and safety.

A shift towards yearly regulatory priorities that use real-time data and the inclusion of research focused on broader industry trends may contribute to better outcomes-based reporting and evidence-based decision-making.

SafeWork NSW employs 352 inspectors (as at August 2023) out of a total maximum cap of 370 inspectors. With finite resources, it is important that SafeWork NSW effectively measures, evaluates, and reports on the impact and outcomes of its compliance and enforcement activities.

SafeWork NSW does not effectively use available data to strategically target its activities or assess its performance

SafeWork NSW has collected more than 20 years' worth of work health and safety data within its Workplace Services Management System (WSMS). This data has the potential to provide important detailed insight to support SafeWork NSW's strategic planning and reporting processes.

However, the wider strategic use of the system is hindered by its age and data quality issues. The system is not governed by a centralised quality assurance process. No single data custodian was identified during the audit and a data governance committee was only recently established by SafeWork NSW. Inconsistencies in data entry mean manual searches of the system are sometimes needed in order to identify relevant case data for analysis and reporting.

Inconsistent data entry and use, and ineffective quality assurance, have meant that reports produced from the system can be unreliable. In attempting to use the system to extract useful information, individual directorates have developed their own capabilities, resulting in disparate, duplicative and fragmented use of data to inform decision-making.

A data science function was recently established within the Centre for Work Health and Safety, which is intended to provide a dedicated team for the analysis of internal and external data.

SafeWork NSW took around eight years to actively and sufficiently respond to the critical emerging risk of respirable crystalline silica in manufactured stone

Silicosis is a progressive, occupational lung disease resulting from inhalation of respirable crystalline silica (RCS). This disease is one of the oldest known occupational diseases, particularly affecting industries such as mining and stonecutting. It is preventable through appropriate workplace practices. In recent years, there has been heightened attention to RCS exposure from manufactured stone products (such as kitchen benchtops), though these risks had been published in international research since at least 2010. Unlike asbestos, RCS from manufactured stone can lead to the development of silicosis and other lung diseases after relatively short exposure and latency periods, resulting in relatively young workers developing serious diseases.

SafeWork NSW has stated that it has been focusing on the dangers posed by RCS since 2017 through its 2017–2022 *Hazardous Chemicals Exposure Baseline and Reduction Strategy*. However, the regulator did not begin to actively and substantially respond to the dramatic increase in the use of manufactured stone and resultant risk of silicosis in the manufactured stone industry until after it commenced an expansive program of workplace inspections in 2018–19. Prior to this, the extent of its active response to the emerging risk was to conduct a limited inspection program of six worksites in May and August 2017. This work contributed to a research paper that was finalised in August 2018.

After commencing its more expansive program of workplace inspections in 2018–19, SafeWork NSW conducted 523 visits to 246 manufactured stone sites. These inspections resulted in 656 improvement notices being issued, along with 43 prohibition notices (this included WHS matters not related to silica).

The WSMS information system is limited and imprecise in its ability to identify all silica-related complaints submitted by workers, members of the public and other stakeholders. This is because identifying these cases relies on manual key word searches (such as variations of 'silica' or 'benchtop'). This means that there may be additional complaints related to silica that are not identified in searches.

There has been a reduction over time in the risk rating applied by SafeWork NSW to work health and safety complaints received, without corresponding evidence that risks across the workforce have reduced

Complaints received by SafeWork NSW about potential breaches of the WHS Act are triaged according to five categories of seriousness – from most serious (category 1) through to where there is insufficient information to respond (category 5). Analysis of data from WSMS from 2013 to 2023 shows that there has been an overall trend for complaints to be assessed and triaged into less serious categories.

For example, between 2013 and 2023:

- the proportion of complaints assessed as triage category 2 (a serious injury or illness though not posing an immediate risk to life) decreased from 29% to 14% of all complaints
- the proportion of complaints assessed as triage category 4 (warranting only an administrative response, such as a letter) increased from 25% to 38% of all complaints.

While there has been a trend for complaints to be triaged as less serious, data published by Safe Work Australia shows that there has been an increase in the incident rate of serious injuries in the workplace over this period.

Administrative response letters are rarely followed-up to verify whether the employer has received them or whether the letter has had any impact on work health and safety

The use of administrative responses, primarily letters, to respond to lower-risk matters may create workforce efficiencies that free inspectors to be deployed more readily to critical matters that are often more resource and time intensive. However, the use of administrative responses needs to be monitored to ensure that the approach is not over-used. Inherently, letters may be a less effective regulatory tool than workplace visits, as recipients may either not receive the letter or not action the letter.

While the audit team was informed in interviews that there was an annual target that 20% of administrative response letters require follow-up verification, analysis of WSMS data found that this had never occurred, with that proportion of verifications never exceeding 16% of all letters sent in a year, and was usually lower than 10%.

A reliance on non-field responses to work health and safety complaints may result in unsafe work practices continuing due to a perceived lesser regulatory threat. This is compounded where there is no follow-up to verify whether these responses have had any effect on work health and safety outcomes. In effect, there is no incentive for a regulated entity to do anything in response to an administrative letter.

A SafeWork NSW shift to yearly priorities may come at the expense of achieving a longer-term vision for the state, particularly as there is little certainty about how future priorities will be determined

From 2016 to 2022, SafeWork NSW's activities were guided by a six-year *Work Health and Safety Roadmap* ('the Roadmap'). This provided a relatively long-term focus for the regulator across specified risk areas, but was viewed by SafeWork NSW management as limiting its ability to respond effectively to emerging work health and safety risks that were unforeseen at the time the Roadmap was developed. An example of an emerging risk area not addressed by the Roadmap was the work health and safety risks posed to 'gig economy' workers, such as food delivery drivers.

In 2023, SafeWork NSW adopted a model of annual regulatory priorities, setting seven priorities contributing to three strategic outcomes for the regulator. This was intended to facilitate a more agile and responsive approach to changes in industry and workforce risks. There were mixed views across SafeWork NSW about this shift. Concerns raised included the short-term nature of the approach to the exclusion of a longer-term vision, a lack of detail, and regular churning of priorities affecting the regulator's ability to measure and take stock of its impact and its capabilities for emerging threats.

By November 2023, SafeWork NSW had developed a project timeline for mapping the process for developing its 2024 priorities, including conducting internal and external consultation. However, beyond developing a timeline, substantive work toward setting its 2024 regulatory priorities had not progressed. The timeline provided that a review of the 2023 annual priorities would be completed in January 2024. At the time of this audit, this process was underway.

SafeWork NSW inspectors have discretion in exercising their regulatory role, but there are risks that discretion is applied inconsistently leading to variations in regulatory outcomes

Under the WHS Act, individual SafeWork NSW inspectors have significant decision-making authority. Managers cannot direct an inspector to issue a notice where the inspector has not formed their own view that a notice is warranted, though managers do have responsibility for quality assuring the decisions made by their inspectors. However, there is no formalised approach to consistently and regularly review and quality assure the decisions made by the inspectorate.

SafeWork NSW has made efforts to promote consistency in the application of discretionary powers, through guidance provided to inspectors in written Compliance Policy Principles, inspector practice notes that detail expectations on practice and include flow charts to aid decision-making, and team discussions on selected topics.

There are a number of reasons for SafeWork NSW to implement assurance mechanisms for regulatory decision-making, including:

- it aligns with good regulatory practice for regulatory outcomes to be consistent and predictable
- there are likely to be variations in management practice across teams and directorates
- there are risks to independence and probity due to the singular nature of the inspector's role
- there is the risk of inconsistent application of discretionary factors in decision-making (for example the duty holder's compliance history, or the prevalence of the offence in the jurisdiction and industry impact)
- there is the risk of potential or perceived conflicts of interest, especially in rural or regional based teams and directorates where inspectors may be exercising authority in their own local communities
- there is evidence of variations in individual practice across the directorate, with inspectors of different tenure issuing notices (such as fines) at different rates.

The implication of continuing inconsistencies is that SafeWork NSW may not deliver fair, consistent and predictable regulatory decisions. Accordingly, measures to encourage consistency in decision-making will remain an ongoing task for the regulator.

Significant flaws in procurement, project governance and risk management contributed to potential maladministration in the procurement of research partner to develop a real-time respirable crystalline silica monitoring device

The audit examined the procurement of a research partner, Trolex, to deliver the Air XS respirable crystalline silica monitoring device. This work was led by the Centre for Work Health and Safety within SafeWork NSW. Examination of the procurement of this research partner and departmental records surrounding this project identified significant flaws. These included:

- the failure to adequately resolve or escalate risks raised regarding the accuracy of the device
- poor record-keeping, including the absence of signed briefings and reports for key decisions that may have cast light on how decisions were made
- inappropriate involvement in the tender evaluation process of persons who had declared conflicts of interest
- errors in the scoring of tender responses
- incorrect use of delegations.

SafeWork NSW and DCS did not have the right checks and balances to mitigate errors in process, as well as to manage risks raised during the process. Despite this, the project received an award from the DCS Secretary for excellence in digital innovation. The case study in this report highlights that the regulator needs to ensure an independent investigation into the conduct of this research project, and that risk is appropriately managed.

2. Recommendations

As soon as reasonably practicable and in coordination with other reviews, the Department of Customer Service should:

1. ensure that an independent investigation into the procurement of the research partner for the real-time silica detection device is completed to identify whether the project was affected by maladministration, fraudulent activity, or misconduct.

By 1 July 2024, the Department of Customer Service should:

2. develop and implement a formal accountability framework that consolidates, assesses and reports on its funding, spending, activities, performance against KPIs, and achieved outcomes
3. embed a formal process to:
 - a) set annual regulatory priorities, including evidence gathering and data analysis
 - b) consult with internal and external stakeholders to identify and validate potential regulatory priorities
 - c) evaluate the outcomes of annual regulatory priorities
4. publish a consolidated report of progress against regulatory priorities and key metrics on the SafeWork NSW website
5. undertake strategic planning and define a set of long-term priorities as the basis for making investment decisions in the organisation, including workforce planning and technology uplift.

By 1 December 2024, the Department of Customer Service should:

6. develop a formalised data governance process for the use of WSMS data and identify the data custodian for WSMS
7. resolve key limitations currently experienced with WSMS including by:
 - clearly setting out a strategy, including preferred timing and detailed technical design, for a replacement system
 - in consultation with NSW Treasury, preparing a business case for system replacement, including a robust assessment of costs, benefits and risks
8. review a randomly selected sample of procurement processes to identify common procurement failings and any systemic issues which have facilitated these
9. ensure effective management of internal and external risks by:
 - reviewing its risk culture and risk management framework
 - implementing clear protocols for the escalation of risk
10. review its policies, procedures and practices to ensure the quality and consistency of regulatory decision-making across directorates.

1. Introduction

1.1 Background

Establishment of SafeWork NSW

The WorkCover Authority of NSW (WorkCover NSW) was established in 1989. Until 2015, it was responsible for workplace health and safety regulation, and the management of workplace compensation and return to work practices.

On 1 September 2015, WorkCover NSW was abolished and replaced by three separate entities, pursuant to the *State Insurance and Care Governance Act 2015*: SafeWork NSW, the State Insurance Regulatory Authority (SIRA), and icare.

SafeWork NSW was established as New South Wales' workplace health and safety regulator. It was government's intention that SafeWork NSW would be an independent regulator.

SafeWork NSW reports to the Minister for Work Health and Safety. It is responsible for enforcing compliance with the *Work Health and Safety Act 2011* (the WHS Act) and the Work Health and Safety Regulation 2017.¹ The full functions of SafeWork NSW are set out in section 152 of the WHS Act:

- a) to advise and make recommendations to the Minister and report on the operation and effectiveness of this Act
- b) to monitor and enforce compliance with this Act
- c) to provide advice and information on work health and safety to duty holders under this Act and to the community
- d) to collect, analyse and publish statistics relating to work health and safety
- e) to foster a co-operative, consultative relationship between duty holders and the persons to whom they owe duties and their representatives in relation to work health and safety matters
- f) to promote and support education and training on matters relating to work health and safety
- g) to engage in, promote and co-ordinate the sharing of information to achieve the object of this Act, including the sharing of information with a corresponding regulator
- h) to conduct and defend proceedings under this Act before a court or tribunal
- i) any other function conferred on the regulator by this Act.

The WHS Act establishes that the regulator for workplace health and safety in New South Wales is the Secretary of the department. The WHS Act also provides that the Secretary may, by a written instrument, delegate to an authorised person a power or function under the Act.

¹ SafeWork NSW is also responsible for the administration of the *Explosives Act 2003* and *Dangerous Goods (Road and Rail Transport) Act 2008* (except parts the Minister for Environment and Heritage is responsible for).

Evolution of SafeWork NSW

Following the abolition of WorkCover NSW in 2015, SafeWork NSW and its functions were located in the then Department of Finance, Services, and Innovation, specifically in the department's Better Regulation Division. A consultant was engaged to review and advise on the design of SafeWork NSW's governance in 2016–17. Work commenced on the state government's desire to establish a 'Commerce Regulator', which would include SafeWork NSW.

When the Department of Customer Service (DCS) was established on 1 July 2019, SafeWork NSW and its functions (including the Better Regulation Division) were moved into this new department.

In December 2020, the then Minister for Better Regulation stated the government's revised plan was for the 28 business regulators, including SafeWork NSW, to keep their identity, but there would be a 'digital amalgamation' - that is, all business regulators on one centralised digital platform to drive efficiencies.

SafeWork NSW's 2019–2020 *Strategic Business Plan* was intended to (along with the *Work Health and Safety Roadmap 2016–2022*), 'provide a clear line of sight between SafeWork NSW's strategic objectives and the activities that will allow protection against harm, reduce unnecessary compliance costs and secure safety standards'. The 2019–2020 *Strategic Business Plan* included progress reporting against critical strategic KPIs.

Structure of SafeWork NSW within DCS

During the conduct of this performance audit, SafeWork NSW functioned as a part of the Better Regulation Division of DCS, which included other regulators such as NSW Fair Trading, Long Service Corporation, Office of the Registrar General, Mine Subsidence Advisory, and the Professional Standards Authority.

At the time of the audit, the Secretary of DCS delegated functions under the WHS Act to the Deputy Secretary, Better Regulation Division, who also functioned as Head of SafeWork NSW. The audit was undertaken within this context. On 16 October 2023, SafeWork NSW delegations were transferred to an Acting Deputy Secretary for SafeWork NSW and from 1 December 2023 SafeWork NSW transitioned to a standalone division of the Department of Customer Service.

Funding of SafeWork NSW

The Audit Office does not audit SafeWork NSW's financial statements as an independent agency, as it is grouped into DCS's financial statement as a cost centre.

Details of SafeWork NSW's total expenses and total revenue are reported in SIRA's annual reports.² SafeWork NSW's budget for 2022–23 was \$174.47 million.

Under section 35(2)(b) of the *Workplace Injury Management and Workers Compensation Act 1998* (WIMWC Act), SIRA 'is responsible for funding the remuneration, allowances, office accommodation and other associated costs of SafeWork NSW'. The funding provided by SIRA to SafeWork NSW is drawn from the Workers Compensation Operational Fund (WCOF), established under section 34 of the WIMWC Act and is funded from contributions by insurers and self-insurers.

While the WCOF is SafeWork NSW's main source of funding, it also has other revenue streams from retained taxes, fees and fines, and sales of goods and services.

² SafeWork NSW is predominantly funded from the Workers Compensation Operational Fund. However, SafeWork NSW also has a portion of funding coming from internally generated revenue (e.g., fines and fees) and a small portion of Treasury Funding for the Respect at Work Taskforce.

Over the period 2016–2022, the regulator's cost of total personnel services as a proportion of total expenses increased from around 40.8% in 2016 to 47.6% in 2022. SafeWork NSW's 2023–24 budget provides for up to 370 positions in the inspector classification without impacting the delivery of other functions such as investigators, lawyers, policy officers, education officers etc. SafeWork NSW has discretion to use its budget any way it chooses. For example, it could remove all of its education function or policy function to increase inspector numbers. An application for funding for this amount of inspectors was submitted in 2020, with SafeWork NSW providing SIRA with its budget estimate for the forward ten years. Funding to increase the number of inspectors without impacting other functions would require a new policy proposal as part of the NSW government budget process, and would require approval from SIRA and NSW Treasury.

As part of the 2020–21 NSW Budget, the then NSW Government stated that 'SafeWork NSW's annual budget of about \$162 million includes funds for more than 330 inspectors'. An announcement of an additional \$6.4 million was made in June 2021 by the NSW Government to recruit a further 40 new inspectors, bringing the total number of inspectors when fully recruited to 370. The SafeWork NSW inspectorate increased from 333 inspectors in February 2023, to 352 inspectors as at August 2023 (including in team manager roles), an increase of 19 inspectors.

Independent Review into SafeWork NSW

On 6 September 2022, the Auditor-General advised the Secretary of DCS of the decision to add a performance audit of SafeWork NSW to the Audit Office of NSW's 2022–23 forward program of work. Audit commencement letters were issued to the Secretary of DCS on 2 March 2023.

On 25 October 2022, the former NSW Government announced the appointment of the Hon. Robert McDougall KC to carry out an independent review of SafeWork NSW. An earlier review of icare, also conducted by Mr McDougall and which reported to the then NSW Government in April 2021, recommended a review of SafeWork NSW's performance of its regulatory and educational functions under the WHS Act.

The independent review's interim report was submitted to the Minister for Work Health and Safety on 31 May 2023, and publicly released by the Minister on 8 June 2023. A final report was publicly released on 22 February 2024.

Regulatory policy for work health and safety in Australia

The Commonwealth, state and territory governments have agreed to harmonise work health and safety laws to improve work health and safety, provide consistent protection for Australian workers and reduce the regulatory burden.

In 2008, the Council of Australian Governments (COAG) established an intergovernmental agreement to harmonise work health and safety laws across all jurisdictions, based on agreed model legislation. Following a consultation process, NSW implemented the model WHS laws on 1 January 2012.

In addition to the harmonisation of legislation, COAG agreed that national uniformity would be:

...complemented by a nationally consistent approach to compliance policy and enforcement policy.

The National Compliance and Enforcement Policy was endorsed by Workplace Relations Ministers' Council on 10 August 2011. The policy:

...sets out the principles endorsed by the Workplace Relations Ministers' Council that underpin the approach work health and safety regulators will take to monitoring and enforcing compliance with the Work Health and Safety Act and Regulations.

The custodian of the National Compliance and Enforcement Policy (NCEP) is Safe Work Australia.

Principles underpinning work health and safety compliance and enforcement

The NCEP guides regulators to monitor and enforce compliance by setting out seven principles that are intended to underpin all work health and safety compliance and enforcement activities. These principles are:

- Consistency – Regulators try to ensure similar circumstances at workplaces lead to taking similar approaches, providing greater protection and certainty in workplace and industry.
- Transparency – Regulators show impartiality, balance and integrity.
- Accountability – Regulators are willing to explain their decisions and provide ways to make a complaint or appeal a decision.
- Proportionality – Compliance and enforcement responses equal the seriousness of the conduct.
- Responsiveness – Compliance and enforcement measures respond to the particular circumstances of the duty holder or workplace.
- Targeted – Activities focus on those areas, which are assessed highest risk to health and safety.
- Constructiveness – Regulators support, advise and guide on compliance with WHS laws and build capability.

