



Finance,  
Services &  
Innovation

***Work Health and Safety Act 2011***  
**Statutory Review Report**

**June 2017**

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# 1. Executive Summary

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The NSW *Work Health and Safety Act 2011* (**the WHS Act**) commenced operation on 1 January 2012. The *WHS Act* aims to secure the health and safety of workers and workplaces through the elimination or minimisation of risks, so as to provide workers and others with the highest level of protection from hazards and risks, so far as is reasonably practicable.

This review is conducted pursuant to s 276B of the *WHS Act* which requires the Minister to review the *WHS Act* to determine whether the policy objectives of the *WHS Act* remain valid and whether the terms of the *WHS Act* remain appropriate for securing those objectives.

The *WHS Act* implements in NSW a nationally harmonised law for the maintenance of work health and safety (**WHS**). Thus, s 3 provides that:

“[T]he main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces.”

To give effect to that object, it is necessary for the *WHS Act* to incorporate the terms of the model law (although the Commonwealth, States and Territories have agreed certain modifications and additions may be made to the model law to ensure it remains jurisdictionally appropriate).

As such, there is a distinction between those terms of the *WHS Act* which are unique to NSW and those terms which reflect the terms of the model law. In reviewing the former, the issue is whether the terms achieve valid WHS purposes. In reviewing the latter, there is a threshold question of whether the object of a nationally harmonised law remains valid: if it does and the terms of the *WHS Act* continue to reflect the model law, then it will follow that those terms will remain appropriate to securing that objective. It is also appropriate to observe that the Commonwealth, States and Territories have agreed to conduct a national review of the model WHS legislation in 2018.

There is a general (though not uniform) view that national harmonisation remains a valid object and accordingly the harmonised terms of the *WHS Act* are securing that objective. That is a view with which this review agrees. For this reason agreement was reached with stakeholders to focus this review on the NSW-specific provisions of the *WHS Act* (although the majority of submissions to this review supported the objective of nationally harmonised work health and safety laws). An initial paper regarding the potential scope of the review was sent to over 230 stakeholders and their feedback informed the final terms of reference authorised by the then Minister for Innovation and Better Regulation, which included expressly focusing this review on the NSW-specific provisions.

The terms of reference of the review also extended this review to include the NSW-specific provisions of the *Work Health and Safety Regulation 2011* (**the WHS Regulation**) and the pre-WHS Codes of Practice that remain current under the *WHS Act* in NSW, in response to stakeholder feedback. The Minister has completed the review through the Better Regulation Division within the Department of Finance, Services and Innovation (DFSI).

The review received 39 public submissions (refer to Appendix 1), all of which were given careful consideration. Consultation was further undertaken with key stakeholders including the NSW WHS Regulators: SafeWork NSW and the Resources Regulator (**the Regulators**).

Within the limited scope of the NSW-specific provisions and based upon the comments of respondents, the review found that, overall, the objectives of the *WHS Act* remain valid and

its terms remain generally appropriate to secure those objectives. However, some submissions suggested the objectives could be amended particularly in relation to the national harmonisation of WHS laws. There were also several suggestions on how the terms of the WHS Act could better achieve the stated objectives by amending the model laws, rather than the NSW-specific provisions. These suggestions should be forwarded for consideration as part of the national model law review in 2018.

The review identified a number of NSW-specific provisions which should be amended, including, but not limited to:

- adding new penalty notice offences related to requirements for authorisation of work and falls from heights; and undertaking a review to consider the adequacy of penalty notice amounts and whether any other penalty notice offences should be introduced;
- amending the *WHS Regulation* to clarify the identity of the duty holder for the purposes of Schedule 1 of the *WHS Act*, as that Schedule applies to certain dangerous goods and high risk plant affecting public safety but which are not situated, operated or used at a workplace or for use in carrying out work;
- amending the *WHS Act* to authorise extraterritorial application of the *WHS Act*, to the extent the State's legislative power allows, including to obtain records and issue notices outside of NSW in relation to health and safety matters arising in NSW; and
- undertaking a review of the manner and form of stakeholder consultative mechanisms and in consultation with key stakeholder organisations, develop a model for tripartite consultation.

## 2. Work health and safety law in Australia

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### 2.1 Introduction

The WHS laws in Australia consist of a three tiered structure – the *WHS Act*, the *WHS Regulation* and Codes of Practice. They are designed to protect the health, safety and welfare of persons at work and those who may be affected by work activities undertaken by others.

The *WHS Act* is the principal legislation which sets out who has duties and what they are. The *WHS Regulation* is the middle tier, which contains detail on how the outcomes required by the *WHS Act* can be achieved. The third and final tier are the Codes of Practice which provide guidance about what is known about a hazard or risk in specific situations and what is reasonably practicable to ensure health and safety. While compliance with these Codes is not mandatory, they are admissible in legal proceedings under the *WHS Act*.

The WHS laws in Australia are the responsibility of the Commonwealth and each State and Territory, with a number of Australian jurisdictions having “harmonised” their WHS laws. Each jurisdiction enacts its own legislation, but the legislation mirrors the model laws which permit very limited departures.

### 2.2 Harmonisation of WHS laws

The introduction of harmonised WHS laws in January 2012 was the most significant reform to workplace health and safety laws in Australia in several decades and represented a fundamental shift in the development of regulation in this area<sup>1</sup>. The *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (the IGA)* contains a commitment to developing and maintaining consistent WHS in all States, Territories and the Commonwealth and ongoing maintenance, reviews and improvements to the model laws.

The content of the model laws is comprehensive and the following provisions are common across all harmonised jurisdiction’s legislation:

- duties to provide a safe and healthy workplace for all workers and other people who attend the workplace;
- requirements for work systems that are safe and without risk to health;
- training of workers to work in a safe and competent manner;
- requirements to take steps to prevent injury, illness and disease;
- requirements to consult with workers and their representatives over WHS matters; and
- powers for inspectors to visit workplaces, investigate incidents and enforce legislative provisions.

Variations to the model laws are permitted in accordance with jurisdictional notes found in the model Act and Regulations. Jurisdictional notes allow each jurisdiction to address local matters and ensure the workability of the model provisions without affecting harmonisation.

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<sup>1</sup> Victoria and Western Australia are yet to harmonise their WHS laws.

## 3. Work health and safety law in NSW

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### 3.1 Operation of the *WHS Act* in the NSW setting

The NSW *WHS Act* commenced on 1 January 2012. NSW has utilised the jurisdictional notes to ensure the workability of the model provisions in the State. NSW also has some unique provisions relating to:

- Having two Regulators for WHS;
- industrial organisations being able to bring proceedings for an offence under the *WHS Act* in certain circumstances; and
- the review of the *WHS Act* in accordance with NSW Parliamentary practice.

#### ***WHS Regulators***

In NSW, WHS is overseen by two regulators: SafeWork NSW and the Resources Regulator which is the Secretary of the Department of Planning and Environment. SafeWork NSW is responsible for regulating WHS at all workplaces except for mining workplaces. The Resources Regulator is the WHS Regulator for mines and petroleum sites.

SafeWork NSW and the Resources Regulator have a co-operative relationship, with the two Regulators meeting as required to discuss policy and legislation issues. However, they work independently to regulate WHS in NSW.

#### ***Industrial Organisations' right to bring proceedings for an offence under the WHS Act***

The *WHS Act* authorises the secretary of an industrial organisation of employees to commence proceedings for a Category 1 (reckless conduct) or Category 2 (failure to comply with a health and safety duty) *WHS Act* offence, if the regulator (after referral of the matter to the Director of Public Prosecutions) has declined to follow the advice of the Director of Public Prosecutions to bring the proceedings. This provision reflects a similar role for unions in the repealed *Occupational Health and Safety Act 2000* (the ***OHS Act***). It is appropriate to observe that the provision was not included in the Bill that was introduced in Parliament and was the result of an amendment moved in the Legislative Council.

## 4. The statutory review

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### 4.1 Requirement for review

Section 276B of the *WHS Act* requires the Minister to review the *WHS Act* to determine whether the policy objectives of the *WHS Act* remain valid and whether the terms of the *WHS Act* remain appropriate for securing those objectives. The minister responsible for the *WHS Act* is the Minister for Innovation and Better Regulation.

The review is to be undertaken as soon as possible after the period of 5 years from the date of assent of the *WHS Act*, with a report on the outcome to be tabled in each House of Parliament.

The *WHS Act* was passed by both houses of the NSW Parliament in June 2011 and this is the first statutory review of the *WHS Act* to be undertaken since its assent.

The Minister has conducted this review through the Better Regulation Division within DFSI. The review has involved a public consultation process and has been governed on a day-to-day basis by a Steering Committee comprised of members from DFSI Regulatory Policy Branch, DFSI Communications, DFSI Legal, the Resources Regulator and SafeWork NSW.

### 4.2 The purpose of the *WHS Act*

The object of the *WHS Act*, as set out in s 3(1), is to provide for a nationally consistent framework to secure the health and safety of workers and workplaces by:

- (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant, and
- (b) providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety, and
- (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment, and
- (d) promoting the provision of advice, information, education and training in relation to work health and safety, and
- (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures, and
- (f) ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act, and
- (g) providing a framework for continuous improvement and progressively higher standards of work health and safety, and
- (h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.

### 4.3 Review focus and scope

Section 276B of the *WHS Act* is a standard form provision included in all new NSW legislation, and it must be considered in light of the national WHS legislative regime. The national WHS regulatory regime is a cooperative scheme which harmonises regulation of work health and safety regulation across participating jurisdictions. The NSW Parliament acknowledged this in enacting the *WHS Act*.

National co-operative legislative schemes of this nature have been implemented in relation to a number of other industries and sectors in the last decade. As is the case with those other legislative schemes, State and Territories have agreed to review the model provisions on a national basis. The next review will take place in 2018 and Safe Work Australia has already commenced the planning process. Accordingly, noting this review's conclusion on the threshold question that national harmonisation remains a valid object which the harmonised terms of the *WHS Act* continue to secure, this review of the NSW *WHS Act* does not seek to duplicate the activities of the national review and instead focuses on whether the NSW-specific provisions of the *WHS Act* remain appropriate for securing its statutory objectives. It is important to note, on this point, that the statutory objectives in the *WHS Act* are themselves model provisions which will be subject to national review in 2018.

Development of a review strategy commenced in August 2015. Research was undertaken to identify previous reviews completed at the national and state level and the extent of those reviews. Consultation also occurred with the NSW WHS Regulators; SafeWork NSW and the Resources Regulator to assist in determining a review approach and scope.

During May 2016 an initial discussion paper recommending four proposed terms of reference was sent to over 230 stakeholders.

Feedback was received from 24 stakeholders with strong support for three of the four proposed terms. The feedback was used to fine tune the draft Terms of Reference which were approved by the then Minister for Innovation and Better Regulation on 20 October 2016 and are as follows (indicated below by *italics*):

<b>Terms of Reference</b>	
1	Section 276B of the <i>WHS Act</i> prescribes "The review is to enquire into and determine whether the policy objectives of the <i>WHS Act</i> remain valid and whether the terms of the <i>WHS Act</i> remain appropriate for securing those objectives". Therefore <b><i>the review must enquire into the objectives contained in section 3 of the WHS Act. The review will also consider how the WHS Act is operating in the NSW context, to ensure it continues to be effective. The review will also consider the NSW-specific provisions of the WHS Act.</i></b>
2	The <i>Work Health and Safety Regulation 2011</i> (the <i>WHS Regulation</i> ) is due for staged repeal on 1 September 2017 under the terms of the <i>Subordinate Legislation Act 1989</i> , and is to be re-made before this date. In light of this, <b><i>the review will also consider the NSW-specific provisions of the WHS Regulation.</i></b>
3	The harmonised work health and safety framework includes the model Work Health and Safety Act, Regulations and Codes of Practice. Given all parts of the harmonised framework are regularly reviewed and updated, the NSW review provides an opportunity to consider a number of NSW legacy Codes not planned to be considered in any other reviews. These Codes were made under NSW occupational health and safety legislation prior to development of the harmonised framework and were carried over to the WHS legislative regime. <b><i>The review will consider the pre-WHS Codes of Practice that remain current under the Work Health and Safety Act 2011 in NSW.</i></b> A list of these Codes of Practice can be found at Appendix 2.



## **4.4 Consultation**

### ***Public submissions***

The review involved public consultation, which took place between 11 November 2016 and 20 December 2016, inclusive. The NSW Government drafted a discussion paper entitled the “Statutory review of the Work Health and Safety Act 2011 Discussion Paper” to guide feedback. It provided a brief background to the statutory review and included 83 questions to prompt consideration and stimulate discussion around the NSW-specific provisions of the WHS Act and the WHS Regulation.