The scope of this performance audit is not focused on advice and guidance to build WHS capability among 'persons conducting a business or undertaking' (PCBUs) (that is, the 'constructiveness' principle).

The NCEP principles accord with the requirements of procedural fairness in administrative and regulatory decision-making. In particular, that fair decision-making procedures are followed to ensure that people who are affected by a decision have opportunity to be heard, and that the decision-maker is impartial and have no personal stake in the decision.

SafeWork NSW has adopted the NCEP, and uses a mix of positive motivators, guidance, compliance monitoring and deterrents to encourage and secure the highest possible levels of compliance with WHS laws. The Head of SafeWork NSW is a member of Safe Work Australia.

2. Evidence-based priority setting

This chapter considers whether SafeWork NSW has evidence-based processes to set its objectives and priorities, including how it takes into account operational feedback and expertise. It also includes how existing and emerging risks are assessed as part of the priority-setting process, and how planning and prioritisation takes into account resourcing, including workforce skills and capacity.

SafeWork NSW's operating model is now based on annual regulatory priorities, rather than longer-term priorities

From 2016 to 2022, SafeWork NSW worked under a six-year *Work Health and Safety Roadmap* ('the Roadmap'). The Roadmap was revised in August 2018 and included the following statements:

The WHS Roadmap for NSW, along with the BRD Strategic Plan, provides a clear line of sight between our strategic objectives and the activities that will allow us to deliver our overall outcomes.

This Roadmap spans 2016-2022 but it will be refreshed and released every two years to ensure it stays relevant.

In addition to the Roadmap, SafeWork NSW operated under its 2019–20 *Strategic Business Plan*.

After SafeWork NSW was moved into DCS, the Roadmap was subject to a mid-term evaluation by ARTD Consultants in 2020. SafeWork NSW management subsequently accepted all nine recommendations of that mid-term evaluation, which included the following:

- Strengthen business intelligence data systems to allow managers and inspectors to access to real-time data on safety incidents and workers compensation claim data (Rec 5).
- Improve evidence available to assess Roadmap outcomes in 2022 (Rec 9).

In 2023, SafeWork NSW replaced its six-year Roadmap with a model of setting annual regulatory priorities. Seven regulatory priorities were set for 2023. These priorities were:

- **gig economy** – increase safety and WHS compliance in the sector, particularly food delivery riders and health care
- **safety around moving plant** – reduce workplace safety incidents, particularly forklifts
- **seasonal workplaces** – increase WHS compliance to support itinerant workers, particularly in the agricultural sector and those working with amusement devices
- **psychological safety** – reduce the prevalence of psychological injury at workplaces, with a focus on mental health and well being
- **respect at work** – reduce the incidence of bullying, sexual harassment, and customer aggression in the workplace, particularly in male dominated sectors and healthcare.
- **exposure to harmful substances** - reduce the incidence of worker exposure to dangerous substances in the workplace, particularly silica and dangerous chemicals
- **falls** – reduce the incidence of falls from heights with a particular focus on construction.

These priorities are intended 'to deliver on three strategic outcomes':

- Workers understand their rights and responsibilities.
- Employers ensure that work is healthy and safe, with no advantage for cutting corners.
- Regulation is efficient and fair.

As SafeWork NSW works to deliver on these outcomes, the focus is on priority or vulnerable groups of workers – these being younger workers, workers from culturally and linguistically diverse backgrounds (especially newly arrived workers), and Aboriginal people.

Shorter-term priorities are intended to enable SafeWork NSW to be more responsive to work health and safety risks and were developed in consultation with operational staff

The adoption of shorter-term priority-setting is intended to enable a more agile approach to regulation that, according to DCS, is better able to adapt to changes in risk profiles and industries. It was put to the audit by some interviewees that the six-year plan was less able to respond to rapid changes in the economy that may lead to quickly emerging work health safety risks. An example commonly cited was the significant increase in gig economy workers, including in areas such as food delivery workers and personal care workers. It was put to the audit that this example highlighted new WHS risks unique to those emerging workplaces.

According to DCS, in addition to being more agile and responsive to macro changes in the workforce, the annual priorities are intended to enhance accountability by creating a more timely and contemporaneous link between activities and outcomes. The more immediate nature of annual priorities is also designed to provide a more immediate and tangible link to SafeWork NSW's activities and ensure better accountability for delivery.

The annual priorities are intended to complement SafeWork NSW's commitments under the national *Australian Work Health and Safety Strategy 2023-33*. This strategy sets a high-level vision and goal for Australia's work health and safety regulators, including to address agreed persistent challenges, such as psychosocial risks, vulnerable workers, and ensuring that small businesses are adequately supported to meet their work health and safety obligations.

The process for developing regulatory priorities for 2023 involved internal consultation with SafeWork NSW executive directors, directors, managers, inspectors, project leads, as well as consultation with external stakeholders and experts. There is evidence that SafeWork NSW considered the feedback it received, including from its inspectors.

SafeWork NSW staff identified potential risks that SafeWork NSW will need to manage as the process for developing regulatory priorities continues to develop

The audit team interviewed almost all SafeWork NSW executive directors, directors, and team managers, particularly those performing regulatory functions. These interviews revealed a strong level of commitment to the purpose and functions of SafeWork NSW, as well as a shared desire to see the organisation fulfil its potential.

In regard to the annual priorities, senior executives and the majority of team managers we interviewed supported the adoption of annual priorities and expressed confidence that establishing annual priorities would improve the effectiveness of SafeWork NSW in delivering its compliance functions. It was noted by SafeWork NSW that the shift towards regulatory priorities 'brings us to a level of maturity mirroring the approach of regulators such as ASIC and the ACCC'.

While most staff interviewed during this audit welcomed the sharper focus and greater flexibility afforded by shorter-term priorities, others identified a range of risks. Some experienced people managers in SafeWork NSW expressed significant doubts about the pursuit of annual regulatory priorities. Risks identified during audit interviews included:

- That the short-term focus had prevented SafeWork NSW from establishing a longer-term goal or vision.
- That the annual priorities were simplistic and lacked sufficient detail to engage the regulator, industry, and the community.
- That short-term priorities would make it difficult to meaningfully measure and report progress, especially for activities and initiatives that may take longer to achieve demonstratable change.
- That the process of considering the next annual priorities may need to commence well before initiatives for the current year have been completed (or even commenced), hindering how effectively lessons can be incorporated into future planning.
- That frequent changes in regulatory priorities may make it difficult to ensure that the SafeWork NSW workforce has appropriate capability and capacity, particularly for potentially complex emerging threats such as artificial intelligence in workplaces.

In response to these risks, SafeWork NSW has noted that:

- SafeWork NSW has a separate vision in addition to the regulatory priorities. This is 'healthy, safe and productive working lives'.
- A review process will occur to understand what went well and what did not from the first year of regulatory priorities before finalising priorities for 2024.
- Planning will improve over time as the process reoccurs, and lessons learned will be linked to future priorities.

The inability to achieve full 'buy-in' from experienced people managers in SafeWork NSW suggests that change management, including consultative and communication processes, has not been completely successful. SafeWork NSW advised that this initiative was a significant shift for all its staff and in particular middle management. Given this, the leadership of SafeWork NSW should prioritise investment in effective change management processes, especially if the annual regulatory priorities are anticipated to change in 2024.

Importantly, the SafeWork NSW leadership team should undertake strategic planning to ensure that a meaningful set of longer-term priorities underpin their investment decision-making on organisational fundamentals, such as a capable and sustainable workforce and fit-for purpose technology systems. Without this, there is a real risk that the regulator's business needs and priorities will be overtaken by the priorities of a much bigger department.

SafeWork NSW consulted with external stakeholders in determining its 2023 annual regulatory priorities

SafeWork NSW developed a discussion paper in 2022 for external stakeholders as a precursor to consultation on its 2023 annual priorities. This discussion paper outlined an intent by SafeWork NSW to develop a new strategy that would prioritise activities that were the biggest points of leverage to drive material change and were the biggest risks and most important trends affecting WHS in NSW.

SafeWork NSW considered expert feedback and expertise in the development of its regulatory priorities through this process. A summary document detailing the rationale for its regulatory priorities provides evidence that feedback from external stakeholders, such as unions and industry groups, were taken into account.

SafeWork NSW has not established a formal process for determining its regulatory priorities for 2024 and beyond

SafeWork NSW has an indicative timeline for preparing its 2024 priorities which provides that the priorities will not be settled until March 2024 and will be based on the results of the previous year's priorities to December 2023. However, no ongoing process for determining annual priorities in each future year was settled at the time of writing this report. Some priorities might be expected to remain relatively constant, especially persistent challenges such as preventing falls from heights. However, if the annual priorities model is to meet the expectation of being agile, then new and emerging priorities will need to be identified, understood, scoped, and responded to with relatively short notice.

Elements of the 2023 regulatory priorities will overlap with any new or revised priorities, such as the monitoring and evaluation framework, and the three-year Construction Services Blueprint. SafeWork NSW explains that these longer-term initiatives are 'intended to support the delivery of priorities that are likely to run over many years, providing more granular detail on specific drivers of harm, regulatory responses and targets'.

SafeWork NSW does not effectively use data to inform its priority-setting or assessment of risk, despite adopting the recommendations from the 2020 mid-term Roadmap evaluation

SafeWork NSW states that it chose its regulatory priorities in 2023 based on the following factors - potential for serious harm or death, new or emerging risks, and increases in the frequency of an issue. An emerging issue is where:

A hazard and/or risk to health and safety relating to a new or existing product, process or service was not previously known or fully realised and SafeWork NSW intervenes to address the workplace health and safety risks for example, guidance material, training, regulatory change.

SafeWork NSW has a substantial data repository, with over 20 years of case and activity data contained in its Workplace Services Management System (WSMS). However, SafeWork NSW does not effectively interrogate this data to provide an evidence base for its regulatory functions.

SafeWork NSW has only recently established a data governance committee. SafeWork NSW also advised that a data science function was created within the Centre for Work Health and Safety during 2023, repurposing existing resources and supported by a business intelligence working group comprising of inspector representatives from operational directorates.

While this data science function is newly created, SafeWork NSW does not have a strategic business intelligence function that is both recognised and understood across each directorate and team, and the ability of its technology infrastructure to deliver sophisticated strategic and operational data intelligence has been limited.

As a result of this lack of central coordination and capability, directorates have sought to develop their own data analysis capability, with inconsistent, fragmented and potentially duplicative results. The audit did find specific (albeit isolated) examples of data being used to inform decision-making, though these efforts were disparate and uncoordinated at the directorate level.

SafeWork NSW said that data is used to inform leadership discussions at the quarterly SafeWork NSW Leadership Meetings, and monthly operational executive meetings. The audit did not review the agenda papers for these meetings.

At the 2020–21 NSW Parliament Budget Estimates Committee hearing, SafeWork NSW stated that it:

...used predictive analytics and machine learning to generate a WHS rating system leveraging a large dataset to aid decision-making. The WHS rating supports an evidence-based approach to identifying high risk workplaces and provides additional data-based evidence to assist in decision-making'.

SafeWork NSW has started to use artificial intelligence to interrogate historical compliance data to rate the risk of different employers. However, this is used inconsistently across SafeWork NSW and there is limited evidence about its effectiveness. A similar tool does not exist for industry or product-related trends or relationships that may assist SafeWork to proactively identify high-risk workplaces and issues.

Outdated technology and uncertainty in planning its replacement is limiting SafeWork NSW's ability to effectively use its data for analytics and insights

SafeWork NSW uses WSMS to manage work health and safety data. This system has been in place for over 20 years. It was noted in interviews conducted during this audit that this data system is at the end of its effective life.

Issues noted by users of WSMS include:

- The lack of governance associated with data management of WSMS. There is no data custodian, and a formalised data quality assurance process does not exist. This means that data can be extracted from the system with no controls on the accuracy of the analysis.
- Access to WSMS cannot be tracked (and is therefore not auditable).
- Data quality is variable, depending on the quality of notes provided by inspectors (with individuals noting that these notes could be full of speculation), and inconsistent approaches to entering information into the system. At the same time, inspectors noted that entering information into the system can be an administrative burden due to duplication and time requirements.
- Analysis cannot readily be undertaken on a geographic basis (for example, all high-risk employers within a particular region).
- As WSMS does not track information about the directors of companies, it is unable to identify risks associated with 'phoenixing', where directors of wound-up businesses establish new entities, or other forms of related-entity risk. The audit team linked WSMS data with ASIC data to match company directors with company and notice data. This was done in order to understand the additional intelligence that could be used to inform risk-based decision-making. As an example, the audit found that there is a large number of companies that have not received notices from SafeWork NSW but may be at higher risk due to the conduct of their directors:
 - There were approximately 151,000 companies with directors that were also linked to at least one other company that had received at least one type of notice from SafeWork NSW.
 - There were approximately 24,500 companies with directors that were also linked to one or more companies that had cumulatively received over 100 notices from SafeWork NSW.
 - There were approximately 8,600 companies with directors that were also linked to one or more other companies that had cumulatively received over 400 notices from SafeWork NSW.

In addition to the feedback provided by WSMS users within SafeWork NSW, the audit team also found related data quality issues during the course of our own analysis, including:

- Industry analysis is more challenging to perform because specific industry data points and grouping details are not captured in WSMS.
- There was no systematic method to identify all silica-related incidents. The search terms were not standardised and relied on judgement, for example: 'silic' (potentially capturing both 'silica' and 'silicosis') and 'benchtop', though SafeWork NSW advised that consultation with subject matter experts informed these searches. There is a high-risk of false positives and incomplete analysis without time intensive manual review of each identified case. WSMS was not readily able to provide data on silica-related complaints without workarounds and manual file review (which proved unreliable) and requiring significant effort from data staff in both the Audit Office and SafeWork NSW.
- Test data is captured in production systems, rather than in test systems. These records do not have a unique identifier and are difficult to identify and isolate for business intelligence analysis.
- Data validations are not enforced (for example, on Australian Business Number, Australian Company Number columns). Instead, the data entry fields allow for incorrect details to be captured or left blank without explanation from the staff entering the data.

SafeWork NSW provided advice to the audit team that an upgrade of WSMS was planned as part of the broader e-regulation program across DCS (that is, the single digital platform for all 28 business regulators). However, this upgrade is now uncertain as there is no funding for SafeWork NSW to be onboarded to the new platform. This means that for the foreseeable future SafeWork NSW will be constrained by the limitations inherent to WSMS.

SafeWork NSW took around eight years to actively and sufficiently respond to the emerging risk of respirable crystalline silica in manufactured stone

Silicosis is a progressive, occupational lung disease resulting from inhalation of respirable crystalline silica (RCS). Silicosis is one of the oldest known occupational diseases, particularly affecting industries like mining. In Australia, silicosis has been a known cause of death and disability for over 100 years. This disease is preventable through appropriate workplace practices in a hierarchy of controls, which includes the use of correct personal protective equipment.

The use of manufactured stone for applications such as kitchen benchtops became popular in Australia in the early 2000s. Other substances that contain silica, such as rock, stone, clay, gravel, concrete and brick, may contain between 2% and 40% silica. In contrast, manufactured stone contains up to 95% silica. Workers exposed to respirable crystalline silica from manufactured stone are more likely to develop severe silicosis (and other serious lung diseases), and more quickly, than workers exposed to silica from other sources.

In 2010, international research was published that pointed to the specific heightened risk posed by the high silica content of manufactured stone used primarily for kitchen countertops and bathroom fixtures. This was confirmed by subsequent research published in 2012, which concluded that, in regard to a documented outbreak of silicosis among manufactured stone workers in Israel:

This silicosis outbreak is important because of the worldwide use of this and similar high-silica-content, artificial stone products. Further cases are likely to occur unless effective preventive measures are undertaken and existing safety practices are enforced.

This research was relevant to Australia as the sample of workers was derived from the same Israeli-based manufacturer and exporter of manufactured stone that supplies the majority of the product used in Australia.

The first identified group of related workers who contracted silicosis in NSW was reported in literature in 2015. Further cases have been reported in the media since 2015. These included examples of relatively young workers developing silicosis, presumptively from inhaling silica dust derived from manufactured stone.

In 2017, SafeWork NSW listed RCS as one of the top ten priority chemicals in its 2017–2022 *Hazardous Chemicals and Materials Exposures Baseline and Reduction Strategy* (dated October 2017).

A legislatively-mandated case finding study conducted by SafeWork NSW in 2021³ reported that screening conducted by icare between 2017–18 and 2019–20 found an average of 29 cases per year of silicosis among workers in the manufactured stone industry.⁴ Despite the relatively small size of this workforce, this was three times the number of cases of all workers engaged in all other at-risk industries.

³ This study, conducted by a third-party, stemmed from a recommendation made by the NSW Parliament's 2019 Dust Disease Review to amend the WHS Act to require SafeWork NSW to ensure that a case finding study was carried out:

- to investigate respirable crystalline silica exposure in the manufactured stone industry, and
- to gather information to improve the identification and assessment of workers at risk of exposure.

The purpose of this recommendation was to 'to improve the identification and assessment of workers at risk of exposure.

⁴ The authors of this case finding study identified significant data limitations, which meant that it was not possible to estimate with confidence the complete number of workers potentially affected by silicosis.

While the heightened risk posed by respirable crystalline silica in manufactured stone was first published in research in 2010 and detected in cases from 2015, SafeWork NSW's first substantial practical response commenced in 2018–19.

From July 2018, SafeWork NSW convened a Manufactured Stone Industry Taskforce, including representatives from industry, unions, health, education and other government agencies. During the term of this taskforce (which ended at 30 June 2019), SafeWork NSW conducted 523 visits to 246 manufactured stone sites. These inspections resulted in 656 improvement notices being issued, along with 43 prohibition notices (this included matters not related to silica). Prior to this, the extent of SafeWork NSW's active response to the emerging risk was to conduct a limited inspection program of six work sites in May 2017 (one site) and August 2017 (five sites). The results of these six workplace visits were incorporated into a research project report that was finalised in August 2018.

In the period from 2012 to 2018, SafeWork NSW also received complaints about silica-related matters, including matters not related to manufactured stone. These are detailed in Exhibit 1 below. The number of complaints was a relatively small proportion of all complaints received, though the number increased after 2018. This increase may be a result of increased community and industry awareness through media reporting and SafeWork NSW's proactive audit work.⁵ The majority of these complaints did not result in further regulatory action by SafeWork NSW beyond preliminary inquiries and, in some cases, site visits. The right-hand column of the below table shows key events leading up to and shortly after SafeWork NSW's first regulatory interventions.

⁵ Because of the lag period between when a worker is exposed to risky work practices and when they may develop silicosis, complaint data is not necessarily a useful tool to identify the emerging risk, especially where awareness of the risk is low. Unlike with risks that pose a more immediate and direct harm – such as falling off an insecure elevated platform - individuals may be less conscious to complain about a risk where the potential injury is not immediately visible.