The NSW Government posted the discussion paper on its “Have Your Say” website with a “Survey Monkey” questionnaire to assist potential respondents in making submissions. In addition, the Government distributed the discussion paper by email to over 200 stakeholders with an invitation to participate in the review.

The Government received 39 public submissions (refer to Appendix 1 for list of respondents), which, through DFSI, it considered in accordance with the assessment methodology outlined in Appendix 3.

### ***NSW WHS Regulator consultation***

Consultation with the NSW WHS Regulators; SafeWork NSW and the Resources Regulator, was undertaken on an ongoing basis throughout the period of the review. Representatives from both Regulators further met with each other to discuss issues and obtain agreement on the matters put forward for consideration. Details of the methodology applied in assessing the matters put forward for consideration by the Regulators is provided in Appendix 3.

Management representatives from both Regulators were also members of the *WHS Act* Statutory Review Steering Committee. This Committee provided high level advice, oversight of the project and endorsed the review recommendations. The membership of this committee was comprised of representatives from:

- DFSI Regulatory Policy Branch;
- DFSI Communications;
- DFSI Legal;
- The Resources Regulator; and
- SafeWork NSW.

## 5. Findings

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### 5.1 Overview

The “*Statutory review of the Work Health and Safety Act 2011 Discussion Paper*” invited potential respondents to submit comments for consideration including if they fell outside of the questions posed in the discussion paper.

As such, many submissions, while partially within scope of the review, included comments on provisions not covered by the 83 discussion paper questions. Many such submissions included comments on provisions in the model laws, rather than on the NSW-specific provisions. To avoid pre-empting or duplicating the 2018 national review (and noting this review’s view on the validity of national harmonisation), submissions made to this review which relate to model WHS legislation will be forwarded to the 2018 national review, so that nationally consistent positions can be developed. A brief overview of such comments is contained in Appendix 4.

Further, some submissions contained content that did not relate to the *WHS Act* or the *WHS Regulation* or the Codes of Practice but which specifically identified operational or non-legislative interventions for possible implementation by the Regulators. This content has been forwarded to the Regulators for their consideration.

The remainder of the Report deals with the public submissions received and matters raised by the NSW WHS Regulators for consideration under the review.

### 5.2 Submissions on specific Parts of the *WHS Act*

In accordance with the ‘*Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*’, consultation with the appropriate Commonwealth body will be undertaken for any recommended amendments that may materially affect the operation of the model legislation.

#### **Part 1: Preliminary**

##### **Objects of the *WHS Act***

Section 3 of the *WHS Act* sets out the statutory objectives of the *WHS Act*. The main object of the *WHS Act* is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces. The majority of the respondents advised that the objects contained in s 3 of the *WHS Act* remain valid and the provisions remain largely appropriate for securing those objectives.

Some submissions suggested that the objectives could be amended particularly in relation to the national harmonisation of laws. In particular, one union stated that ‘harmonisation should not be a priority if it is to see the dilution of protections and rights of workers’. On the other hand, a number of industry and employer associations supported the specific objective of harmonisation, although one submission warned that existing jurisdictional variations in implementing the model WHS legislation across Australia had the potential to undermine the objective of harmonisation.

Rates of serious incidents in NSW have continued to drop since the enactment of the model WHS legislation in NSW through the *WHS Act*. SafeWork NSW’s *Work Health and Safety Roadmap for NSW 2022 (the Roadmap)* shows that: fatality incidence rates per 100,000; serious musculoskeletal injuries and illnesses incidence rates per 1,000; and serious injuries

and illnesses incidence rates per 1,000 continued to decline from the commencement of the *WHS Act* through to the end of 2014-15 financial year.<sup>2</sup> This data indicates that decreases in incidence rates have remained on track to meet the national targets during the period of harmonised legislation, while contributing to the Productivity Commission's estimated net cost savings of \$480 million per year nationally for multi-state businesses, resulting from reduced compliance costs and improved safety outcomes.<sup>3</sup> The 2018 national review will provide a further opportunity for stakeholders to provide submissions on the impact of the operation of the model WHS legislation within harmonised jurisdictions.

Several submissions also provided specific feedback on paragraphs (a) to (h) of subsection 3(1) of the *WHS Act*, which contain specific sub-objectives designed to support the main objective of providing for a balanced and nationally consistent framework for WHS. As these specific objectives are based on model WHS legislation provisions, these suggestions will be forwarded for consideration as part of the national model law review in 2018.

### **Cost reduction for business**

A majority of submissions to the review indicated the objectives of the *WHS Act* were not causing unnecessary cost for business. However, some respondents suggested that the Regulator providing additional material (such as handouts and risk identification tools), incentives (such as rebates towards the purchase of safety equipment), and education, would assist business in reducing their costs. Such comments have been forwarded to the NSW WHS Regulators for further consideration.

Some unions objected to the consultation questions relating to business cost reduction, contending that cost reduction for business was not an appropriate objective for WHS laws. That contention was put on the basis that the purpose of the legislation should be to protect workers and others in the workplace rather than reducing the cost to business.

Respectfully, this review does not accept those objections to the discussion paper questions: *first*, the questions posed in the discussion paper did not suggest any decrease in safety standards.

*Secondly*, as noted above, s 276B(1) requires this review examine “whether the terms of the Act remain appropriate for securing [the Act’s] objectives.” The purpose of the *WHS Act* may be identified by appropriate recourse to extrinsic materials<sup>4</sup>, including the second reading speech, or by inference from its terms<sup>5</sup>. In the second reading speech, the Minister said “[b]usiness will benefit from a national system through reduced complexity and red tape” and that the Bill “will ensure less complexity and red tape for business, more certainty for employers and those that engage workers and, through this, provide enhanced protection for workers wherever they work”. A balanced approach to WHS regulation is also apparent from subs 3(2) of the *WHS Act*, which gives effect to the “principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of substances or plant *as is reasonably practicable*” [emphasis added]. As Gleeson CJ said in *Carr v Western*

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<sup>2</sup> SafeWork NSW, *Work Health And Safety Roadmap For NSW 2022*, page 4 available at:

[http://www.safework.nsw.gov.au/data/assets/pdf\\_file/0006/99123/swnew-roadmap-8067.pdf](http://www.safework.nsw.gov.au/data/assets/pdf_file/0006/99123/swnew-roadmap-8067.pdf)

<sup>3</sup> Productivity Commission (2012), *Impacts of COAG Reforms: Research Report*

*Business Regulation and VET*, page 153, available at: <http://www.pc.gov.au/inquiries/completed/coag-reporting-busines-vet/report/coag-reform-regulation.pdf>

<sup>4</sup> *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ).

<sup>5</sup> *Lacey v Attorney-General (QLD)* (2011) 242 CLR 573, 592 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

*Australia* (2007) 232 CLR 138 at [5], “[l]egislation rarely pursues a single purpose at all costs”. The *WHS Act* is not an example of the rare exception; while its emphasis is on WHS, it is adapted to ensure business does not experience *unreasonable* burdens in achieving that important objective. Once the balanced approach to WHS adopted by the *WHS Act* and the nature of this review are appreciated, it follows that the questions posed in the discussion paper were reasonably and appropriately designed to discharge the Minister’s statutory duty.

### ***NSW specific definitions***

There are six NSW specific definitions in the *WHS Act* relating to the meaning of “Authorising Authority”, “Court”, “Local Authority”, “Medical Treatment”, “Public Authority” and “Regulator”. An overwhelming majority of submissions to the review confirmed the NSW specific definitions are clear and working effectively.

### ***Strict Liability***

NSW has added a provision specifying that “strict liability applies to each physical element of each offence under this Act unless otherwise stated in the section containing the offence”. The majority of submissions, from a cross section of groups, stated the strict liability provisions should be maintained.

### ***Extraterritoriality***

The Regulators submitted that the inclusion of a provision for extraterritoriality would be appropriate to the extent the State’s legislative power allows, including to obtain records and issue notices outside of NSW.

While Part 1A of the *Crimes Act 1900* “geographical jurisdiction” is of some assistance, it is limited in scope. To ensure the Regulators are able to carry out their functions of monitoring and enforcing compliance with the *WHS Act* where cross border issues are involved, avoid disputes and be more transparent, it is considered best to make clear in the *WHS Act* that all powers under the NSW WHS laws are, so far as possible, intended to operate to the full extent of the extraterritorial legislative power of the NSW State Parliament.

Regulatory practices and reach need to keep pace with developments in the modern economy. Due to technological advances, the number of businesses operating in NSW that have either their head office, data centres or control rooms located outside of the State is growing. There has also been an increase in the number of fly-in-fly-out (**FIFO**) workers coming into NSW due to the construction boom. As a result, the need for Regulators to obtain records or interview persons located interstate regarding an incident that has occurred in NSW has increased. For example, there is a mine located in NSW that has its control room located in Queensland. If an incident was to occur at this mine, the ability for the Resources Regulator to investigate and obtain records from the control room located in Queensland, and the admissibility of these records as evidence may be challenged. Similarly, if a FIFO worker witnesses an incident and subsequently leaves the state, the ability of the Regulators to compel that person to provide evidence is unclear. Another relevant example is that air traffic control can now also be conducted remotely.

There are many examples of NSW laws that include an extraterritorial application clause, including a number of the key regulatory oversight statutes and national laws. They include the:

- *Fair Trading Act 1987* (introduced in 2006);
- *Fisheries Management Act 1994*;
- *Heavy Vehicle National Laws (NSW)*;

- *Crimes (Criminal Organisations Control) Act 2012*;
- *Rail Safety National Law (NSW)*;
- *Occupational Licensing National Law (NSW)*; and
- *Health Practitioners Regulation National Law (NSW)*.

The jurisdictional note for s 11 of the model Act provides for each jurisdiction to insert a local provision relating to extraterritorial application including the extraterritorial reach of offences. To date, South Australia, the Australian Capital Territory and the Commonwealth have adopted extraterritorial provisions. Accordingly, it is recommended that the legislature amend the *WHS Act* to authorise extraterritorial exercises of the investigatory powers referred to above.

The Parliamentary Counsel's Office is best placed to advise on the final drafting of the provision. It is noted that in the interests of co-operation with *WHS Regulators* in other States and Territories, there will also need to be consultation as to any practical implications of the *NSW Regulators* exercising powers and functions in their jurisdiction.

#### **Recommendation 1**

The Government to consider amending the *WHS Act* to authorise extraterritorial application of the *WHS Act*, to the extent the State's legislative power allows, including to obtain records and issue notices outside of NSW.

### **Part 2: Health and safety duties**

The scope of the review focused on the NSW-specific provisions of the *WHS Act*. There are no NSW-specific provisions in Part 2 of the *WHS Act*.

### **Part 3: Incident notification**

All workplace deaths, plus serious injuries, illnesses and dangerous incidents that happen as a result of work activities need to be notified to the *NSW WHS Regulators* as provided for in Part 3 of the *WHS Act*. Comments were sought in relation to the provision in the *WHS Act* that prevents duplication of incident notifications where they must be notified to the *Resources Regulator* under the *Work Health and Safety (Mines and Petroleum Sites) Act 2013*.

Generally, respondents submitted that the incident notification provision was a useful variation because it reduced regulatory burden to businesses by preventing duplication of incident reporting requirements.

*SafeWork NSW* raised a matter in relation to the method of notification for notifiable incidents, as in accordance with a Ministerial directive, it has ceased the use of facsimiles as a form of notification (except in very limited circumstances approved by the Minister).

To ensure consistency with this practice *SafeWork NSW* has requested the term "facsimile" be removed from the *WHS Act*.

The *Resources Regulator* still sends and receives faxes; however, this is mainly for the receipt of incident notifications under the provisions of the *Work Health and Safety (Mines and Petroleum Sites) Act 2013*. Further, it is intended removal of the term "facsimile" from the *WHS Act* will not preclude the *Resources Regulator* from using this facility, as it is likely a "facsimile" would ordinarily be considered to be a type of "electronic transmission" or "service by electronic means" (as still provided for in the *WHS Act*).

## **Recommendation 2**

That the term “facsimile” be removed from the *WHS Act*.

### **Part 4: Authorisations**

The scope of the review focused on the NSW-specific provisions of the *WHS Act*. There are no NSW-specific provisions in Part 4 of the *WHS Act*.

### **Part 5: Consultation, representation and participation**

Under Part 5 of the *WHS Act*, to ensure that workplaces and work activities are safe, Persons Conducting a Business or Undertaking (**the PCBUs**) are required to consult with workers and other PCBUs that may be affected by the *WHS* activities of their business.

#### **Disqualification of Health and Safety Representatives (HSRs)**

The Industrial Relations Commission (**the IRC**) has jurisdiction to determine applications to disqualify a HSR. The majority of the submissions were in favour of this. However, two submissions suggested receiving applications for the disqualification of a HSR should be dealt with by the Fair Work Commission (**the FWC**). The FWC is part of the federal jurisdiction and it is appropriate for functions under a NSW Act to be exercised by a NSW body.