Exhibit 1: Silica-related complaints made to SafeWork NSW, 2012–2023

Year	Number	Silica-related activity and events
2012	55	International published research reiterates 2010 findings of a link between manufactured stone and silicosis.
2013	52	
2014	55	
2015	38	First NSW case series linked to manufactured stone industry.
2016	54	Youngest known case of silicosis in NSW admitted to hospital.
2017	70	Crystalline silica listed as the second priority chemical (out of 10 priority chemicals) by SafeWork NSW. Media reporting on the ABC.
2018	104	SafeWork NSW commences proactive work. Manufactured Stone Industry Taskforce commenced. Media reporting on the ABC, The Project and Daily Mail on silicosis.
2019	173	NSW Parliamentary Dust Diseases Review. Probable first Australian death from silicosis caused by manufactured stone.
2020	210	Silicosis becomes notifiable, fines introduced, workplace exposure standard halved.
2021	174	Respirable crystalline silica exposure in the NSW manufactured stone industry case finding study undertaken. Media reporting by The Project and ABC 7.30 Report.
2022	193	
2023*	381	
TOTAL	1559	

* 2023 data are to 30 November 2023.

Note: Complaints received by SafeWork NSW where the issue description includes 'silic*' or 'benchtop'. This will include silica derived from sources other than manufactured stone, including relating to those products listed in the Safe Work Australia 2020 national guide.

Source: Audit Office analysis of WSMS data.

High-profile media reporting in 2018, 2021, and early 2023 appeared to provide impetus to SafeWork NSW's regulatory actions. SafeWork NSW subsequently conducted further rounds of proactive compliance, education and awareness activities among identified workplaces. This work increasingly targeted high-risk workplaces. Since 2018–19, SafeWork NSW has conducted three rounds of workplace inspections that have progressively focused on the highest risk workplaces. This program has adopted a strategic and evidence-based approach.

Since October 2019, 17 matters were progressed to further investigation with a view to prosecution. Five silica-related matters have been filed in court for prosecution. Three of these matters were still in court at the time of this audit, and two matters have been finalised.

In 2020, NSW introduced a range of legislative reforms including:

- Banning the practice of dry cutting engineered stone containing crystalline silica. Maximum penalty of \$30,000 for a body corporate and \$6,000 for an individual, with on-the-spot fines for uncontrolled dry processing of engineered stone.
- Halving the Workplace Exposure Standard from 0.1mg/m³ to 0.05 mg/m³ (ahead of the national deadline to implement it).
- Silicosis becoming a notifiable disease requiring clinicians to report each case of silicosis diagnosed in NSW. Those notifications are shared with SafeWork NSW to manage a NSW Dust Disease Register. An annual report is tabled in Parliament and published on the NSW Government website www.nsw.gov.au (NSW Silica Dashboard) alongside some information on compliance activities.
- On 27 October 2020, silicosis became a notifiable disease requiring clinicians to report each case of silicosis diagnosed in NSW. Those notifications are shared with SafeWork NSW to manage a NSW Dust Disease Register. In August 2021, SafeWork NSW published the first NSW Dust Disease Register Annual Report, detailing diagnosed cases of silicosis, asbestosis, and mesothelioma in NSW during 2020–21 and the Case Finding Study Report on silica exposure in the Manufactured Stone Industry. The Annual Report is tabled in Parliament and published on the NSW Government website www.nsw.gov.au (NSW Silica Dashboard) alongside some information on compliance activities.

Also in 2020, SafeWork NSW released the *NSW Dust Strategy 2020-2022*, which identified silica as one of three focus areas for the regulator.

In February 2022, New South Wales introduced the *NSW Code of Practice – Managing the risks of respirable crystalline silica from engineered stone in the workplace*, based on the National Model Code that was finalised in late 2021. The Code provides practical information on how to manage health and safety risks associated with respirable crystalline silica from engineered stone in the workplace.

Silica continues to be a priority for SafeWork NSW in 2023 under the SafeWork NSW regulatory priority: *Exposure to harmful substances - Reduce the incidence of worker exposure to dangerous substances in the workplace, particularly silica and dangerous chemicals*.

The online NSW Silica Dashboard provides members of the public with information on SafeWork NSW's silica workplace visit program that commenced in 2018 through to 30 September 2023.

Organisational silos within SafeWork NSW contribute to inconsistent regulatory decision-making, duplication of effort, and inefficient practices

There is evidence indicating that SafeWork NSW works in silos, with limited communication, collaboration, and awareness of activities across functions.

We note the finding made by the South Australian Independent Commission Against Corruption in reviewing SafeWork SA:

A failure to ensure adequate and appropriate communication within an agency can result in duplication of effort, inconsistent approaches to the same function and the creation of unique risks.

The existence of silos was evidenced by the audit team through:

- The inconsistent application of policies and procedures. For example, performance management practices differ between directorates and individual teams. This is further discussed in Chapter 4.
- How data is used across SafeWork NSW. While there are pockets of effective data analysis, they often seem to operate in isolation from each other, resulting in duplication and a failure to achieve economies of scale and the benefits of synergies.
- Limited feedback loops across SafeWork NSW. SafeWork NSW does not have an overarching continuous improvement framework, and communication surrounding decision-making is limited. For example, where the Investigations and Emergency Response team decide to discontinue an investigation, there is no requirement to inform the referring inspector that this has occurred, or the rationale behind the decision.

Similar findings on the existence of silos, and the need to improve teamwork and collaboration, have been made by SafeWork NSW in internal reviews undertaken as part of restructuring activities.

This audit also found broader issues of concern regarding organisational structure. SafeWork NSW staff frequently expressed reservations about the effectiveness of the current structure and compared it unfavourably to the regulator's previous form. In particular, some SafeWork NSW staff said that the existing structure:

- reduced SafeWork NSW's profile as the regulator for work health and safety in NSW
- confused lines of accountability for senior strategic leadership
- diluted the regulator's focus and the cohesion of the staff.

The Independent Review of SafeWork NSW being conducted by Mr Robert McDougall KC is examining organisational structural issues. In the interim, the decision has been made by DCS that SafeWork NSW will transition out of the Better Regulation Division of DCS from 1 December 2023, to become a standalone division within DCS.

Organisational restructuring and any uncertainty that it involves in the short- to medium-term could impact on the SafeWork NSW's progress in achieving desired policy outcomes, especially if the change management process is not effective.

The lack of a strategic approach to data and intelligence by SafeWork NSW hampers effective targeting and prioritisation of proactive compliance activity

Effective proactive compliance work is an important part of an effective regulatory approach. For SafeWork NSW, these activities range from dedicated state-wide programs over extended periods through to specific, localised 'blitzes' of targeted workplaces. These activities are performed alongside 'reactive compliance activities' such as responding to incidents, complaints, or requests by 'persons conducting a business or undertaking' (PCBUs) for education and awareness-building activities.

In accordance with Safe Work Australia's National Compliance and Enforcement Policy, proactive compliance activities are intended to be:

...conducted in line with the activities of assessed highest risk and the strategic enforcement priorities.

SafeWork NSW's proactive compliance activity is intended to be based on:

- SafeWork NSW's annual regulatory priorities
- data and insights on high-risk harms, industries or businesses
- the identification of new or emerging risks
- targeted programs focused on reducing the greatest harms.

As discussed earlier in this section, SafeWork NSW does not effectively use data to inform priorities or to assess risk.

While managers at SafeWork NSW referred to an overall target for proactive work (it was commonly suggested that between 60% and 70% of regulatory activities should be proactive), we were informed by the Head of SafeWork NSW (and Deputy Secretary of the Better Regulation Division) that there was no specific target.

In practice, there is significant variation in the mix of proactive and reactive compliance activities between directorates and teams, with some teams doing either largely proactive or largely reactive activities. This can depend on the nature of the industry sectors and geographic areas in which they function, and the extent of teams' non-discretionary reactive workload.

Planning, implementing and evaluating proactive compliance work is inconsistently done across SafeWork NSW, making it hard to assess whether resources are being used effectively

The audit team found widely differing approaches to how directorates and even individual teams within the same directorate used evidence to identify and target risk areas for proactive work programs, such as blitzes. While there was evidence that data was used to inform how activities would be targeted, this was not consistent. For example, some teams draw on intelligence generated by dedicated interventions staff in their directorates, while others rely entirely on opportunistically identifying potential worksites for proactive work by driving or walking past sites. The audit found examples of effective use of data and intelligence to plan proactive activities.

There is also no consistent approach to planning, implementing, or evaluating proactive compliance work across SafeWork NSW. Even within the same directorate, there can be significant differences in approach. Some of these differences can be explained by the different types of matters and circumstances that apply to PCBUs across different industries. However, inconsistencies extended to fundamental aspects of proactive compliance work such as:

- the rigour of evidence and intelligence by which priorities are determined and targeted, which was partly reflected by directorates having different levels of internal data capability
- the degree of project management capability and resourcing, including where some directorates have dedicated specialist project management skills, while others rely on inspectors to perform project management
- the extent to which different directorates and teams had a clear approach to how programs would be evaluated, beyond simply measuring activity, something which appears undermined by the absence of an evaluation framework
- whether the strategic intent of programs and blitz activities are to drive meaningful behavioural change or just, as some interviewees expressed it, to 'make sure they tick some boxes.'

These material differences and lack of consistency in approaches to proactive compliance makes it difficult to assess whether these activities are effective and efficient regulatory interventions. While there was strong support for proactive compliance activity among both managers and inspectors (indeed, most thought that there should be more proactive activity), there were relatively few who could provide an evidence base to justify the significant staff resources that they consume.

The Centre for Work Health and Safety has a function to improve data, research, and evidence to support risk identification

The Centre for Work Health and Safety (CWHS), a functional unit within SafeWork NSW, was established in December 2017 under the *WHS Roadmap 2016-2022*. Among other things, it has an insights and analytics function. Its establishment was driven by the recognition that SafeWork NSW was not effectively using data and evidence to support its decision-making and activities.

Two pieces of work undertaken by the CWHS are intended to provide SafeWork NSW with greater capability in identifying and addressing risk in both strategic and operational contexts.

First, the WHS Radar project is intended to deliver ‘...regular and actionable insights about WHS in an Australian context.’ Conducted twice a year, the WHS Radar synthesises information about work health and safety by drawing on five sources of evidence:

- existing data, including incidents, worker’s compensation, ABS, and prosecutions
- analysis of grey literature (non-peer reviewed sources, such as government reports, some conference papers, and reports from academic, business and industry bodies)
- social media listening
- nationwide survey of WHS inspectors and experts
- nationwide survey of Australian workers across all industries.

The WHS Radar is intended to reduce the extent to which SafeWork NSW is dependent on lag data, by actively collecting more contemporaneous data from multiple sources. The first WHS Radar report was released publicly in April 2023.

A second piece of work delivered by the CWHS is the WHS Risk Rating tool for a PCBU.⁶ This tool attributes a rating to many businesses in NSW based on assessment of their future risk of non-compliance with WHS legislation. The WHS Risk Rating is intended to:

- support existing SafeWork NSW Triage decision-making
- support IDMP decision-making
- select high-risk profiles during blitz operations
- proactively screen and target high-risk profiles.

While some managers in SafeWork NSW did use the WHS Risk Rating tool, others were less confident in its value, expressing doubts about the accuracy and completeness of the data, or were not aware of it at all. These inconsistent views between different managers and directors, between those who use the WHS Risk Rating tool and those who do not use it or do not even have awareness about it, suggests that its purpose and functionalities have not been fully communicated to the wider inspectorate.

The governance of the CWHS, and particularly its relationship to SafeWork NSW, is somewhat unclear. While the Centre sits under the Executive Director, Regulatory Engagement, it identifies on its website as ‘A division of the Department of Customer Service’. Structurally, it is equivalent to a directorate under the Regulatory Engagement business area of SafeWork NSW, rather than a division of the department.

SafeWork NSW's inspectors are its core asset, and its ability to recruit, train and retain inspectors is key to fully performing its functions and meeting the internationally recognised benchmark

SafeWork NSW is funded to fully operate with up to 370 inspectors, though with 352 inspectors at August 2023 it has not recruited to full capacity.

Staff retention within the inspectorate has been a historic strength of the regulator. However, there has been a recent increase in inspector turnover. SafeWork NSW notes that from 2020 to 2022 attrition rates doubled from 5.3% to 10.6% within the inspectorate, which – due to the average age of its workers – was anticipated. Nearly one-third of inspectors were 56 years or older in the 2021–22 financial year. SafeWork NSW also experienced a general increase in resignations since the COVID-19 pandemic.

Increased recruitment activity is intended to mitigate the impact of ongoing attrition due to retirement. However, given the training requirements for new inspectors, there is a significant lag time between recruitment and the utility of inspectors in the field to progress regulatory priorities. SafeWork NSW notes however that inspectors receive authorisations to use their powers throughout the 12-month training period, with individuals assessed at a number of stages based on individual competence.

⁶ A person conducting a business or undertaking has the primary duty of care for work health and safety.

Where there have been capacity limitations, there have been localised responses such as the sharing of inspectors between teams, or the change in resourcing profile of investigations where instead of one inspector working on a case, a case is assigned to a team.

The International Labour Organization sets a benchmark of one labour inspector per 10,000 workers in industrial market economies. This benchmark is considered the number of inspectors deemed sufficient to ensure the effective discharge of the duties of the inspectorate. In October 2022, SafeWork NSW reported at the Parliamentary Budget Estimates Committee hearings that recruiting the full contingent of 370 inspectors would have meant that there was one SafeWork NSW inspector for every 10,000 workers, allowing it to meet this benchmark.

SafeWork NSW provided advice to the audit team that forecast increases in the number of workers and workplaces in New South Wales will result in 471 inspectors being required to meet the International Labour Organization benchmark by 2027.

SafeWork NSW inspectors can take up to two years to be considered ready to be fully utilised, due to training requirements and variations in their experience

Once recruitment is completed and new inspectors commence employment, they will start the New Inspector Training Program (NITP). The NITP is a 12-month comprehensive training program which prepares new Inspectors to perform the duties required of an Inspector within SafeWork NSW as well as providing training and assessment required for the PSP50116 Diploma of Government (Workplace Inspection) qualification. Inspectors will be fully trained after 12 months.

They will be issued with their instrument of appointment (authorities) to use their powers throughout the 12 month course. However it was noted throughout interviews with the inspectorate that it can take up to two years for new inspectors to be deployed in the field on their own and confidently making decisions. SafeWork NSW notes that the level of mentoring and support provided to individual inspectors, and access to a variety of experiences to build a range of skills contributes to variations in new inspectors building their confidence.

SafeWork NSW also provides:

- a structured framework for new inspector onboarding and capacity-building, including in May 2023 formalising requirements for accompanied field visits, and delivering the NITP, delivered by the SafeWork NSW Registered Training Organisation (RTO) and utilising experienced inspectors from across the directorate to deliver training across the 12-month period
- a SafeWork NSW Inspectorate and Manager Continuing Professional Development Program Policy
- formal processes for Inspectorate Continuing Professional Development and Manager Continuing Professional Development, including recognition of prior learning through credit transfer from other registered training organisations
- a formalised procedure for inspectors to progress to senior inspector and principal inspector.

While it was beyond the scope of this audit to assess the effectiveness of this training and capability development framework, it was recognised by interviewees that the commitment of time and resources provided by SafeWork NSW to training inspectors was significant. This underscores the importance of ensuring the effective use of inspectors.

There are inconsistent expectations around the responsibilities of SafeWork NSW inspectors and managers for identifying new and emerging issues

Inspectors may apply to the Inspector Progression Panel of SafeWork NSW to progress from Inspector to the level of Senior Inspector, or Senior Inspector to the level of Principal Inspector. In addition to the overarching requirements of the (*Department of Customer Service – SafeWork NSW Inspectors 2007*) *Reviewed Award*, this process is governed by a formal written procedure.

This procedure sets out that in considering applications for progression, the panel should take into account whether the applicant has fulfilled the responsibilities of their current role. The procedure specifies that inspectors and principal inspectors are accountable to:

Identify trends and emerging issues and provide advice to inform decision making.'

It is unclear why inspectors and principal inspectors have this responsibility, but not the intermediate level of senior inspectors. It is also unclear whether people managers, such as team managers, directors, and executive directors, also have similar formal obligations to proactively identify emerging issues.

Moreover, as senior inspectors are not accountable for identifying trends and emerging issues, inspectors are not assessed against this accountability when seeking progression to the senior inspector level. In contrast, when seeking progression from senior inspector to principal inspector, the applicant is required to provide evidence of how they meet this accountability, even though it is not an accountability specified for senior inspectors.

The accuracy of SafeWork NSW's workforce planning is uncertain

Workload capacity is managed at the directorate level, with a forecasting report on the capacity across all teams discussed quarterly at the SafeWork NSW Leadership Group. Inspectors do not fill out timesheets, instead, this is based on time estimates for specific activities undertaken by inspectors. Directorates are also responsible for leading or supporting work against specific regulatory priorities, requiring directorates to discuss workforce capacity as part of planning proactive work.

SafeWork NSW has a 'workload management treatment model' that provides operation guidance once certain thresholds are reached within this forecasting report. These mechanisms include the reallocation of resources within the directorate at 125% of capacity reached, sharing and reallocation of work between equivalent portfolios at 150% of capacity reached, and cross directorate sharing of work and resources as well as the cessation or deference of work at 175% of capacity reached.

The actual allocation of inspectors to individual directorates is determined at the executive level when vacancies arise, with SafeWork NSW noting that 'consideration is given to the demand for regulatory services (current and expected future) across all teams to determine which directorate and office location a replacement position should be allocated'.

Audit interviews identified some concern that the calculations the forecasting reports are based on were not accurate, overestimated time, and that the data was used inconsistently and as a method to 'grab for resources'. While this audit did not examine SafeWork NSW's forecasting methodology in detail, a sample of the workforce forecasting report for April to June 2023 showed average capacity ranging from 9% to 390%, which may indicate under-utilised or over-utilised teams, or under or overweighted activities.

While there are mechanisms in place to review operational capacity, longer-term strategic workforce planning does not seem to form part of these review processes.

As part of developing its regulatory priorities, SafeWork NSW released a discussion paper that noted broader trends affecting workplaces and communities that it regulates, for example the rise in mental health issues in the workplace, automation, and the return of regional on-shore manufacturing. SafeWork NSW has a *SafeWork Inspectorate and Manager Continuing Professional Development Program Policy*, however this policy was only finalised in July 2023.

3. Performance monitoring and reporting

This chapter considers how effectively SafeWork NSW measures and reports its performance in monitoring and enforcing compliance with the WHS Act. This includes whether it has meaningful performance measures, whether its performance is transparent to all stakeholders, and whether it uses performance information to support continuous improvement and quality assurance.

Performance measurement and reporting are essential to demonstrating a regulator's effectiveness

The Audit Office's 2022 *Audit Insights 2018–22* report noted that:

Defining measurable outcomes, tracking and reporting performance are core to delivering system stewardship, and to ensure effective and economical use of public funds.'

The same report also observed that government activity should:

...be supported by performance frameworks that provide structure for agencies to set performance targets, assess performance gaps, measure outcomes achieved, and benefits realised, capture lessons learned, and implement continuous improvement.

Relatedly, the Organisation for Economic Co-Operation and Development has said that it is important for regulators to be aware of the impacts of their regulatory actions and decisions, and that this:

...helps drive improvements and enhance systems and processes internally. It also demonstrates the effectiveness of the regulator to whom it is accountable and helps to build confidence in the regulatory system.

SafeWork NSW reports its activities and performance against certain KPIs, along with equivalent regulators in other Australian jurisdictions

Safe Work Australia, the national policy body for work health and safety, collects, analyses and publishes data across jurisdictions. SafeWork NSW provides data on regulatory activities such as the volume of proactive and reactive regulatory work, and performance measures such as injuries and fatalities. This is contained in the Safe Work Australia *Comparative Performance Monitoring – Work Health and Safety Performance*, and *Work Health and Safety Compliance and Enforcement Activities* reports.

The data published by Safe Work Australia provides comparative and longitudinal performance data relating to workplace injuries, fatalities, and compliance activities. This is 'lag' data, often 12 months or more in arrears. SafeWork NSW notes that due to the currency of data, it is not useful for planning purposes.

The ability to directly compare jurisdictional activities to form a view on the effectiveness of each regulator is limited, due to differences in how each work health and safety regulator works and the scope of their powers and responsibilities. For example, unlike in other states and territories, SafeWork NSW is not responsible for claims management or return to work matters.

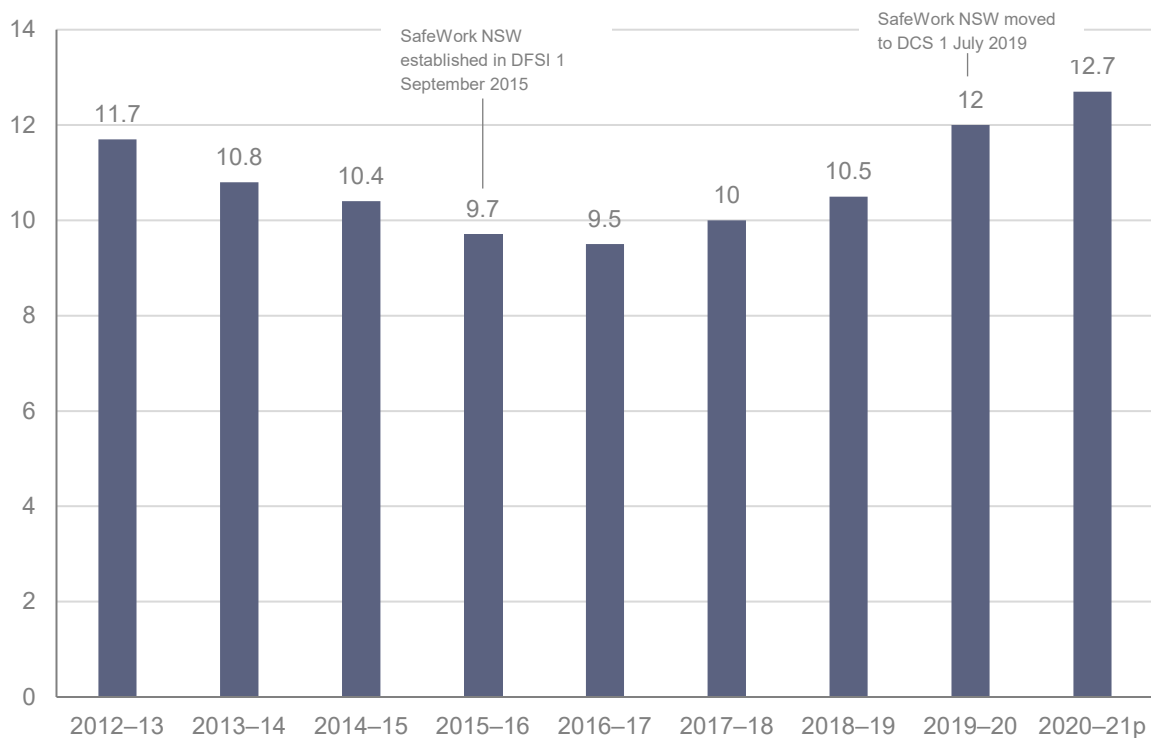
Data reported by SafeWork NSW to Safe Work Australia indicates that, while fatalities have decreased, SafeWork NSW may not have had meaningful impact on the rates of serious injuries and disease claims since 2016–17

The data provided to Safe Work Australia shows that SafeWork NSW has presided over a period where there has been an increase in the incident rate of serious injury and disease claims in New South Wales. While SafeWork NSW is not responsible for workers compensation, the payment of workers compensation necessitates that a workplace injury has occurred.

The audit team has not seen evidence that SafeWork NSW has interrogated the root cause data trends since 2016–17 (discussed below). While the causes of workplace injury are often complex and multifaceted, the data suggests that SafeWork NSW may not be having a meaningful impact on reducing rates of serious injuries, but the poor data quality means that we cannot be sure. It was beyond the scope of this audit to specifically examine serious injuries and disease claims, or the root cause(s) for the upward trend.

An extract of one performance indicator is shown in Exhibit 2 below. It shows serious injury and disease claim data from 2012–13 through to 2020–21 (where 2020–21p stands for preliminary data). The 2015–16 financial year is highlighted to indicate the establishment phase of SafeWork NSW.

Exhibit 2: NSW incident rates of serious injury and disease claims per 1,000 employees, 2012–13 to 2020–21

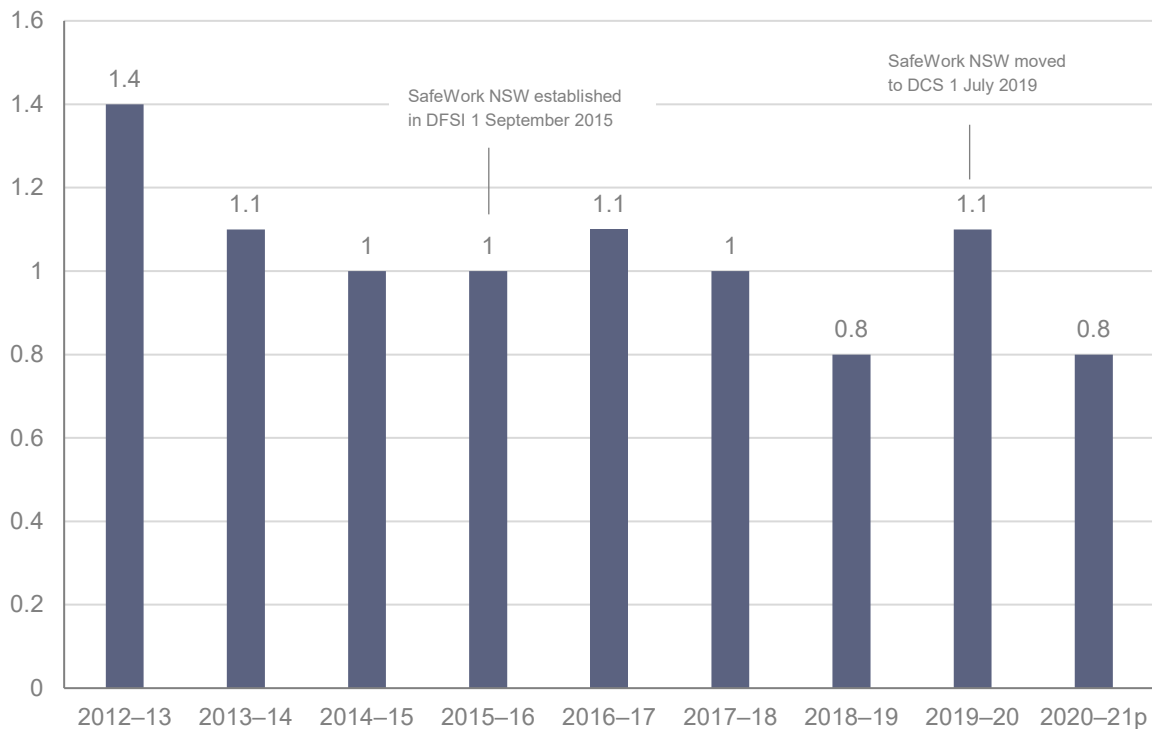


Note: 2020–21p is preliminary data.

Source: Safe Work Australia Comparative Performance Report 24th edition, and Safe Work Australia Comparative Performance Report 20th Edition.

Indicators for serious fatalities have however continued on a downward trend since 2012–13, even after the establishment of SafeWork NSW. An extract of one indicator concerning fatalities is shown in the following Exhibit 3.

Exhibit 3: NSW traumatic injury fatality incident rate per 100,000 workers (not on a public road), 2012–13 to 2020–21



Note: 2020–21p is preliminary data.

Source: Safe Work Australia Comparative Performance Report 24th edition, and Safe Work Australia Comparative Performance Report 20th Edition.

The annual priorities approach does not explicitly include any commitments to reduce injuries and fatalities to specific levels

Under the previous WHS Roadmap, SafeWork NSW committed to specific targets of:

- 30% decline in worker fatalities due to injury
- 50% decline in the incident rate of claims for serious injuries and illnesses
- 50% decline in the incidence rate of claims for serious musculoskeletal injuries and illnesses.

SafeWork NSW advised the audit team that it does not duplicate Safe Work Australia targets in its localised plans, and is awaiting guidance from Safe Work Australia on reporting parameters under the Australian *Work Health and Safety Strategy 2023–2033*. Targets from national strategy include a 30% reduction in worker fatalities caused by traumatic injuries, a reduction in the overall incidence of work-related injury or illness among workers to below 3.5%, and a reduction in the frequency rate of work-related respiratory disease by 20%.

The data published in Safe Work Australia’s comparative reports provides an overview of SafeWork NSW’s regulatory activities in line with national priorities. However, the data is not benchmarked against specific targets.

SafeWork NSW primarily reports the volume of its activities, and not on the outcomes of these activities

The metrics that SafeWork NSW report are primarily concerned with the extent to which it undertakes regulatory activities, such as inspector interactions with PCBUs, and the number of notices issued. These are primarily output focused measures, and do not, as one inspector noted, 'distinguish effort from impact'. For example, they do not measure changes in the behaviour or attitude of PCBUs as a result of regulatory activity. The audit team did sight internal reports (labelled 'draft concept' and 'mock up'), intended for use at quarterly SafeWork NSW Leadership Group meetings, that included data points across customer experience, compliance outcomes, industry engagement, and specific priorities.

As part of developing its annual regulatory priorities, SafeWork NSW has developed a monitoring and evaluation framework with clear outcome indicators at both the individual priority level and whole of SafeWork NSW level. For example, 'reductions in serious incidents and deaths at NSW workplaces'. Reporting against this framework will fall outside of the one-year period, with no specific target set against these outcome targets.

The regulatory priorities for 2023 do not contain specific performance measures for SafeWork NSW, nor for the specific priorities identified. For example, one priority is to 'reduce the incidence of falls from heights with a particular focus on construction', though no specific targets are set for this priority.

One indicator reported by SafeWork NSW that does relate to outcomes is included in NSW State Budget papers. This is under *NSW State outcome 3: fair, secure, and efficient markets*. The indicator is 'the reduced rate of work-related traumatic injury fatalities (worker fatalities per 100,000 employees)'.⁷

The 2022–23 *Budget Paper No. 2 Outcomes Statement for the Customer Service Cluster* showed that worker fatalities per 100,000 employees reduced from over 1.5 in 2016–17 to a forecast rate of 1.34 fatalities per 100,000 by the end of December 2022. This rate would meet national targets adopted in 2016. These figures differ from the Safe Work Australia reported fatality rates due to how fatality rates are reported (for example, the performance indicator used for NSW State Budget outcomes is for all fatalities).

SafeWork NSW does not report as a standalone regulator, with transparency having reduced since becoming part of DCS

The WHS Act requires the regulator to report on certain issues to the responsible Minister.⁷ This includes reporting on the operations and effectiveness of the WHS Act and occupational dust diseases, such as silicosis. The WHS Act does not require SafeWork NSW to provide any of these reports publicly, except for section 152(d), which requires SafeWork NSW to 'collect, analyse and publish statistics relating to work health and safety'.

⁷ These legislative reporting obligations include:

- Section 152(a): to advise and make recommendations to the Minister and report on the operation and effectiveness of this Act.
- Section 152 (b): to monitor and enforce compliance with this Act.
- Section 152(d): to collect, analyse and publish statistics relating to work health and safety.
- Section 271D: (1) As soon as practicable after the end of each financial year, but no later than 30 September, SafeWork NSW must ensure the Minister is given a report stating—
 - a) the number of cases of occupational dust diseases notified to SafeWork NSW under section 271B during the financial year, and
 - b) the number of deaths resulting from occupational dust diseases notified to SafeWork NSW under section 271B during the financial year, and
 - c) the types of diseases or conditions recorded in the Dust Diseases Register during the financial year, and
 - d) the actions SafeWork NSW has taken to implement the purposes of the register, and
 - e) any other information about a disease or condition recorded in the register that SafeWork NSW considers appropriate.

SafeWork NSW currently reports on its activity through the DCS annual report. There is additional reporting through the NSW State Budget reporting, national reporting through Safe Work Australia, and the NSW Dust Disease Register Annual Reports published by SafeWork NSW.

Over time, there has been a loss of consolidated detail in what is reported about the regulator, as compared to when SafeWork NSW reported information as a standalone regulator, or as part of the former Department of Finance, Services and Innovation. Exhibit 4 below illustrates this difference in both detail and dispersion of information.

SafeWork NSW has stated that it is looking at developing key performance indicators to monitor the delivery of its functions. It is unclear why SafeWork NSW has not already conducted this work to meet its legislative obligations under section 152 of the WHS Act.

The DCS Secretary is formally the 'regulator' under the WHS Act, though has delegated functions to a Deputy Secretary who performs as the Head of SafeWork NSW. SafeWork NSW told this audit that 'the Deputy Secretary provides regular reports in their fortnightly meetings on SafeWork NSW operations. SafeWork NSW also obtains approval for items within the Department of Customer Service Delegations or other instruments where required'.

SafeWork NSW's performance reporting is fragmented and focused on activity, making it difficult to know how effectively it is performing

The last standalone report on the activities of a work health and safety regulator in NSW was in WorkCover NSW's final annual report in 2014–15. Information about SafeWork NSW's effectiveness is now dispersed through reporting across both state and federal government bodies. DCS does make available a consolidated document that summarises SafeWork NSW's performance against national and state priorities.

Information about SafeWork NSW's enforcement activity is dispersed through:

- the DCS annual reports, which include activity-based regulatory work by inspectors, notices issued, and investigation outcomes in the appendices of the report
- Safe Work Australia comparative reports, which includes more detailed data on compliance activities, injury, and fatality rates across jurisdictions
- the SafeWork NSW website, which includes detailed sector-based information on risks and injury rates, though the information available varies. For example, year in review summary information is provided for the food delivery industry, though not for other industries.

Exhibit 4 below shows the performance measures previously reported by WorkCover NSW up to 2014–15, as well as the current performance measures about SafeWork NSW that are reported in:

- the DCS annual reports
- NSW Budget papers
- the Safe Work Australia comparative performance report, which was last published in 2022.

Exhibit 4: Public reporting of performance of the NSW work health and safety regulator

Performance measure	Previously reported			Currently reported		
	WorkCover NSW	DFSI annual report	DCS annual report	SIRA annual report	NSW Budget papers	SafeWork Australia
Rebates	✓	✓	✓			
Inspector visits	✓	✓	✓			✓
Number of inspector reports	✓					
Verifications (field, license, desk)	✓	✓	✓			
Administrative sanctions (improvement notices, EUs, prohibition notices, penalty notices)	✓	✓	✓			✓
Customer service interactions and metrics	✓	✓	✓			
Fatalities	✓	✓	✓		✓	✓
Fatalities by industry	✓					✓
Fatalities over time	✓	✓				✓
Diseases	✓					✓
Commenced / ongoing prosecutions	✓		✓			
Completed prosecutions	✓	✓	✓			✓
Top causes of workplace injuries	✓					✓
Risk by demographic factors	✓					
Risk by sector	✓					✓
Source of inbound referral	✓					
Asbestos testing, removal, verification	✓	✓	✓			
Educational and awareness activities	✓	✓	✓			
Operational expenses	✓			✓		

Sources: WorkCover NSW Annual Report 2014–15, DFSI Annual Report 2017–18, DCS Annual Report 2021–22, SIRA Annual Report 2021–22, NSW Budget 2022–23 N. 02 Outcomes Statement (Customer Service Cluster), Safe Work Australia Work Health and Safety Performance 24th Edition, Safe Work Australia Work Health and Safety Compliance and Enforcement Activities 24th Edition.

SafeWork NSW does not have a continuous improvement framework

The audit team did not find a formal continuous improvement policy or procedure. This means that the need for quality assurance of decisions made by SafeWork NSW, evaluation of its initiatives, and feedback loops to ensure that lessons learned are distributed across the entirety of SafeWork NSW have not been formalised.

A review of a sample of minutes from the Regulatory Practices Oversight Committee between March 2022 and April 2023 identified that findings from programmatic evaluations, or evaluations of proactive projects did not inform discussions on continuous improvement. According to the SafeWork NSW evaluation webpage, there have been no evaluations published since the evaluation of the enforceable undertakings program in 2020, with the last customer satisfaction survey results published in 2019. This does not provide the community or broader industries with transparency on the effectiveness of SafeWork NSW's activities.

The audit team has identified individual instances of lessons learned through documents stored in the SafeWork NSW Knowledge Hub, and meeting presentations that indicate feedback loops between directorates.

There are some structural enablers for continuous improvement matters to be discussed at senior governance forums. For example, the Regulatory Practice Oversight Committee:

- has a formal role to 'identify areas for SafeWork NSW inspectorate and regulator practice improvement and oversee implementation'
- includes as standing agenda items updates from the Inspector Practice Group, the purpose of which is to collaborate on improvements to inspector practice
- has discussed and made decisions on matters relating to the effectiveness of SafeWork NSW's regulatory approach, workforce skill and capacity, internal policies and procedures, and the consistency of decision-making.

Evaluation findings have not been published since 2020 and do not seem to directly inform practice improvement.

SafeWork NSW has noted that it is in the process of evaluating the WHS Roadmap, which ended in 2022. As stated earlier, a mid-term evaluation was completed in 2020. This mid-term evaluation, while published on the SafeWork NSW website, is not included on the evaluation section of the website.

According to the SafeWork NSW evaluation webpage, there have been no evaluations published since the evaluation of the Enforceable Undertakings program in 2020, with the last customer satisfaction survey results published in 2019. This does not provide the community or broader industries with transparency on the effectiveness of SafeWork NSW's activities.

A review of a sample of committee meetings between March 2022 and April 2023 identified that while the need for evaluations were noted, findings from programmatic evaluations, or evaluations of proactive projects did not inform discussions on continuous improvement.

SafeWork NSW has limited quality assurance processes in place, with regulatory decisions made by inspectors not regularly and systematically quality assured

The SafeWork Health Check Program is a program designed to identify process improvements and piloted in 2021. It was noted in Regulatory Practice Oversight Committee minutes in April 2023 that the Serious Incident Review Process (SIRP)⁸ and Independent Decision Making Panel (IDMP)⁹ processes would be subject to this program.

Prior focus areas of the Health Check Program have concerned the management of conflicts of interest, consistency of notices with legal requirements, and evidence gathering and record keeping for penalty notices. The Health Check Program responds to nominations made to it to examine specific areas, with its work approved by the Regulatory Practice Oversight Committee. It does not set its own work program or provide a regular quality assurance function.