#### **Provisions relating to health and safety committees in coal mines**

The provisions related to coal mines provide that one member on a health and safety committee must be a site safety and health representative for the coal mine, and another an electrical safety and health representative for the coal mine. The majority of submissions indicated that these provisions are working well.

#### **Provisions relating to prisoners**

Section 103 of the *WHS Act* provides that Part 5 (Consultation, representation and participation) does not apply to a worker who is in lawful detention or custody. Two submissions indicated there is ambiguity regarding whether prisoners are to be properly regarded as “workers” under the *WHS Act*. The ambiguity is said to arise because, on the one hand, prisoners are not specifically included in the definition of “worker”; however, on the other hand, the *WHS Act* specifically provides that the consultation provisions do not apply to prisoners, which may imply that they may be properly regarded to be workers. Further, concern was expressed that prisoners undertaking work should be encouraged to develop their work safety skills including the full range of consultation and they should therefore not be excluded from Part 5 of the *WHS Act*. As these issues relate to model law provisions, they will be forwarded to the upcoming national review of the model laws scheduled for 2018.

### **Part 6: Discriminatory, coercive and misleading conduct**

Part 6 of the *WHS Act* prohibits a person from engaging in coercive, discriminatory or misleading conduct to stop another person from raising *WHS* issues or undertaking safety duties under the *WHS Act*.

Section 108(1) prohibits persons from organising, or threatening to organise or taking any action against another person with intent to coerce or induce the other person to exercise a power, or refrain from exercising a power conferred by the *WHS Act*. Section 108(3) of the *WHS Act* provides that a reasonable direction given by an emergency services worker in an

emergency is not an action with intent to coerce or induce a person for the purposes of s 108(1). The review sought comments on whether the organisations listed as an “emergency service” are appropriate. The majority of respondents submitted that it is. While a number of other organisations were put forward for possible inclusion, these fell outside of the definition provided by the *State Emergency and Rescue Management Act 1989*.

The review also sought feedback on this Part of the *WHS Act* in relation to whether the District Court is the appropriate court to determine applications regarding discriminatory, coercive and misleading conduct. A large number of submissions suggested the IRC be tasked with dealing with these matters rather than the District Court. These are dealt with in section 5.4 “Appropriateness of various forums”, below.

### ***Part 7: Workplace entry by WHS entry permit holders***

Part 7 of the *WHS Act* relates to workplace entry by WHS entry permit holders whereby union officials may obtain and use a WHS entry permit to enter workplaces and ask questions about suspected WHS breaches, and discuss with workers, their WHS rights and obligations.

The NSW-specific provisions in this Part confer powers on the IRC as the Authorising Authority and name the *Industrial Relations Act 1996* as the relevant state industrial law in NSW. The majority of submissions supported these NSW-specific provisions.

### ***Part 8: The Regulators***

#### ***General***

Part 8 confers a number of functions and powers on the Regulators. Section 154 also authorises the Regulators to delegate their function to an “authorised person”. The majority of respondents submitted that the definition of “authorised person” is working well.

One submission (supported by three others) recommended a check inspector system be developed similar to that found in the coal mining regime. The submission suggested that several professionals from each high risk industry undertake the SafeWork NSW Inspector training program and be provided with additional powers as an authorised officer. This proposal will be forwarded to SafeWork NSW for consideration. The Resources Regulator has indicated that check inspectors in NSW coal mines are now called safety and health representatives and do not undertake inspector training but undertake a five day training program to support their role as worker representatives.

#### ***Technical error***

The review identified a drafting error in s 166 “Persons assisting inspectors”. That section refers to inspectors entering a workplace under s 165. That reference is incorrect: s 163 confers the power to enter premises, while s 165 confers on inspectors certain powers when they enter a workplace under s 163. The model Act has the correct reference. This error should be corrected.

#### ***Recommendation 3***

Amend section 166(1) of the *WHS Act* so that the reference to “section 165” is replaced with “section 163”.

## **Recording of interviews**

Section 155(2)(c) of the *WHS Act* allows the Regulator to require a person to appear and give evidence. Section 171 of the *WHS Act* confers on inspectors the power to require the production of documents and the answering of questions. Currently, the Regulators may arrange to record an interview with the consent of the interviewee; however, the Regulators do not have the power to record the interview if the interviewee withholds his or her consent. Currently, if the person withholds their consent, the inspector makes a written record of the interview while it is in progress which is time consuming for both the Regulator and the person being interviewed and results in a loss of time and subsequent increase in cost to business.

Clarifying that an interview can be recorded using sound recording or audio visual equipment without the consent of the person being interviewed does not increase any of the inspector's current powers in relation to obtaining information. It simply speeds up the recording process, making it more efficient and effective for all concerned.

Further, the benefit of having an audio recording of an interview over a hand written or typed record is that an audio recording provides a clear, accurate and objective record of the interview. This reduces the scope for dispute as to the content of any representation made in interviews.

For these reasons, the review finds that there is merit in authorising the Regulators to record an interview without consent, after giving notice that the recording is taking place. In such instances, the Regulator would also be required to provide a copy of the recording to the interviewee as soon as practicable after it is made.

The *WHS Act* would continue to provide that an answer to a question by an individual is not admissible as evidence against that individual, other than in proceedings for a false or misleading answer.

Several NSW Acts include a specific power for an authorised officer to use sound recording or audio visual apparatus to record questions and answers, without consent, subject to the interviewee being informed of the fact that the interview is being recorded. These include:

- *Environmental Planning and Assessment Act 1979* (s119L)
- *Crown Land Management Act 2016* (s10.24)
- *Biosecurity Act 2015* (s95)
- *Protection of the Environment Operations Act 1997* (s203A)
- *Water Management Act 2000* (s338C)
- *Mining Act 1992* (s248M)
- *Petroleum (Onshore) Act 1991* (s104G)

The Resources Regulator administers the last two Acts and therefore has the power to record interviews without consent under these Acts, but is unable to do so under the *WHS Act* even though that Act also applies to mines.

The NSW Department of Justice will be consulted in relation to any interaction of the proposed amendment with the *Surveillance Devices Act 2007*, which is administered by the Attorney General.

### **Recommendation 4**

Amend the *WHS Act* to permit the recording of interviews by the Regulators without consent, subject to the interviewee being given notice that his or her interview is being recorded.



## **Part 9: Securing compliance**

The powers, functions and accountability of appointed inspectors are provided by Part 9 of the *WHS Act*.