Inspectors have discretionary powers under the WHS Act and act independently of other inspectors, making decisions with little supervision. Review of inspector practice occurs at the team and directorate level, with managers responsible for reviewing the evidence and decision-making for individual cases, as well as reviewing applications for SIRP and IDMP processes. Practices vary across teams and directorates. For example, the Investigations and Emergency Response directorate has work review templates to support formal discussion across different positions within the inspectorate, and include broader career development items as well as specific matters. These templates do not seem to be contained within the SafeWork Knowledge Hub for broader usage.

Quality assurance plays an essential role in promoting regulatory decisions that align with good regulatory practice, including that they are consistent and predictable. This is discussed further in Chapter 4.

⁸ The SIRP involves a panel of directorate members, including inspectors, who consider matters that fall within identified priority areas to determine next steps. Each directorate runs their own SIRP. The process is used to determine which incidents are escalated to the IDMP.

⁹ The IDMP is a process that was introduced to enable a consistent approach to determining what matters are progressed to further investigation with a view to prosecution. The panel is made up of seven SafeWork NSW directors from Compliance and Dispute Resolution, and Investigation and Enforcement functions.

4. Application of policies and procedures

This chapter considers selected policies and procedures that SafeWork NSW has implemented to ensure that it performs its compliance functions in a manner that is consistent with regulatory good practice. This includes that regulatory decisions are fair, consistent, predictable, transparent and in accordance with any laws or government policy. This extends to how complaints and incidents are initially triaged, the decisions inspectors make in response to complaints or incidents, and decisions made about whether a matter is referred to investigation for possible prosecution.

SafeWork NSW has made significant efforts to promote consistency in regulatory decision-making

A core element of an effective compliance regime is that the regulator's behaviour and decision-making should be consistent and predictable. This encourages trust and confidence in the regulator, while promoting clarity and certainty among regulated entities.

SafeWork NSW faces particular challenges to achieving consistency in regulatory outcomes without fettering the legislative decision-making authority of individual inspectors. The audit was made aware of cases where stakeholders could not understand the rationale by which decisions were made, including in matters raised in Parliamentary Budget Estimates Committee hearings.

The reasons for the lack of consistency, whether perceived or actual, includes such matters as:

- the unique circumstances that may apply to individual risks, hazards, or incidents
- the wide variation in characteristics of PCBUs, including in regard to matters that might affect their culpability for non-compliance, such as their size or compliance history
- varying levels of experience across inspectors
- potential differences between individual inspectors in risk appetite, regulatory posture and attitudes to varying regulatory interventions.

These complexities have received heightened attention by SafeWork NSW since the 2020 findings of the NSW Ombudsman's inquiry into SafeWork NSW and the Blue Mountains City Council. Among other things, in this inquiry the Ombudsman found that:

- only inspectors had the authority to form a 'reasonable belief' that non-compliance with the WHS Act or regulation had occurred
- where an inspector forms a 'reasonable belief' of non-compliance, then they must issue a regulatory notice
- instances had occurred where inspectors had issued notices without forming the necessary 'reasonable belief' that valid grounds existed for those notices
- inspectors had issued notices without forming their own requisite 'reasonable belief' because they had been directed to issue notices by management.

Notwithstanding these challenges, SafeWork NSW was able to demonstrate that it has implemented measures aimed at promoting consistency in regulatory decision-making. These measures include:

- extensive guidance in exercising discretionary decision-making
- inspector practice notes
- directorate and team level discussions intended to promote consistency in decision-making.

These measures are primarily focused at encouraging consistency in the application of the law prospectively. There was less evidence that decisions were consistently, formally, and robustly reviewed retrospectively, such as by:

- peer review
- internal audit or quality assurance of decisions
- managerial coaching and mentoring.

The audit found varying practices and processes across SafeWork NSW teams and directorates for these sorts of retrospective and reflexive learning processes. Some managers and directors were able to describe regular review activities, either through one-on-one case reviews with individual inspectors, or through team meetings, though the evidence was that these activities were not consistent across regulatory decision-making areas of SafeWork NSW.

Such retrospective mechanisms would not be aimed at varying decisions already made, but at contributing to standardising how inspectors make future decisions by promoting consistency through setting precedents for responding to substantively similar matters.

Staff performance management is inconsistent across SafeWork NSW, which may hinder consistent practices, behaviours and outcomes

The use of organisational performance management and planning systems can be an important tool for promoting consistent behaviours, understandings and outcomes.

This audit included a survey of all members of the inspectorate, excluding team managers. Approximately 60% the inspectorate responded to the survey. The survey of found that:

- 36% said that they did not have an annual performance agreement – almost one in every two inspectors (46%) in the two metropolitan focused directorates said they did not have performance agreements that set out what was required of them
- the Investigation and Emergency Response directorate had a comparatively higher rate of reported performance agreements in place (80%) than all the other directorates that comprised SafeWork NSW (57%) – the reasons for this were not examined by the survey.

Findings from a survey of the inspectorate highlight the role of discretion in decision-making, and how these factors can be inconsistently applied

The survey conducted by the audit also asked inspectors about how different factors might affect their decision to issue a penalty notice for a breach of the WHS Act (excluding the most serious categories of matters that would ordinarily be immediately referred to full investigation and possible prosecution).

The discretionary factors that were included in the survey included:

- a sample taken from SafeWork NSW's written procedure for issuing penalty notices (shown in Exhibit 5 below)
- a small number that had been raised with the audit team by SafeWork NSW staff during interviews, namely: current regulatory priorities, media or political interest, and the size of the PCBU (specifically, whether or not a hypothetical PCBU was a small, family-owned business).

Exhibit 5: Discretionary factors when issuing a penalty notice

Factors that are considered relevant to the exercise of discretion to issue a penalty notice are:

1. The seriousness of the risk and the actual or potential consequences or harm.
2. The extent of any injury or illness (penalties must not be issued for a fatality or serious injury which may lead to a full investigation or prosecution unless in accordance with this procedure).
3. The duty holder's safety and compliance history, e.g., a repeat offender or there is a likelihood of the offence being repeated.
4. The prevalence of the offence in the jurisdiction and industry impact.
5. The culpability of the duty holder, that is, how far below acceptable standards the conduct falls and the extent to which the duty holder contributed to the risk.
6. Whether the duty holder was authorised to undertake certain types of work, e.g., work requiring a licence, registration, permit or other authority (however described) as required by the regulations.
7. Prior notice of the risk or offence (e.g., direct to the duty holder or through codes of practice, educational material, safety alerts, guidance sheets, campaigns or priority interventions etc).
8. Whether the circumstances warrant the application of an administrative sanction at a lesser scale than an enforceable undertaking or prosecution (in addition to remedial action in the form of an improvement or prohibition notice).
9. Any mitigating or aggravating circumstances including efforts undertaken by the duty holder to control risks and the duty holder's co-operation and willingness to address the issue.

Source: SafeWork NSW, Penalty Notice Procedure.

Inspectors were asked whether a range of selected factors were in general more, less, or not at all likely to influence their decision to issue a penalty notice.

As shown in Exhibit 6 below, the survey found that the most common response to most of the factors was that they made it neither more nor less likely that an inspector would issue a penalty notice in response to non-compliance. In some cases, this is probably to be expected.

For example, whether or not a non-compliant PCBU is a NSW government agency should probably not affect whether it is issued with a penalty notice. This was the case for 80% of respondents (though notably, 20% of inspectors responded that it would affect their decision, including 3% who responded that they would be much more likely to issue a penalty notice).

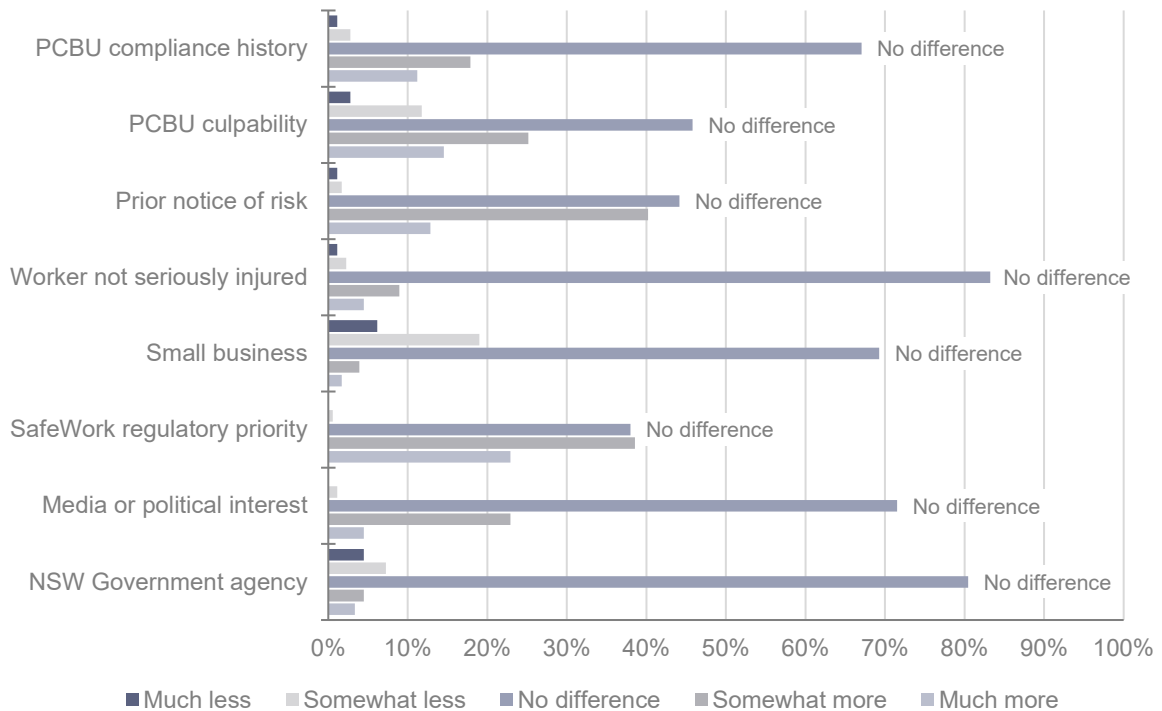
Other variations seem less intuitive to explain. This is particularly the case when a factor is written in policy or procedures. For example, 44% of inspectors responded that their decision would not be affected by whether or not the PCBU had prior notice of the risk, even though prior notice is prescribed in the SafeWork NSW procedure as a factor that should be taken into account (see item 7 of Exhibit 5).

The role played by SafeWork NSW regulatory priorities is also uncertain. On the one hand, 62% of inspectors said that they would be more (39%) or much more (23%) likely to issue a penalty if the non-compliance related to a regulatory priority, while 38% said it would have no impact.

The survey also found noticeable variations in responses between directorates regarding when penalty notices would be more or less likely to be issued. This included in regard to:

- whether a non-compliant PCBU was a small business or not
- the role of PCBU culpability
- whether non-compliance related to a matter of media or political interest.

Exhibit 6: Degree to which selected factors make it more or less likely that a SafeWork NSW inspector will issue a penalty notice



Notes:

For 'PCBU compliance history', the survey scenario posed that the PCBU had '... been issued two improvement notices and a penalty notice in the last two years for unrelated matters'.

For 'PCBU culpability': '...the PCBU probably did what was reasonably practicable to reduce or lessen the risk, except that it failed to check whether the worker was properly licenced for what they were doing when injured.'

For 'Prior notice of risk': 'The offence would probably have been avoided if the PCBU had just followed the available code of practice or educational material'.

For 'Worker not seriously injured': '...the injured worker had to be treated in a hospital Emergency Department for a broken wrist, but did not require admission overnight'. This was deliberately expressed to not meet the definition of 'serious injury' in the WHS Act, which includes where an injury requires admission to hospital as an inpatient.

Consistency in decision-making at the operational level is an ongoing issue for SafeWork NSW

In interviews, the audit team asked all SafeWork NSW senior executives, as well as the majority of team managers, about whether SafeWork NSW is effective in ensuring consistency in decision-making. Responses varied.

Some people managers expressed strong confidence that their work team did demonstrate consistency in both approach and decision-making outcomes. This was usually explained as being due to regular formal and informal discussions and case reviews.

Other managers said that there were different practices and outcomes, including between new inspectors and those who were longer serving. The view was put that experienced inspectors were less likely to issue notices, such as penalty or improvement notices, than were newer managers.

Distinctions were similarly drawn between practices and outcomes in metropolitan versus rural directorates. In this case, it was put by multiple interviewees that rural-based inspectors were more likely to adopt educative or advisory roles than to issue penalty notices, particularly in cases where the inspector may identify as a member of a local community. Analysis of WSMS data by the Audit Office did not find a material difference between the distribution of notices between metro and non-metro teams.

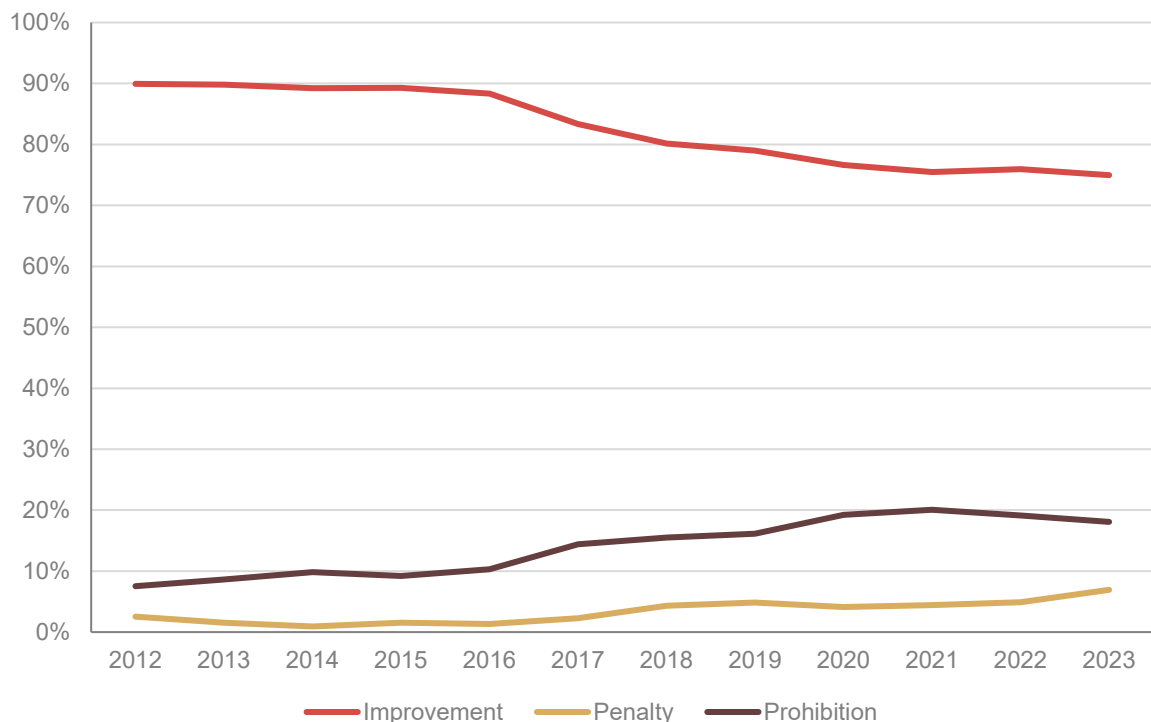
The only consistent observation among interviewees was that perfect consistency is likely to be unachievable when individuals are being asked to make judgements about work health and safety risks, hazards and incidents that will often have unique and complex combinations of factors.

There has been a change over time in the relative use of key compliance notices, with a reduction in the proportion of improvement notices issued

Exhibit 7 shows that between 2012 and 2023, there was a consistent reduction (from around 90% to around 75%) in the proportion of improvement notices issued as a proportion of all improvement, prohibition and penalty notices combined. At the same time, there was an increase in the relative proportions of prohibition and penalty notices.

Further analysis would be required to determine whether these trends are a consequence of inherent changes in work health and safety risks, variations over time in how SafeWork NSW and its inspectors exercises regulatory functions, or some other reason.

Exhibit 7: Improvement, penalty, and prohibition notices as a proportion of all compliance notices issued, 2013 to 2023.



Source: Audit Office analysis of SafeWork NSW data.

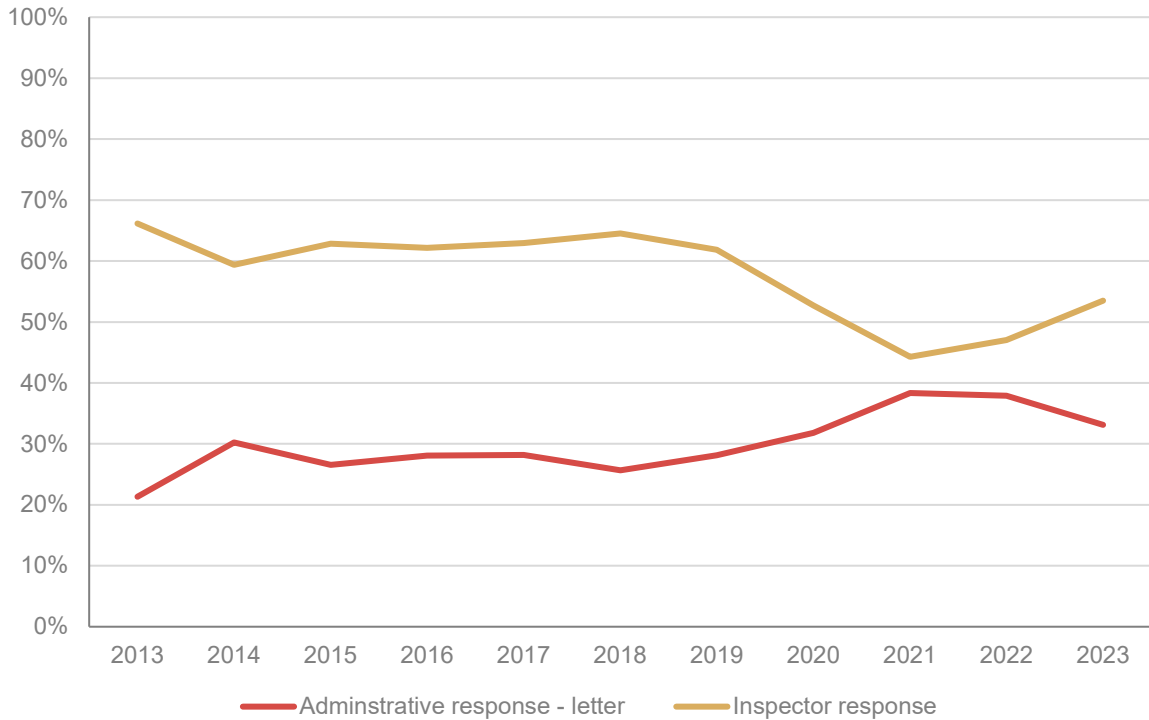
Administrative response letters have accounted for an average of 31% of SafeWork NSW's response to complaints since 2014, though the effectiveness of this regulatory response is unknown because only around eight per cent are followed-up

In 2011–12, SafeWork NSW introduced the option of responding to requests for service (primarily complaints) with the issue of an 'administrative response letter' (commonly, 'admin letters') rather than providing an inspector response. These letters are intended for less critical matters. They are generally assessed and sent by non-inspectorate staff in the SafeWork NSW call centre and are seen as being a less resource-intensive way of responding to non-urgent matters.

Exhibit 8 shows that overall between 2013 and 2023, there was a reduction in the proportion of matters dealt with by inspector response (from 66.2% down to 53.5%) and an increase in the proportion dealt with by administrative letter (from 21.3% up to 33.1%). This trend is particularly obvious in 2020 and 2021 when the COVID-19 pandemic required increased social distancing. Notably, in 2022 and 2023, these trends have reversed, with an increase in the proportion of complaints addressed by inspector response.

The use of administrative response letters may provide an efficient way for SafeWork NSW to use its inspectors by allowing them to be targeted to more serious matters. However, there is also a risk of their overuse, resulting in matters that should be dealt with by qualified inspectors, often via sites visits, being underserved by the use of letter. SafeWork NSW has not done the analysis of whether the administrative response letter mechanism is being appropriately used.

Exhibit 8: Proportion of complaints addressed by administrative response letters and inspector response, 2013 to 2023



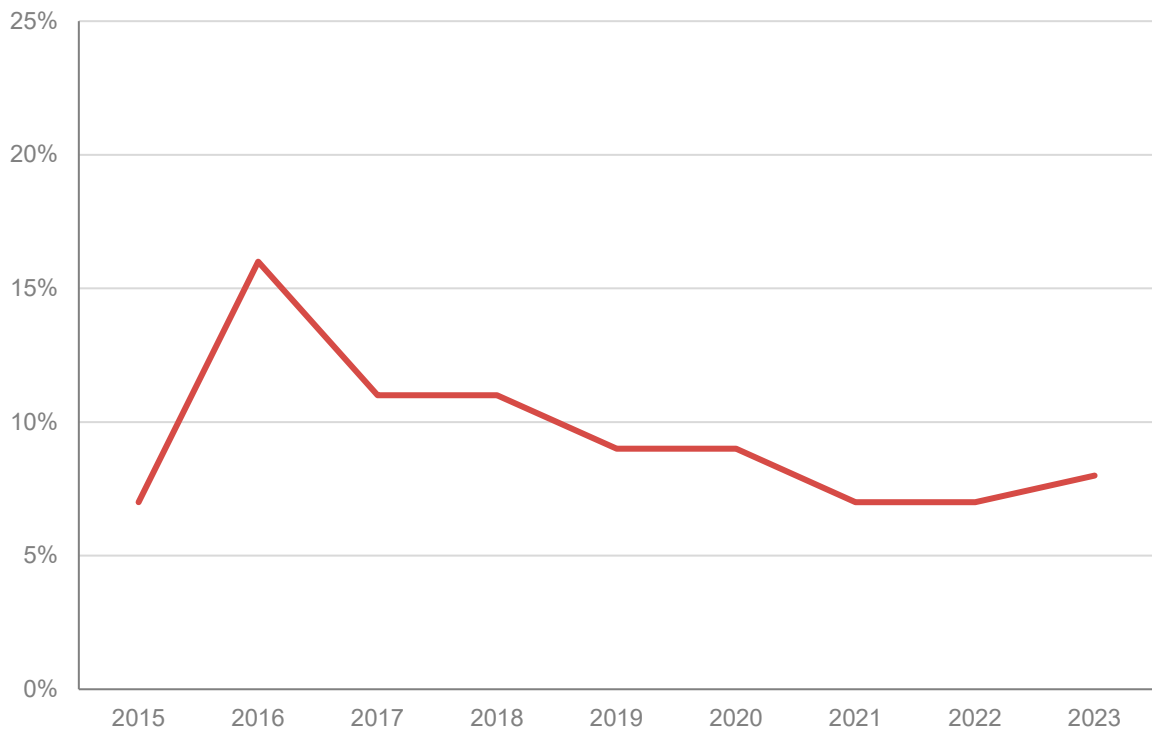
Source: Audit Office analysis of SafeWork NSW data.

SafeWork NSW has a written procedure for the verification (that is, follow-up) of administrative response letters. While it is not specified in the procedure, the audit was told in interviews that there is a target that around 20% of administrative response letters should be subject to follow-up verification by inspectors. The procedure explains that focus of the verification engagement is:

... to determine if the PCBU received the Administrative Response Letter from SafeWork NSW and what reasonable steps the PCBU took to investigate the incident or resolve the WHS concerns identified in said letter. The ARV should continue with the PCBU, regardless of their receipt of the Administrative Response Letter.

As shown in Exhibit 9 below, the audit found that, between 2015 and 2023, the proportion of administrative response letters that were later verified by SafeWork NSW never exceeded 16% and was lower than ten per cent in six of the nine years. The average over the period was eight per cent.

Exhibit 9: Proportion of administrative response letters subject to subsequent verification, 2015 to 2023



Source: Audit Office analysis of SafeWork NSW data.

Field-based responses by inspectors are much more likely to result in some form of regulatory notice being issued than responses made by phone or correspondence

Of complaints that are triaged for inspector response, the majority receive a field-based response, whereby the inspector conducts a workplace visit. However, in around 20% of cases, a complaint allocated to an inspector will be addressed through a non-field based response (such as where a matter is dealt with over the phone or by written correspondence).

It was beyond the scope of the audit to assess whether non-field responses were the most appropriate for individual matters. Non-field responses may be appropriate for rural or remote sites, where it may be difficult for SafeWork NSW inspectors to readily conduct site visits.

However, the different form of response does appear to correlate with different regulatory outcomes. When a request for service is resolved by non-field based means, there is approximately a 95% chance that no form of regulatory notice will be issued. By comparison, when a matter is addressed by field-based response, this figure falls to 63%.

Of the four operational directorates in SafeWork NSW, WHS Metro favoured non-field based responses in 29% of cases, while the remaining three directorates use this model in around 14% of cases. There is also variation in approaches between teams, even within the same directorate. For example, in Construction Services Group Regional, the use of non-field based responses varied from a low of 6.44% in one team, to a high of 44.44% in another.

On average, inspectors with fewer than two years in the role tended to issue more notices than longer serving inspectors

Interview evidence suggested that longer serving inspectors were, on average, less likely to issue compliance notices (of all types) than newer inspectors. This is supported by the data, which shows that on average:

- inspectors with fewer than two years' experience issue 60 notices per year
- inspectors with between two and five years' experience issue 48 notices per year
- inspectors with more than five years' experience issue 50 notices per year.

Further analysis would be required to determine whether this variation, particularly between the least experienced inspectors and the other two cohorts, is a result of intrinsically different types or work, different approaches or attitudes to regulation, or some other factor.

SafeWork NSW has a compliance policy that is intended to ensure that staff actions are consistent in similar circumstances and are seen to be fair

The SafeWork NSW compliance policy, which is a public document, sets out ten policy principles that are intended to 'guide staff in the use of their compliance powers'. The policy is described as 'relating' to all staff.

The policy states that by:

...applying this policy, action taken by staff will:

* be seen as fair

* be consistent across duty holders in similar circumstances.

As shown in Exhibit 10, the policy principles essentially encapsulate the interpretation of the WHS Act articulated in the Ombudsman's 2020 report into SafeWork NSW and the Blue Mountains City Council. That is, in summary, that regulatory notices must be issued by inspectors where they form a reasonable belief that a contravention of the legislation has occurred, but that only the inspector may form that reasonable belief, which may not be dictated to the inspector by another person.

The policy's stated goal that it will ensure decisions are fair and consistent seems ambitious. While this policy may form part of an overall body of policy and doctrine to support fair and consistent decision-making, it does not guarantee this outcome. Decisions still turn on the 'reasonable belief' formed by individual inspectors (principles 5–7) and will be informed by how inspectors exercise their discretion in performing their functions (principle 2).

Exhibit 10: Compliance policy principles

1. All workplace interactions shall be conducted with the aim of achieving sustainable work health and safety improvements, embedding a health and safety landscape in organisations and preventing workplace death, injuries and illnesses.
2. To achieve this and secure compliance with WHS laws, Inspectors will apply the principles of discretion in choosing the appropriate levels of advisory or enforcement action required.
3. When undertaking an intervention, Inspectors are to decide on the combination of actions that are consistent and proportionate to the particular circumstances to achieve the best workplace health and safety outcome.
4. Where there is a contravention of the legislation, dependant on the level of known and foreseeable risk, a notice is to be issued.
5. In determining if a contravention has occurred an Inspector must, based on the evidence available to them, form a reasonable belief that a contravention has occurred before a notice is issued.
6. Where an Inspector decides an improvement and or prohibition notice is required to be issue, the inspector must personally hold the reasonable belief.
7. A reasonable belief cannot be dictated to an inspector by another person.
8. Multiple action tools may be used for a single contravention when their cumulative impact is to promote compliance.
9. Different action tools may be used during a single interaction where multiple non-compliances are found.
10. Actions that build capability, assist future compliance and reduce the risk of harm are to form part of all interactions.

Source: SafeWork NSW, Compliance Policy.

SafeWork NSW's practice of routinely sending a single inspector on jobs creates an independence and probity risk for the regulator and the inspector

Inspectors ordinarily attend worksites alone (that is, 'one-out') when responding to requests for service and workplace incident notifications.

Some interviewees had no concerns about this, noting that it was the established practice. It was also explained that inspectors occasionally attend worksites in pairs ('two-out'), though generally in limited circumstances, including:

- where there was an identified risk of violence and aggression, though this was ill-defined and for some inspectors extended to where a union representative might be on-site
- for complex or sensitive matters, such as fatalities.

Interviewees were unable to point to SafeWork NSW having policy or procedure to support this limited 'two-out' approach, which appeared to vary between individual teams and managers.

Inspectors with discretionary legislative powers routinely attending potentially complex workplaces by themselves may be due to resourcing constraints, but the practice does involve potential risks. One interviewee expressed the view that the practice of single inspectors attending worksites posed the risk of creating:

...gaps in capability, professionalism, experience, accountability, assurance, consistency, and personal safety.

This view aligns with a finding made in the review of SafeWork SA by the South Australian Independent Commission Against Corruption, which noted:

The two-up approach protects inspectors from inaccurate accusations and improves inspector safety. Inspectors may feel more confident in a pair, therefore less likely to decide not to issue a notice where such a notice should have been issued. This approach also provides an opportunity for collaboration and to learn new skills.

The audit was told that some inspectors were openly resistant to attending worksites in pairs. This particularly extended to experienced inspectors being resistant to being accompanied by new or inexperienced inspectors. This resistance was purportedly on the basis that experienced inspectors did not view it as part of their job to train new staff. This view seems inconsistent with expectations of both the DCS and NSW public sector codes of conduct and ethics to act collaboratively in a team environment.

The audit notes that a policy establishing the expectations for new inspectors being accompanied in the field came into effect on 21 April 2023. The policy highlights that supervised workplace visits provide new inspectors with the opportunity to '...hone theoretical skills obtained within the learning environment' by observing experienced inspectors in the field.

The policy has a six-month review date of 21 October 2023. The policy does not address the wider question of the inappropriateness of inspectors routinely attending worksites by themselves.

SafeWork NSW has measures in place to support fair and impartial decision-making by managing conflicts of interest, though it does not collate information about how conflicts are managed

SafeWork NSW demonstrates a high-level of understanding about the importance of managing conflicts of interest at the inspectorate level and can demonstrate a governance framework to support this understanding.

The rigorous and proactive management of conflicts of interest (real or perceived) is crucial given several unique characteristics that apply to SafeWork NSW, including:

- There is substantial decision-making discretion vested in individual inspectors, including to issue penalty notices or other forms of notice that may affect the functioning of a business or undertaking, or impose a cost or other form of regulatory burden.
- A reasonable belief cannot be dictated to an inspector by another person, hence inspectors must disclose any real, potential or perceived conflict that may influence their decision.
- Inspectors may be allocated to the same role and team for long periods. While this may be beneficial in developing local knowledge and situational awareness, it may also contribute to the risk of regulatory capture or what was described to the audit in one case as 'being too cosy' with the regulated entity.
- Inspectors may perform regulatory functions in their own local communities, especially in rural or regional-based teams and directorates.
- As discussed above, inspectors generally attend workplaces by themselves.

SafeWork NSW procedure formally requires that before allocating an inspector to respond to a complaint, incident or service request, the respective manager is required to conduct a risk assessment that must include, among other things:

- whether an actual or perceived conflicts of interest has been identified
- whether any conflict of interest been declared.

SafeWork NSW maintains a conflict of interest procedure that was established in 2013 and last reviewed in 2021. The procedure sets out responsibilities of inspectors and managers for managing conflict of interest and provides guidance on how to develop a conflict of interest management plan. The procedure sets out SafeWork NSW's understanding that it must effectively manage conflicts of interest to:

...ensure the provision of fair and impartial services to the community, maintain public confidence in those services, prevent corruption, and manage allegations of misconduct.

The procedure is also supported by a 'conversation starter' document focused on conflict of interest. This is intended as a practical tool to support directors and managers in having conversations about conflicts of interest to '...ensure that systems and processes are embedded into our everyday business'.

Section 158 of the WHS Act requires that an inspector:

...must give written notice to the regulator of all interests, pecuniary or otherwise, that the inspector has, or acquires, and that conflict or could conflict with the proper performance of the inspector's functions.

An inspector practice note was also released in November 2020 providing instructions to inspectors on the application of section 158. Among other things, this practice note requires that:

If an Inspector becomes aware of a conflict or perceived conflict of interest once an RFS [Request for Service], Workplace Incident or Project Activity has been allocated to them an action item 'conflict of interest' must also be entered into WSMS.

The conflict of interest procedure also requires that any conflicts of interest must be recorded in SafeWork NSW's employee training and capability portal, MyCareer.

A 2021 internal review of conflict of interest declarations and their management found that 28 conflict of interest declarations had been recorded in WSMS between October 2020 and May 2021. The review found that, despite it being a mandatory requirement, management plans were not prepared for 16 of the 28 declarations. Other examples of non-compliance were also identified.

Information about conflicts of interest is not consistently recorded

This audit examined whether inspectors had made annual conflict of interest declarations, as well as whether management plans had been prepared when conflicts were identified. This extended to both annual declarations recorded in MyCareer, as well as case-specific declarations recorded in WSMS.

As shown in Exhibit 11, for the period from July 2020 to August 2023, there were 1,977 mandatory conflict of interest declarations recorded on MyCareer by SafeWork NSW inspectors. Of these, almost exactly one-third (660) identified actual (173) or potential or perceived (487) conflicts of interest.

Of all declarations that identified any conflict of interest and were reported as being approved by the staff member's manager, 60% did not record a comment or decision from the manager about how the conflict would be managed.

In addition, there were 123 conflicts of interest recorded against specific matters and incidents in WSMS between October 2020 and August 2023.

Of these 123 recorded specific conflicts of interest, 96 (78%) had no management decision or comment recorded. It was noted that in some cases, managers entered the conflict on behalf of their inspectors, and then did not complete the manager's declaration.

The audit also asked whether 11 directors and executive directors who performed SafeWork NSW functions within the Better Regulation Division of DCS were required to provide conflict of interest declaration in accordance with the NSW Public Sector Code of Conduct and Ethics and the DCS Code of Conduct and Ethics. We found that all of the executive directors had provided a written declaration regarding actual, perceived or potential conflicts.

Exhibit 11: Management of conflict of interest declarations

Conflict of interest declarations recorded on MyCareer	
Total declarations made July 2020-August 2023	1,977
• <i>Actual, perceived or potential conflicts declared</i>	660
• <i>No actual, perceived or potential conflicts declared</i>	1,317
Actual conflicts declared on MyCareer	
Total actual conflicts declared	173
• <i>Denied by manager</i>	28
• <i>Approved by manager</i>	142
- - Information recorded about how conflict was managed	40
- - Information not recorded about how conflict was managed	102
Perceived or potential conflicts declared on MyCareer	
Total perceived or potential conflicts of interest declared	487
• <i>Denied by manager</i>	13
• <i>Approved by manager</i>	464
- - Information recorded about how conflict was managed	261
- - Information not recorded about how conflict was managed	203
Conflict of interest declarations recorded on WSMS	
Total potential or actual conflicts identified against specific matters	123
• <i>No management decision or comment recorded</i>	96
• <i>Management decision or comment recorded</i>	27

Source: Audit Office analysis of SafeWork NSW data.

SafeWork NSW has a framework for decision-making about serious incidents

SafeWork NSW has a structure for determining how serious incidents¹⁰ will be addressed, including whether they will progress to prosecution. The same structure can consider occasions of potential non-compliance even if they have not reached the threshold of serious incident, including matters that have been reported or detected through requests for service, targeted safety programs and verification activities. This structure is intended to promote consistency and transparency, and reduce the risk of bias (whether real or perceived).

¹⁰ Under the WHS Act, a 'notifiable incident' includes a workplace incident that involves:

- the death of a person, or
- a serious injury or illness of a person, or
- a dangerous incident.

In turn, 'serious injury or illness' and 'dangerous incident' are defined to include matters of heightened gravity, such as:

- in regard to the former, where an individual requires inpatient admission to a hospital, or
- for the latter, where a worker or any other person is exposed to a serious risk to health or safety by the immediate or imminent exposure to an uncontrolled escape, spillage or leakage of a substance.

A PCBU must notify SafeWork NSW immediately after becoming aware that a notifiable incident has arisen out of the conduct of that PCBU.

This structure can be summarised as:

- Serious Incident Review Panels (SIRP) – these are constituted at the directorate-level and consider whether matters should be escalated for further assessment.
- Investigation Decision Making Panel (IDMP) – the IDMP determines whether a matter should proceed to full investigation, with a view to possible prosecution. An IDMP framework is fully codified and sets out the factors that will be taken into account when selecting matters for investigation, including jurisdictional applicability, priority areas, and overarching guiding principles that are applied to decisions about investigations.

The framework sets out that certain matters will ordinarily be immediately referred for investigation such as:

...where the risk/consequence is so serious, and the overwhelming public expectation is such, that the matter would be expected to proceed to investigation.

The Investigation Decision Making Panel is intended to promote consistency in how the most serious matters are addressed by SafeWork NSW

The IDMP plays a crucial role in making decisions about which matters of potential non-compliance will be referred from the Compliance and Dispute Resolution (CDR) directorate to full investigation by the Investigation and Emergency Response (IER) directorate. Investigation by IER is effectively a pathway to possible prosecution for breaches of the WHS Act.¹¹

In February 2011, the Investigations Decision Making Policy was approved by the Work Health and Safety Division (WHSD) Executive of WorkCover NSW. The policy established criteria for guiding decision-making that encompasses target areas and guiding principles. The IDMP policy is in line with the National Compliance and Enforcement Policy.

A 2014 review of the IDMP found that:

The decision to move to a more centralised approach with the establishment of the Panel was taken to introduce greater structure, rigour, consistency and transparency to the investigation decision making process.

According to its terms of reference, the IDMP is convened at director-level by the directors from the CDR and IER branches. A quorum requires a chair and at least four members. There are currently seven directors across the two branches who have SafeWork NSW responsibilities, only one of whom is a director from the IER branch. It is unclear whether this provides a sufficient representation of specialist skills and knowledge in full investigations that may potentially lead to prosecutions.

The audit notes that while not provided for by the terms of reference, the Executive Director, IER chaired the panel for around six months in 2022. This occurred during an internal review of the IDMP. By comparison, the Executive Director CDR has no role in the IDMP, nor in approving matters that are referred for its consideration.