The majority of respondents submitted that the classes of persons that the Regulator may appoint as an inspector are working well. However, one submission (supported by three others) contended that a check inspector system be developed, similar to that which is provided in coal mining legislation. The Resources Regulator has indicated that check inspectors in NSW coal mines are now called safety and health representatives and undertake a five day training program to support their role as worker representatives. As indicated in Part 8 above, this recommendation will be forwarded to SafeWork NSW for consideration.

The majority of submissions contended that the power of inspectors to obtain a search warrant to obtain information about a suspected WHS breach was clear and that the powers for the WHS Inspectors and NSW Police to cooperate and obtain information about a suspected WHS breach were suitable.

Some submissions suggested s 168 and 169 of the *WHS Act* (which are similar in subject matter to model WHS legislation provisions not currently adopted in NSW) be amended so that they are consistent with the model laws. These provisions relate to announcement before entry on warrant and for a copy of a warrant to be given to a person with management or control of a place. This review finds that these sections are not required because Part 5, Division 4 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to search warrants issued under s 167 of the *WHS Act*, which deals with the same subject matter.

Some respondents also submitted that s 185 of the *WHS Act* should be amended so it is consistent with the model Act as follows:

- add s 185(1)(c) to the *WHS Act*, which would enable an inspector to require a person to provide the person's name and residential address, if the inspector reasonably believed the person may be able to assist in the investigation of an offence against the *WHS Act*; and
- remove from s 185(3) of the *WHS Act* the words "[i]t is not an offence for a person to fail to give that evidence."

The jurisdictional note to s 185 provides that "[a] jurisdiction may amend section 185 to align it with its human rights charter or other legislative protocols."

No change is required to this section as an inspector's powers pursuant to which he or she may obtain information such as a person's name and address under the *WHS Act* are not limited to s 185 (see s 155, 165 and 171).

## **Part 10: Enforcement measures**

Part 10 confers on inspectors a range of enforcement powers, including the power to issue improvement notices, prohibition notices and non-disturbance notices.

NSW has nominated the District Court of NSW as the appropriate court to determine applications for an injunction for non-compliance with notices. Some submissions suggested a specialist safety court jurisdiction be established in the IRC to hear matters relating to non-compliance with notices. This matter is dealt with in section 5.4 "Appropriateness of various forums".

## ***Part 11: Enforceable undertakings***

Part 11 allows the NSW WHS Regulators to accept an enforceable undertaking as an alternative to prosecuting. Enforceable undertakings are legally binding agreements between the Regulator and the person who proposed the undertaking.

NSW has conferred on the District Court of NSW jurisdiction to determine applications for orders where a person is alleged to have contravened a WHS undertaking under the *WHS Act*. Some submissions suggested that a specialist safety jurisdiction should be conferred on the IRC to determine such matters instead. This issue is dealt with in section 5.4 “Appropriateness of various forums”, below.

## ***Part 12: Review of decisions***

Decisions made under the *WHS Act* are reviewable in accordance with Part 12.

The *WHS Act* confers on the IRC the jurisdiction to decide an application for review of a reviewable decision made by the Regulator or of a decision made or taken to have been made on an internal review by the Regulator under s 229 of the *WHS Act*. While the majority of submissions agreed the IRC was the appropriate body, some submissions suggested this function be transferred to the NSW Civil and Administrative Tribunal (**the NCAT**). This issue is dealt with in section 5.4 “Appropriateness of various forums”, below.

## ***Part 13: Legal proceedings***

Part 13 sets out the procedure for offences against the *WHS Act* including prosecutions, sentencing for offences and the use of penalty notices.

### ***Forums for proceedings for an offence against the WHS laws***

The *WHS Act* confers on the Local Court and the District Court in its summary jurisdiction, jurisdiction to determine proceedings for an offence against the WHS laws. Several submissions indicated that these matters should be dealt with by the IRC. This issue is dealt with in section 5.4 “Appropriateness of various forums”, below.

### ***The standing of the secretary of a union to commence criminal proceedings for an offence against the WHS Act***

NSW is the only harmonised jurisdiction that authorises the secretary of a union to bring proceedings for an offence against the *WHS Act* (s 230(1)(c)). The provision was inserted in the *WHS Act* as a non-government amendment when the Bill was in the Legislative Council.

Conflicting opinions have been expressed on this matter. Generally, the unions and workers are in favour of retaining this provision and PCBUs, government representatives and employer associations oppose it. Some submissions suggested that the provision be repealed on the basis that standing to bring criminal proceedings should be exclusively conferred on Regulators.

The current legislation provides a high threshold for a secretary of a union to commence proceedings: under s 230(3), proceedings for a “Category 1” (reckless conduct) or “Category 2” (failure to comply with a health and safety duty) offence can only be brought by a secretary of union, if the Regulator has (after referral of the matter to the Regulator and the Director of Public Prosecutions) declined to follow the advice of the Director of Public Prosecutions to bring the proceedings.

There have been no prosecutions commenced by a secretary of a union to date under the *WHS Act*. This may serve as an indication SafeWork NSW is commencing prosecutions where required, the provision is not being misused, and the legislation is effective with regard to this matter. No change to the provision is therefore proposed at this time.

### **Section 230 - misalignment with local legislation**

Under s 8(1) of the *Criminal Procedure Act 1986*, only the Attorney General or the Director of Public Prosecutions (**the DPP**) may prosecute an indictable offence. “Category 1” (reckless conduct) offences are indictable offences under s 229B(3) of the *WHS Act*.

Neither the Attorney General nor the DPP are identified in s 230 of the *WHS Act*, as parties who may commence a prosecution; however, s 230(5) provides:

“[N]othing in this section affects the ability of the Director of Public Prosecutions to bring proceedings for an offence against this Act”.

The review therefore suggests s 230(5) be amended to also include reference to the Attorney General. The jurisdictional note for s 230(4) (the equivalent provision of the model Act) provides for this, by permitting amendments to ensure the provision does not conflict with arrangements under other legislation in that jurisdiction.

#### **Recommendation 5**

Consult with the Department of Justice to determine whether a reference to the Attorney General is required in section 230(5) of the *WHS Act*.

### **Penalty Notice Scheme under the Fines Act 1996**

Section 243 of the *WHS Act* authorises the Regulators to serve a penalty notice on a person for a prescribed offence against the *WHS Act*. Penalty notices under this section are declared to be a penalty notice for the purposes of the *Fines Act 1996*.