The IDMP is established with comprehensive terms of reference and a formal framework document to guide its deliberations. This framework is intended to be consistent with the National Compliance and Enforcement Policy and SafeWork NSW Prosecution Guidelines. Submissions are made to the IDMP using a formal template.

¹¹ The most critical and serious incidents – such as workplace fatalities – may also be referred directly to IER for investigation without requiring the endorsement of the IDMP.

Functions of the IDMP that are relevant to this audit include to:

- promote a proportionate response to the level of risk and/or alleged non-compliance
- promote consistency by confirming factors to be considered in the decision-making process
- ensure investigation decisions are transparent, and ensure those who make decisions are accountable for them
- support good governance and a system for ongoing learning, peer review and recording of decisions and their rationale.

The IDMP is guided by a decision-making framework that is open to interpretation and selective application

The IDMP framework sets out an extensive range of matters that the panel will consider when selecting matters for full investigation. These matters are listed in the following Exhibit 12.

Exhibit 12: Priority areas for selecting matters for investigation

- Priority area #1: notifiable incidents and occupational illnesses that result in a fatality.
- Priority area #2: notifiable incidents or occupational illness that are likely to result in major and permanent disability (including paraplegia, quadriplegia, acquired brain injury, loss of sight, amputation of a limb including a hand or foot, severe burns, asbestosis and silicosis) and/or work-related incidents involving catastrophic disruption to a workplace, public infrastructure or the community.
- Priority area #3: notifiable incidents that are a serious injury or illness not likely to result in major and permanent disability.
- Priority area #4: risk of death or serious injury or illness arising from a dangerous incident or identified during interventions such as complaints, verification programs and risk-based programs.
- Priority area #5: repeated contraventions of work health and safety legislation by a duty holder.
- Priority area #6: offences against inspectors, authorised officers and persons exercising health and safety functions.
- Priority area #7: discrimination against workers on the basis of their health and safety activities.
- Priority area #8: failure to notify incidents and or preserve the scene.
- Priority area #9: strategic regulator and / or directorate – specific priority areas as specified in their Directorate Log (see information below), such as identified emerging issues and new priorities specified within the SafeWork NSW Road Map, Strategic Plan or other relevant documents that change over time.

Source: SafeWork NSW, Investigation and Decision Making Framework.

In addition, the IDMP also sets out 'guiding principles' for deciding which matters will be progressed to full investigation. These guiding principles are shown in Exhibit 13.

Incidents relating to priority areas one and two (fatalities and the most serious injuries) must be referred to the IDMP even if the directorate does not recommend proceeding to full investigation. The framework says that incidents relating to priority areas three to nine are only referred to the IDMP if the directorate recommends full investigation – somewhat inconsistently though, the IDMP submission template includes priority area six matters¹² as requiring referral to the IDMP regardless of the directorate's recommendation.

Collectively, these priority areas and guiding principles are extensive. The framework does not explain how they should be operationalised and applied, such as whether weightings apply or whether the prescribed elements are considered in isolation or combination.

The framework is also silent on whether a matter should be escalated to full investigation if it satisfied many of the guiding principles but did not fall within a defined priority area.

¹² Priority area six includes offences against inspectors, authorised officers and persons exercising health and safety functions.

Even in a non-prescriptive, principle-based regulatory regime such as the WHS Act, greater clarity could be afforded about whether certain matters, collectively or individually, are more or less likely to influence a decision in a certain way.

While the presence of a framework may help to create the impression of objectivity in decision-making, the breadth of the guiding principles and the lack of direction about how they should be applied appears to leave the process open to arbitrariness and subjectivity.

This risk was partly reflected in interviews. The audit found roughly equal mixed views among managers with experience of the IDMP. While some held that the process was broadly effective in ensuring that appropriate matters were progressed to full investigation, others proposed that the process was too conservative, risk averse, and influenced by perceived media or political interest.

A view was also expressed that the IDMP was too influenced by the capacity of an individual submitter to influence and persuade.

The framework provides that the IDMP may:

...develop Panel Practice Notes (PPNs) to provide guidance and direction to SafeWork NSW directorates to more effectively assess and determine whether or not a matter meets these priority areas and should be recommended for investigation.

The audit was unable to source any Panel Practice Notes on SafeWork NSW's online document repository, Knowledge Bank.

An internal DCS review of the IDMP was conducted in 2022. The review found that there was general agreement that the IDMP represented an improvement on the decision-making governance in place previously.

Among other matters, the review recommended that '...the list of criteria and the meaning of 'public interest' should be clarified and include prioritisation of matters, the public interest, and sound and effective deterrence'. This recommendation appears to be remain valid.

The audit also reviewed a sample of submissions made to the IDMP. While there were minor inconsistencies in how the submission templates were completed, they were generally of high quality and clearly identified the investigation target area and relevant guideline factors. The guidance factors are listed in the following Exhibit 13.

Exhibit 13: Guiding principles for deciding to commence full investigations

- The severity and scale of potential or actual harm.
- The seriousness of any potential breach of law.
- The duty holder's compliance history, WHS rating and such matters as notices and other actions taken by SafeWork NSW including prior convictions.
- Whether the offending behaviour was excessive or repeated (recidivism).
- The public interest (i.e., whether an investigation would be the expectation of the public at large).
- The existence and nature of any familial relationship between the injured or deceased person/s and relevant duty holder/s.
- Emerging and escalating issues.
- Availability of reliable evidence to proceed to investigation.
- Whether the matter is within SafeWork's jurisdiction.
- Whether another regulator is investigating the matter; this includes whether the other regulator will adequately consider work – related factors and has appropriate enforcement options (refer to section above regarding co-regulators).
- Foreseeability of the risk (i.e., whether the incident related to a risk that a reasonable person should have been able to anticipate).
- The potential to identify the root cause/s of an incident or work-related illness to inform industry of risk and to identify strategies and initiatives to prevent recurrence.
- The likelihood that the investigation will be the catalyst for improved work health and safety outcomes such as by deterring unsafe practices and promoting prevention in areas of poor compliance.
- The potential to promote better understanding, administration, or enforcement of WHS legislation, including building case law.

Source: SafeWork NSW, Investigation and Decision Making Framework.

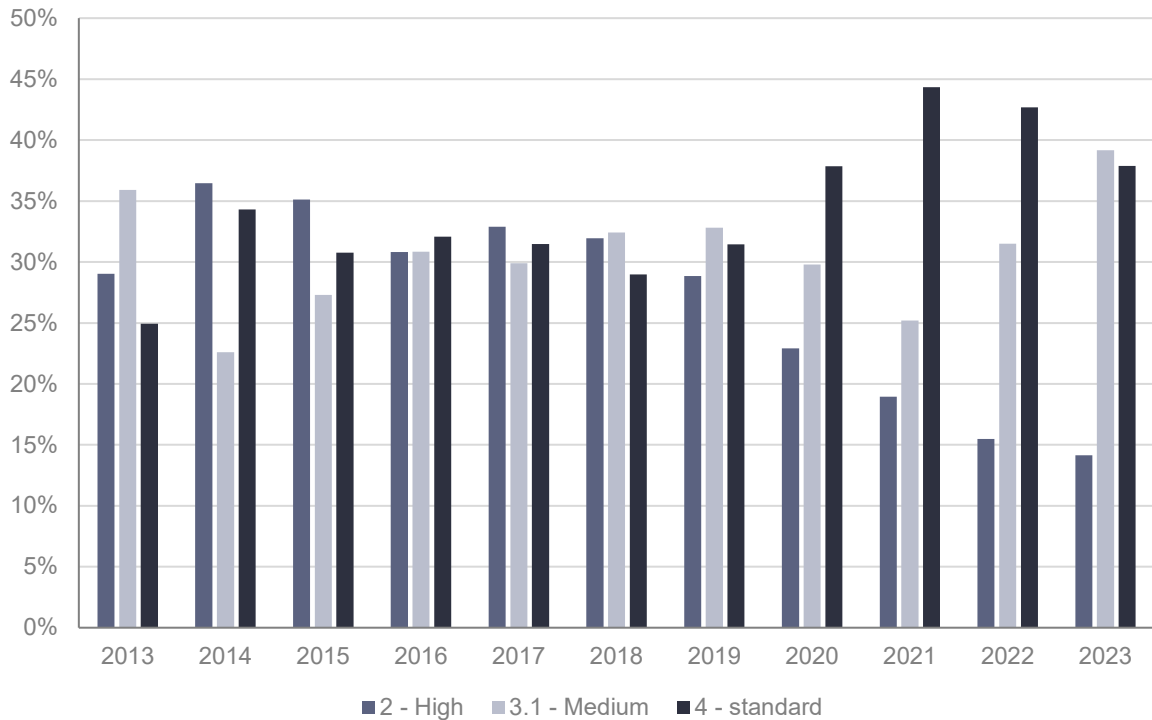
There has been an overall trend of triaging complaints to less critical response categories, though it is unclear whether this is due to a change in triage practice, or broader changes in work health and safety

When complaints are made to SafeWork NSW they result in a complaint being assessed and allocated to one of five categories:

- **Category 1: critical.** Work related fatality. Serious risk to life or permanent injury.
- **Category 2: high.** Serious injury or illness not immediate risk to life. Dangerous incident exposing persons to serious risk.
- **Category 3: medium.** Incident requiring further information or preliminary enquiries to establish circumstances.
- **Category 4: administrative response.** Event within SafeWork NSW jurisdiction but does not meet the criteria for Category 1, 2, or 3.
- **Category 5: insufficient information.** Insufficient details to triage and reasonable attempts made to gain further information.

From 2013 to 2023, there was an overall trend for work health and safety complaints made to SafeWork NSW to be assessed to the lower categories of seriousness. The following exhibit shows a decrease in category 2 assessments, and an increase in category 4 assessments.

Exhibit 14: Triage outcomes from 2013 to 2023



Note:

2023 data does not represent the full 2023 calendar year.

Exhibit excludes category 1 – critical, which were less than one per cent in each year. From 2013 to 2023 there were 50 complaints that resulted in a category 1 triage outcome, with 2013 the highest year with 31 category 1 complaints. There were no category 1 complaints in 2022 and 2023.

Exhibit excludes some subcategories of category 3 as they did not relate to compliance activity or consisted of counts that comprised less than one per cent. Exhibit also excludes categories such as unassessed complaints, complaints with insufficient information, and those not under statute.

Source: Audit Office analysis of SafeWork NSW WSMS data.

The audit team also reviewed data regarding triage decisions for complaints about two specific risk areas: falls for heights and asbestos.

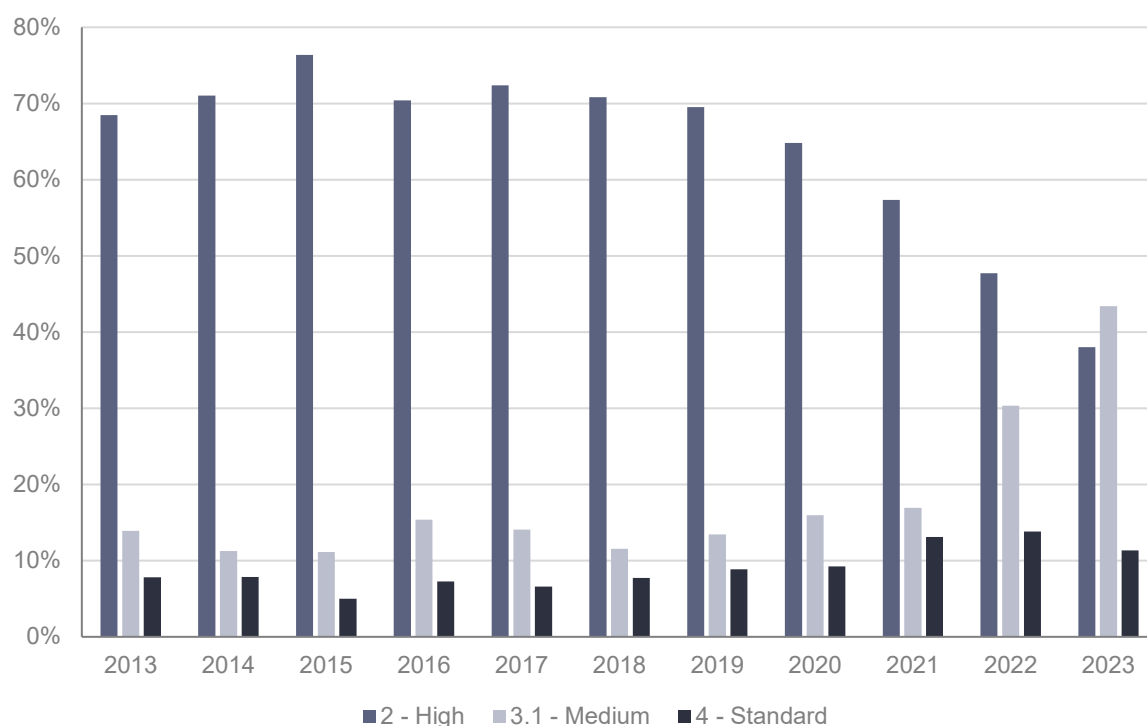
Falls from heights is a long-term intractable work health and safety risk in New South Wales, and a leading cause of workplace death and injury. Asbestos poses longer term work health and safety risks, with disease tending to result from long periods of exposure and after long latency periods.

As shown below, between 2013 and 2023:

- the proportion of complaints about falls from heights that were triaged to category 2 decreased from around 70% to 38% (Exhibit 15)
- the proportion of asbestos-related that were triaged to category 2 decreased from 76.95% to 52.33% (Exhibit 16).

It is unclear whether these trends are the result of changes in how complaints are triaged, safer workplaces resulting in less serious risks, fewer complaints about serious potential breaches, differences in training or guidance provided to inspectors, or a combination of these and others factors.

Exhibit 15: Falls from heights complaints received by SafeWork NSW, triage assessment, 2013–2023



Note:

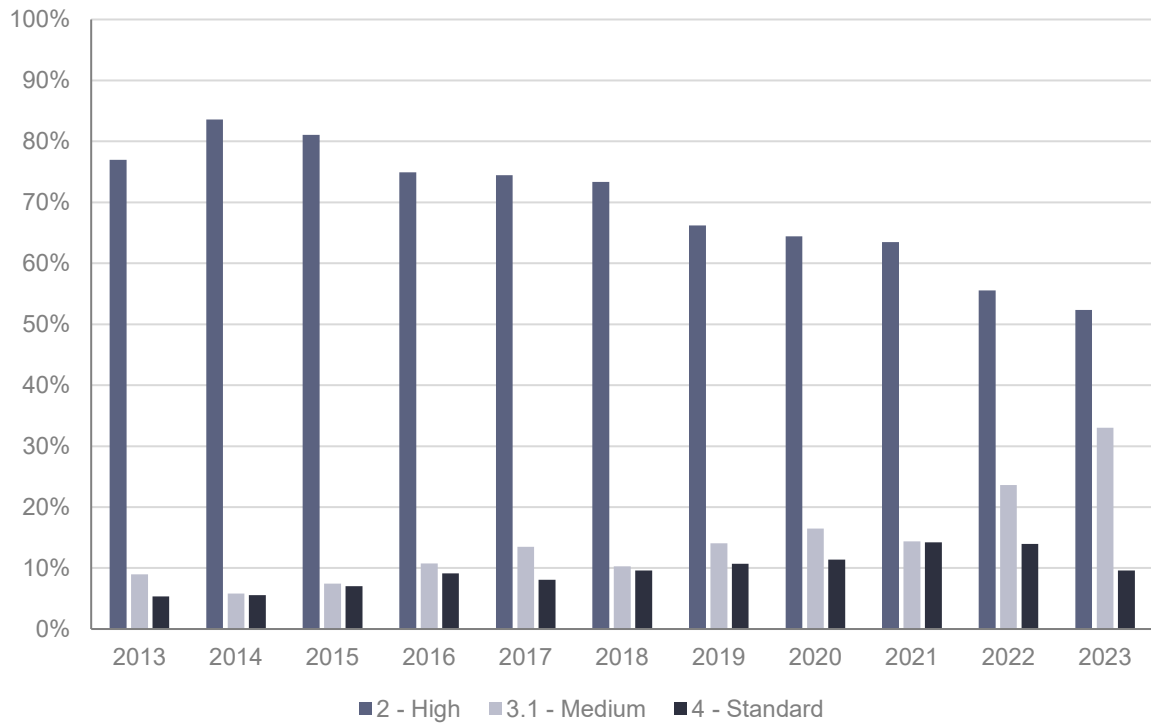
2023 data does not represent the full 2023 calendar year.

Exhibit excludes category 1 – critical, which were less than one per cent in each year. From 2013 to 2023 there were eight complaints that resulted in a category 1 triage outcome.

Exhibit excludes some subcategories of category 3 as they did not relate to compliance activity or consisted of counts that comprised less than one per cent. Exhibit also excludes categories such as unassessed complaints, complaints with insufficient information, and those not under statute.

Source: Audit Office analysis of SafeWork NSW data.

Exhibit 16: Asbestos-related complaints received by SafeWork NSW, triage assessment, 2013–2023



Notes: 2023 data does not represent the full 2023 calendar year.

Exhibit excludes category 1 – critical, which were less than one per cent in each year. From 2013 to 2023 there were ten complaints that resulted in a category 1 triage outcome.

Exhibit excludes some subcategories of category 3 as they did not relate to compliance activity or consisted of counts that comprised less than one per cent. Exhibit also excludes categories such as unassessed complaints, complaints with insufficient information, and those not under statute.

Source: Audit Office analysis of SafeWork NSW data.

5. Case study on managing risk and compliance in a key SafeWork NSW project

This chapter presents a case study that arose during the course of this audit. The case study demonstrates issues discussed in earlier chapters of this report, particularly in relation to the management of risk and the proper application of policies and procedures to ensure SafeWork NSW's effectiveness as a regulator.

About the case study

The case study concerns the activities of the Department of Customer Service and SafeWork NSW, the latter of which is located within the department. Neither the case study nor this performance audit generally examined the activities of the commercial partner (including any related companies) referenced in the case study, including Trolex Ltd (UK), Trolex Nome Australia Pty Ltd., or Trolex Sensors Pty Ltd. No findings have been made, either express or implied, in relation to the commercial partner.

The case study was based on a review of evidentiary documents, primarily in the form of emails sourced from SafeWork NSW. To avoid compromising other processes, interviews were not held.

SafeWork NSW's respirable crystalline silica real-time detection project

As discussed earlier, silicosis is a progressive, occupational lung disease resulting from inhalation of respirable crystalline silica. In recent years, there has been high profile attention to respirable crystalline silica exposure from manufactured stone products (such as kitchen benchtops), though these risks had been published in international research since at least 2010. Unlike asbestos, respirable crystalline silica from manufactured stone can lead to the development of silicosis and other lung diseases after relatively short exposure and latency periods, resulting in relatively young workers developing serious diseases.

From 2016 to 2022, SafeWork NSW's *Work Health and Safety Roadmap* included a target to reduce workplace exposure to priority hazardous chemicals and materials by 30%. This focus was retained in SafeWork NSW's regulatory priorities for 2023, which included the aim of reducing the incidence of worker exposure to harmful substances such as silica.