The review sought submissions on the appropriateness of applying the *Fines Act* scheme to WHS. The majority of submissions commented on the application and extent of penalties under the *WHS Act* rather than on the appropriateness of applying the penalties provided by the *Fines Act*. These comments are addressed later in this report (see Section 5.3 – Submissions on the WHS Regulation - Chapter 11 – General).

Section 21 of the *Fines Act* has recently been amended to allow for a penalty notice to be issued to a person electronically by sending it to an email address or to a phone number voluntarily provided by the person for the issue of the penalty notice. The penalty notice is to be issued by an officer authorised to issue the penalty notice electronically by the relevant issuing agency.

The Review therefore recommends that the *WHS Act* be amended to make it clear that penalty notices may be served electronically in accordance with these recent changes.

#### **Recommendation 6**

Amend the *WHS Act* to clarify that penalty notices may be served electronically in accordance with the *Fines Act 1996*.

## ***Validity of appointments and declaration as to delegation under the WHS Act***

There have been several cases where delegations executed by the Resources Regulator authorising the prosecutor to bring proceedings under the *WHS Act* have been challenged during court proceedings against companies for alleged contraventions of WHS laws. To date these challenges have been unsuccessful; however, such challenges add significant time and cost to proceedings and only serve to distract from the core issues in contention. It is therefore proposed legal advice be obtained in relation to the best mechanism for amending the *WHS Act* to address this matter.

### ***Recommendation 7***

Amend the *WHS Act* to address concerns raised by regulators about technical arguments regarding the validity of appointments and delegations in criminal proceedings, which detract from the substantive issues of the case, and delay and increase the cost of the proceedings.

## ***Part 14: General***

Part 14 of the *WHS Act* contains miscellaneous provisions regarding topics such as information sharing between the Regulators and Codes of Practice.

Submissions received in relation to Part 14:

- supported information sharing between the NSW Regulators;
- suggested using handouts detailing industry hazards and setting out best practice examples, and bi-lingual DVDs to explain the *WHS Act* and *WHS Regulation*. These comments will be forwarded to the NSW WHS Regulators for consideration;
- raised some concerns about the success of the harmonisation of WHS laws and whether or not this has improved matters for PCBUs. These comments will be forwarded to Safe Work Australia for consideration in the national review of the model laws in 2018; and
- queried differences in the approaches adopted by the NSW Regulators, in how they applied the legislation and provided advice and assistance against those adopted by other jurisdictions. The review identified many differences ranging from the number of prosecutions and notices issued by NSW when compared to other jurisdictions, differences in Codes of Practice, and the provision of business forums and webinars. DFSI proposed that its officers could collate all of these responses and forward them to the appropriate NSW WHS Regulator for consideration. One respondent suggested that Safe Work Australia evaluate the efficacy of State Regulator responses to various WHS scenarios. This comment will be forwarded to Safe Work Australia for consideration in the 2018 national review of the model laws.

Several unions also suggested that a NSW consultative forum be established with members from the WHS Regulators and unions for the purposes of developing and sharing advice and assistance and resolving technical issues and differences. Another respondent suggested that the Government re-establish the NSW tripartite industry reference groups that existed under the former OHS regime.

NSW has tripartite consultation arrangements in place related to WHS for the mining sector via the Mine Safety Advisory Council (the Council) which is established under the *Work Health and Safety (Mines and Petroleum Sites) Act 2013*. There are however, no similar formal tripartite consultation arrangements in place for WHS at non-mining workplaces, governed by the *WHS Act*.

The ability for each WHS jurisdiction to include local consultation arrangements in the *WHS Act* is permitted under a jurisdictional note for Schedule 2 to the model *WHS Act*. Several harmonised jurisdictions including the Australian Capital Territory, the Commonwealth, Queensland and the Northern Territory have established WHS consultative forums under this provision.

SafeWork NSW has advised that it consults with unions and employer associations on a regular basis, with consultation being a key component in the Roadmap. In addition, Safe Work Australia Members and the Strategic Issues Group – Work Health and Safety (**the SIG-WHS**) allow for tripartite consultation, with unions and employer associations including the Australian Council of Trade Unions, Australian Chamber of Commerce and Industry and the Australian Industry Group being members of these forums. However, to further complement these consultative mechanisms, it is proposed that a tripartite consultative model for NSW be developed in consultation with local stakeholders.

**Recommendation 8**

Undertake a review of the manner and form of stakeholder consultative mechanisms and, in consultation with key stakeholder organisations, develop a model for tripartite consultation.

**Schedule 1: Application of the Act to dangerous goods and high risk plant**

Schedule 1 to the *WHS Act* extends the application of the *WHS Act* to storage and handling of certain dangerous goods and specified high risk plant affecting public safety at non-workplaces. Schedule 1 only applies to the dangerous goods and high risk plant specified in clauses 10 and 328(1A) of the *WHS Regulation*. The *WHS Act* does not clearly identify a duty holder for the application of Schedule 1 at non-workplaces where there is not a PCBU.

The majority of the submissions to the review supported the regulation of dangerous goods and high risk plant affecting public safety regardless of whether or not they are at a workplace.

The *WHS Act* already imposes obligations in relation to the storage and handling of certain dangerous goods and for the operation or use of specified high risk plant affecting public safety at non-workplaces. These obligations include such things as placard requirements for high quantities of hazardous chemicals and registration of high risk plant. Clarifying the identity of duty holders would enable the Regulators to take compliance action against responsible persons for offences against these provisions, as they were able to do under the former OHS laws.

Non-PCBU duty holders may include non-employing strata title body corporations responsible for common areas used only for residential purposes and to owners and occupiers of premises that are not workplaces.

Further amendments to the legislation may be required to modify the duties of non-PCBUs, and it is proposed these changes will be progressed as a package.

**Recommendation 9**

Amend the *WHS Regulation* to clarify the identity of duty holders for the storage and handling of certain dangerous goods, or for the operation or use of specified high risk plant affecting public safety, when not at a workplace or not used in carrying out work.

## **Schedule 2: The Regulators**

In NSW there are two WHS Regulators: SafeWork NSW and the Resources Regulator. Schedule 2 of the *WHS Act* establishes that co-regulator regime. The majority of submissions indicated that the provisions relating to the Regulators are working well.

## **Schedule 3: Regulation making powers**

Schedule 3 to the *WHS Act* permits the making of regulations relating to various provisions such as duties, incidents, plant, substances or structures, hazards and risks, and authorisations.