In 2018, SafeWork NSW commenced a project to fund a 'research partner' to develop a device that would detect in real-time the presence of respirable crystalline silica in workplaces. This project was led by the Centre for Work Health and Safety within SafeWork NSW.

Following a selection process, Trolex, a private company from the United Kingdom, was selected as the research partner. Trolex developed a device intended to meet the objective of the project. This device is called the Air XS and sells for approximately \$18,500 AUD. The Air XS device was launched on 7 April 2022. The first-generation of the Air XS devices are no longer on the market, however up to 60 second-generation devices are currently in use across Australia.

In December 2022, this research project won the DCS Secretary's Award for Excellence in Digital Innovation and was also one of the department's nominees for a Premier's Award in 2022.

As part of understanding SafeWork NSW's response to the work health and safety risks of respirable crystalline silica from manufactured stone products, the audit examined this research project to procure a 'research partner' to develop a respirable crystalline silica real-time detection device. The findings of this examination are set out below.

SafeWork NSW's processes were ineffective in responding to and mitigating risk and in ensuring compliance

As detailed below, our examination of this project found significant governance failings in SafeWork NSW, including the absence of key documentation, which created risks relating to whether the project would deliver its objective and whether it complied with procurement requirements. Concerns about whether the Air XS device would satisfy project objectives were not properly addressed.

We also found non-compliance with mandatory procurement policies. The failure to ensure compliance with procurement requirements leaves open the risk that value for money was not achieved, or that the procurement was not fair, transparent, consistent with promoting competition, or free from corruption or maladministration.

As a result of the Audit Office raising these issues with the Head of SafeWork NSW, the regulator undertook to enter into discussions with the CSIRO to conduct further testing of the real-time RCS detection device.

Concerns were raised by staff about the accuracy of the Air XS devices, though these concerns were not escalated beyond Director-level staff

Both before and after the launch of the Air XS device, concerns were raised by technical staff within SafeWork NSW about the accuracy of the devices and the rigour with which they had been tested during development.

It should be noted that the manufacturer, in correspondence with SafeWork NSW, defended the accuracy of the Air XS devices. It was beyond the scope of the audit to reconcile apparently conflicting technical assessments. Rather, the audit examined how SafeWork NSW managed the potential project delivery risk when these material concerns were raised.

Toward the end of 2021, concerns first emerged about the accuracy of the Air XS devices in emails between staff in the Regulatory Engagement business area of SafeWork NSW. These emails outlined concerns that the Air XS devices were not sufficiently accurate in detecting respirable crystalline silica. These views were derived from testing performed outside of any technical assurance process. At the time, these concerns were not shared with executive-level staff, including with any relevant Directors.

By the end of March 2022, the Centre for Work Health and Safety had requested and received from Trolex testing reports on the Air XS device. Two technical staff in the Testing Services directorate of SafeWork NSW were asked to review the testing reports. They were given five days to conduct these reviews.

On 5 April 2022, two days before the product was launched, one of the technical staff emailed the Director, Testing Services, advising that each of the two technical staff had independently prepared assessments and that their conclusions were '...not what DCS will want to hear'.

The internal assessment reports were subsequently provided to the Director, Testing Services, and to the Centre for Work Health and Safety. One of the reports stated that the product was not 'market ready' and that further testing was required. The audit did not find evidence that these conclusions were escalated to the Executive Director, Regulatory Engagement.

On 6 April 2022, the research project manager was advised by a staff member in the Centre for Work Health and Safety that an independent expert's report (commissioned by the Centre for Work Health and Safety) concluded that '...there isn't enough data to assess the validity of the device'.

Despite these concerns, the product launch occurred on 7 April 2022.

The audit found that concerns were again documented on at least two occasions after the product was launched. First, in September 2022, a senior technical staff member in the Centre for Work Health and Safety expressed concerns to colleagues, including the Director, Testing Services, that the staff member was uncomfortable promoting the Air XS without further testing being conducted.

Secondly, in May 2023, an internal test report prepared within the Testing Services business unit highlighted specific concerns about the accuracy of a first-generation Air XS device. This internal test report was provided to the Director, Testing Services, and was conducted with at least the knowledge of the Director, Research and Evaluation.

In both cases (September 2022 and May 2023), there are gaps in the evidence concerning how widely these internal concerns were shared. The audit found no evidence of:

- any material response by SafeWork NSW management to address the concerns that had been raised
- any assessment of risks posed to SafeWork NSW and other stakeholders
- any escalation of the concerns to the relevant Executive Director or to the Head of SafeWork NSW.

This apparent lack of management action was despite the potential risks to the work health and safety of workers who may have relied on the Air XS, and to the reputation of the regulator.

Some SafeWork NSW staff were hesitant to raise concerns about the Air XS device

Some staff reported to us that they did not raise these risks with their managers due to concerns that to do so might affect their employment. In the Auditor-General's 2018 audit report *Managing risks in the NSW public sector: risk culture and capability*, it was noted that:

Effective risk management is essential to good governance, and supports staff at all levels to make informed judgements and decisions.

The report also observed that it is now widely accepted that organisational culture is a key element of risk management because it influences how people recognise and engage with risk. This includes ensuring that agencies have a culture of open communication so that all employees feel comfortable speaking openly about risks.

In this case, SafeWork NSW lacked the risk processes and culture to encourage all staff to identify, raise, escalate, and respond to risk appropriately. While the department does have a mechanism (via dedicated phone and email contacts) for staff to report integrity concerns, this mechanism was not used.

Concerns about the Air XS device were also raised by an external user of the device, though there is no evidence that these concerns were substantively addressed

On 21 August 2023, a senior manager from an external user emailed staff in SafeWork NSW's Testing Services Directorate to advise that they had told the local distributor that they no longer wished to conduct further testing, nor purchase any Air XS devices. The senior manager stated that:

...the claim that the Air XS Silica monitor 'delivers highly accurate, continuous, real-time silica detection' could not be validated by the distributor despite many requests and efforts in the field to test the monitors and validate the data.

The senior manager further stated that they were:

...disappointed that SafeWork NSW promotes the monitors with no evidence, known and/or held by them, that the monitors deliver the promoted monitor outcomes.

The audit found no evidence that these concerns were meaningfully addressed by SafeWork NSW.

The process of procuring a ‘research partner’ to develop the Air XS device was flawed, in that there was non-compliance with procurement obligations and inadequate record keeping

The cost of procuring the Air XS research partner increased from an initial estimated cost of \$200,000 when the request for tender was issued in May 2019 to \$1.34 million when the final contract was executed in August 2019.

The audit found non-compliance in the process undertaken by the CWHS to procure the research partner. This non-compliance related to the requirements of the applicable departmental procurement manual, as well as with DCS financial delegations, and with the tender evaluation plan prepared for the process.

Examples of non-compliance and other poor practices are outlined below.

- The Director, Research and Evaluation, was a voting member of the evaluation committee and also signed the acceptance letter for the successful proposal. This contravened the department’s procurement requirement that an approving delegate may not also evaluate tender responses. At the time, the estimated cost of the engagement was \$200,000 and was therefore within the Director’s financial delegation.
- The evaluation of the submitted tenders included an assessment provided by a designated non-voting member of the tender evaluation committee who had a declared conflict of interest.
- One member of the tender evaluation committee lodged a strong objection to the preferred provider. SafeWork NSW could not provide documentation about how this objection was addressed.
- When the final cost of the engagement increased to \$1.34 million by August 2019, the Director, Research and Evaluation, no longer had the necessary delegation to approve the engagement of Trolex. Under the delegations issued by the DCS Secretary on 29 August 2019, the approval of an Executive Director was required for contracts valued between \$500,000 and \$2 million.
- The scoring in the tender evaluation committee’s (unsigned) evaluation report did not comply with the approach set out in the tender evaluation plan. This was material as, had the tender evaluation plan been followed, two tenders would have been assessed as having the same successful score.
- SafeWork NSW was unable to provide:
 - a signed and dated copy of an approval to issue the initial request for tender
 - a signed and dated copy of an approval for SafeWork NSW to enter into a formal agreement with Trolex
 - a final tender evaluation report signed by all members of the tender evaluation panel
 - evidence of any approval to increase the value of the contract from the \$200,000 anticipated in the initial request for tender up to the \$1.34 million final value of the contract.

Such non-compliance can contribute to the risk of maladministration in procurement activities, including by undermining probity and challenging whether value for money is achieved.

Section two

Appendices

Appendix one – Response from agency

Department of Customer Service
Office of the Secretary



Our reference: BN-00695-2024
Your reference: R009-170535826-21300
13/02/24

Ms Margaret Crawford
Auditor-General
Level 19, Darling Park Tower 2,
201 Sussex Street
Sydney NSW 2000
By email: mail@audit.nsw.gov.au

Re: Response – Performance Audit – Effectiveness of SafeWork NSW in exercising its compliance functions

Dear Ms Crawford

I refer to your letter 16 January 2024 regarding the final report of the Performance Audit of SafeWork NSW. Thank you for the opportunity to provide a response on behalf of the Department of Customer Service (DCS).

The findings of the report are highly critical of a number of key areas of the methods, systems and operations of SafeWork NSW. I note that the McDougall Review into SafeWork NSW is also complete and has been presented to the NSW Government. I anticipate that it will also identify a range of areas for operational improvement and for policy consideration by Government. Both reports will provide a strong evidence-base from which to drive a significant program of improvement.

Your report makes 10 recommendations, which I accept, albeit with one qualification. Recommendation 1 states that: “By the end of April 2024, the Department of Customer Service should ensure that an independent investigation into the procurement of the research partner for the real-time silica detection device is completed to identify whether the project was affected by maladministration, fraudulent activity, or misconduct.” This recommendation relates to a matter referred to on page 3 of your report, namely that “the department and the Audit Office have made separate referrals to the Independent Commission Against Corruption regarding the procurement process for the Air XS.” Given the referral referenced here, the scope and timing of any departmental investigation will, of course, depend on ICAC’s consideration of the matter.

Further, please also note that to address concerns raised during the audit process in relation to the real-time silica detection device, SafeWork NSW is in the process of engaging the NSW Office of the Chief Scientist and Engineer to support a further independent testing process.

It is important to acknowledge that SafeWork NSW has a committed and expert team of inspectors and staff who work hard to secure the health and safety of everyone at work in NSW. In accepting the recommendations of this Audit, I expect to be able to further assist our inspectors and staff in achieving this important outcome.

I look forward to progressing these recommendations and reporting back on our progress. Specifically, I will advise you of any implications for how I respond to recommendation 1 when the outcome of the reference to ICAC is known.

Lastly, I would like to thank the team from the Audit Office of NSW for their professionalism and collaborative approach during the audit process.

If you have any further queries, please contact

Sincerely,

A handwritten signature in blue ink, appearing to read "Graeme Head".

Graeme Head AO
Secretary

Appendix two – About the audit

Audit objective

This audit assessed the effectiveness of SafeWork NSW in monitoring and enforcing compliance with the *Work Health and Safety Act 2011*.

Audit criteria

We addressed the audit objective by examining the following audit criteria:

1. Does SafeWork NSW have evidence-based processes to set its objectives and priorities for monitoring and enforcing compliance?
 - a) Operational feedback and expertise are included in relevant processes.
 - b) Existing and emerging risks are assessed as part of priority-setting processes.
 - c) Objectives and priorities take into account the resources required, including workforce skill and capacity.
2. How effectively does SafeWork NSW measure and report its performance in monitoring and enforcing compliance against the WHS Act?
 - a) SafeWork NSW has meaningful performance measures for its compliance functions.
 - b) SafeWork NSW transparently reports its performance in exercising its compliance functions.
 - c) SafeWork NSW uses measurement and reporting processes to support continuous improvement and quality assurance.
3. Are SafeWork NSW's policies and procedures for monitoring and enforcing compliance applied consistently across different sectors?
 - a) Policies and procedures are aligned with regulatory good practice.
 - b) Decision-making is in accordance with any legislative, policy, practice requirements, or written delegated obligations.

Audit scope and focus

SafeWork NSW states that it offers:

- advice on improving work health and safety
- provides licenses and registration for potentially dangerous work
- investigates workplace incidents and enforces work health and safety laws in New South Wales.

The audit scope focused on examining the effectiveness of SafeWork NSW in undertaking its core regulatory and compliance roles.

Audit exclusions

The audit did not seek to:

- examine the merit of decisions made by SafeWork NSW on individual compliance and enforcement cases
- examine issues of organisational culture, or the effectiveness of SafeWork NSW's educational functions. These areas are however within the scope of the Independent Review into SafeWork NSW.

Audit approach

Our procedures included:

- Interviewing SafeWork NSW staff, such as:
 - Management staff to understand the overall context that SafeWork NSW operates in, key decisions made, and the application of policies and processes.
 - Inspectors to understand the impact of policies and procedures, how they are applied in practice, and unintended consequences of decisions made.
 - Data custodians to understand the operating context of SafeWork NSW and how it uses available data and the systems used to capture it.
- Interviewing broader sector stakeholders including:
 - Industry peak bodies to understand the extent to which SafeWork NSW has used sector feedback as part of prioritising risks, and perspectives of the effectiveness of SafeWork NSW as a regulator.
 - Unions to understand the extent to which SafeWork NSW has used employee and peak body feedback as part of prioritising risks, and perspectives off the effectiveness of SafeWork NSW as a regulator. Union consultation will also provide qualitative feedback on the extent to which SafeWork NSW processes and structure have affected workforce skill and training, if at all.
- Examining documents such:
 - SafeWork NSW strategic plans, governance minutes, and evidence papers.
 - Directorate level planning documents.
 - Research and evaluation plans and reports on whole of SafeWork NSW outcomes, individual SafeWork NSW initiatives, and broader sector risks.
 - Policy, process, and compliance documentation, such as triage processes, inspector notes, and memorandum of understanding with relevant agencies.
 - Internal audit reports and external inquiries or investigations that have examined SafeWork NSW.
- Analysing data to triangulate qualitative findings, assess the overall activity of SafeWork NSW, and identify risk areas that require further examination. The main data set used will be the WSMS system, which is the main database used by SafeWork NSW.
- Examining how policies and procedures are applied in practice, with a focus on the consistency of decision-making.

Audit methodology

Our performance audit methodology is designed to satisfy Australian Auditing Standard ASAE 3500 Performance Engagements and other professional standards. The standards require the audit team to comply with relevant ethical requirements and plan and perform the audit to obtain reasonable assurance and draw a conclusion on the audit objective. Our processes have also been designed to comply with requirements specified in the *Government Sector Audit Act 1983* and the *Local Government Act 1993*.

Acknowledgements

We gratefully acknowledge the cooperation and assistance provided by staff at the Department of Customer Service and SafeWork NSW.

In particular, we wish to thank our liaison officers, and the staff who participated in audit interviews and provided materials relevant to the audit.

Audit cost

Including staff costs and overheads, the estimated cost of the audit is \$550,000.

Appendix three – Performance auditing

What are performance audits?

Performance audits assess whether the activities of State or local government entities are being carried out effectively, economically, efficiently and in compliance with relevant laws.

The activities examined by a performance audit may include a government program, all or part of an audited entity, or more than one entity. They can also consider particular issues which affect the whole public sector and/or the whole local government sector. They cannot question the merits of government policy objectives.

The Auditor-General's mandate to undertake audits is set out in the *Government Sector Audit Act 1983* for state government entities, and in the *Local Government Act 1993* for local government entities. This mandate includes audit of non-government sector entities where these entities have received money or other resources, (whether directly or indirectly) from or on behalf of a government entity for a particular purpose (follow-the-dollar).

Why do we conduct performance audits?

Performance audits provide independent assurance to the NSW Parliament and the public.

Through their recommendations, performance audits seek to improve the value for money the community receives from government services.

Performance audits are selected at the discretion of the Auditor-General who seeks input from parliamentarians, State and local government entities, other interested stakeholders and Audit Office research.

How are performance audits selected?

When selecting and scoping topics, we aim to choose topics that reflect the interests of parliament in holding the government to account. Performance audits are selected at the discretion of the Auditor-General based on our own research, suggestions from the public, and consultation with parliamentarians, agency heads and key government stakeholders. Our three-year performance audit program is published on the website and is reviewed annually to ensure it continues to address significant issues of interest to parliament, aligns with government priorities, and reflects contemporary thinking on public sector management. Our program is sufficiently flexible to allow us to respond readily to any emerging issues.

What happens during the phases of a performance audit?

Performance audits have three key phases: planning, fieldwork and report writing.

During the planning phase, the audit team develops an understanding of the audit topic and responsible entities and defines the objective and scope of the audit.

The planning phase also identifies the audit criteria. These are standards of performance against which the audited entity, program or activities are assessed. Criteria may be based on relevant legislation, internal policies and procedures, industry standards, best practice, government targets, benchmarks or published guidelines.

During the fieldwork phase, audit teams will require access to books, records, or any documentation that are deemed necessary in the conduct of the audit, including confidential information which is either Cabinet information within the meaning of the *Government Information (Public Access) Act 2009*, or information that could be subject to a claim of privilege by the State or a public official in a court of law. Confidential information will not be disclosed, unless authorised by the Auditor-General.

At the completion of fieldwork, the audit team meets with management representatives to discuss all significant matters arising out of the audit. Following this, a draft performance audit report is prepared.

The audit team then meets with management representatives to check that facts presented in the draft report are accurate and to seek input in developing practical recommendations on areas of improvement.

A final report is then provided to the accountable authority of the audited entity(ies) who will be invited to formally respond to the report. If the audit includes a follow-the-dollar component, the final report will also be provided to the governing body of the relevant entity. The report presented to the NSW Parliament includes any response from the accountable authority of the audited entity. The relevant Minister and the Treasurer are also provided with a copy of the final report for State Government entities. For local government entities, the Secretary of the Department of Planning and Environment, the Minister for Local Government and other responsible Ministers will also be provided with a copy of the report. In performance audits that involve multiple entities, there may be responses from more than one audited entity or from a nominated coordinating entity.

Who checks to see if recommendations have been implemented?

After the report is presented to the NSW Parliament, it is usual for the entity's Audit and Risk Committee / Audit Risk and Improvement Committee to monitor progress with the implementation of recommendations.

In addition, it is the practice of NSW Parliament's Public Accounts Committee to conduct reviews or hold inquiries into matters raised in performance audit reports. The reviews and inquiries are usually held 12 months after the report received by the NSW Parliament. These reports are available on the NSW Parliament website.

Who audits the auditors?

Our performance audits are subject to internal and external quality reviews against relevant Australian standards.

The Public Accounts Committee appoints an independent reviewer to report on compliance with auditing practices and standards every four years. The reviewer's report is presented to the NSW Parliament and available on its website.

Periodic peer reviews by other Audit Offices test our activities against relevant standards and better practice.

Each audit is subject to internal review prior to its release.

Who pays for performance audits?

No fee is charged to entities for performance audits. Our performance audit services are funded by the NSW Parliament.

Further information and copies of reports

For further information, including copies of performance audit reports and a list of audits currently in-progress, please see our website www.audit.nsw.gov.au or contact us on 9275 7100.

OUR VISION

Our insights inform and challenge government to improve outcomes for citizens.

OUR PURPOSE

To help Parliament hold government accountable for its use of public resources.

OUR VALUES

Pride in purpose

Curious and open-minded

Valuing people

Contagious integrity

Courage (even when it's uncomfortable)

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