That schedule also confers jurisdiction on the Local Court and the IRC to conduct reviews under the *WHS Regulation* and on the NCAT to conduct administrative reviews under the *Administrative Decisions Review Act 1997*. One respondent (supported by three others) submitted that a specialist safety court jurisdiction should be created. This issue is dealt within in section 5.4 “Appropriateness of various forums”, below.

## **Schedule 4: Savings, Transitional and other provisions**

Half of the submissions indicated some of the provisions in Schedule 4 are out of date. A review should be undertaken to determine the extent to which certain provisions of Schedule 4 may be repealed.

## **5.3 Submissions on the *WHS Regulation***

Although s 276B of the *WHS Act* does not require a review of the *WHS Regulation*, the terms of reference include consideration of the NSW-specific clauses within that Regulation.

### **Chapter 1 Preliminary**

Chapter 1 of the *WHS Regulation* sets out the meaning of various terms. The review sought submissions on whether or not the definitions were clear and working effectively.

Half of the submissions indicated that the definitions were working effectively. While several submissions provided suggestions for amendments, most of these related to the model regulations and will therefore be forwarded to Safe Work Australia for consideration in the 2018 national review of the model laws.

One submission addressed cl 7(1)-(2) of the *WHS Regulation*. Those subclauses operate to deem a non-employing “strata title body corporate”, which is responsible for any common areas used only for residential purposes, to not be a PCBU in relation to those premises. The submission contended that many strata title complexes have high risk plant rooms, ceiling cavities and three and four storey rooflines, and, by being excluded from the definition of a PCBU, a “strata title body corporate” has no incentive to improve the safety of their buildings.

Clauses (1) to (2) of cl 7 of the *WHS Regulation* are identical to those in the model regulations and, as such, are not the focus of this review. Further, the policy intent behind cl 7 of the *WHS Regulation* is to treat such non-employing “strata title body corporations” in the same way as an occupier of a private house and so that it is not subject to the duties of the *WHS Act*, except where Schedule 1 (Application of Act to dangerous goods and high risk plant) applies. As such, any work undertaken in the common areas is a workplace of the contractor undertaking the work and it is the contractor’s responsibility to ensure all risks are identified, assessed and acted on if necessary.

One submission also contended that the definition of “Competent Person” should be removed from cl 5 as it restricts persons other than electricians (such as engineers) from performing activities such as electrical testing. SafeWork NSW has advised that the definition should not be removed as a competent person for electrical work is clarified in the “*Managing electrical risks in the workplace code of practice*” which includes electrical engineers and apprentices in the definition.

## **Chapter 2: Representation and participation**

This chapter sets out the rights and duties of PCBUs, workers and workers’ representatives when determining work groups, electing, removing and training of health and safety representatives and the resolution of health and safety issues. NSW has added a note about training for health and safety representatives which the majority of submissions found helpful.

## **Chapter 3: General risks and workplace management**

The scope of the review focused on the NSW-specific provisions of the *WHS Regulation*. There are no NSW-specific provisions in Chapter 3 of the *WHS Regulation*.

## **Chapter 4: Hazardous work**

Chapter 4 of the *WHS Regulation* relates to hazardous work including noise limits, confined spaces, management of risk of falls, high risk work, diving work and electrical safety.

### **Demolition work**

As to the licensing of demolition work under Part 4.6 of the *WHS Regulation*, the vast majority of submissions stated no additional information was required as the reporting requirements for PCBUs were clear. Clause 143 of the model *WHS Regulation*, which requires licensing of demolition work, has not yet been adopted in NSW and is instead provided for by saved provisions of the former OHS Regulation pending a national position.

Two submissions indicated support for amending the provision to refer to the former legislation and incorporating the requirements into the WHS framework. The jurisdictional note in the model Regulations provides “[j]urisdictions may insert transitional and savings provisions for the licensing of demolishers pending the regulation of demolishers under the Occupational Licensing National Law.” SafeWork NSW has confirmed that a decision on the regulation of demolishers under the Occupational Licensing National Law is still pending and that this clause should therefore remain as is.

### **General electrical safety in workplaces and energised electrical work**

Clause 144(1) of the *WHS Regulation* defines the term “electrical equipment” in relation to general electrical safety in workplaces under Part 4.7 of the *WHS Regulation*. The review received nine submissions, all confirming that the meaning of “electrical equipment” was clear and did not need amendment.

Clause 146 of the *WHS Regulation* defines work that is not considered “electrical work”. This includes reference to a person assisting or being supervised by an “authorised electrician” and work carried out in relation to a person becoming an “authorised electrician”. Clause 146(3) of the *WHS Regulation* provides that “authorised electrician” means a person who is authorised under the *Home Building Act 1989* to do electrical wiring work.

A submission received from a union (and supported by 3 others) suggested amending the provisions to align the terms “authorised” and “licensed” between all relevant legislation

including consumer safety laws. Another submission suggested that it would be more appropriate to use the terms “licenced” or “registered” in place of the term “authorised”.

SafeWork NSW has advised the term “authorised” has been used to align cl 146 of the *WHS Regulation* with s 40 of the *WHS Act*, which defines the term “authorised” to mean “authorised by a licence, permit, registration or other authority (however described) as required by the regulations”. As the term “authorised” is adequately defined under s 40 of the *WHS Act* the amendment of cl 146 of the *WHS Regulation* is not necessary.

Clause 152 of the *WHS Regulation* provides an exclusion from compliance requirements set out in Chapter 4, Part 4.7, Division 4 of the *WHS Regulation* for certain types of electrical work on energised electrical equipment. The review received one submission from a union (which was supported by 3 other unions) suggesting that the provision should be amended to make it clear that cl 152 does not reduce the obligations of the PCBU with regards to the rest of the *WHS Act* and *WHS Regulation* related notification requirements.

The scope of the exclusion under cl 152 of the *WHS Regulation* is narrow and does not provide any limitation on the reporting requirements of a PCBU. In addition, cl 153 clarifies that a reference to a PCBU in relation to electrical work is to be deemed to be a reference to the PCBU who is carrying out the electrical work. It is therefore not necessary to amend cl 152 of the *WHS Regulation*.

Clause 164 of the *WHS Regulation* sets out minimum safety requirements and offences for PCBU’s in the use of socket outlets in hostile operating environments. The vast majority of submissions confirmed that the note in cl 164 (which confirms “residual current devices are also regulated under the *Electricity (Consumer Safety) Act 2004*”) is helpful.

Clause 166 of the *WHS Regulation* clarifies the duties of, and provides offences for a PCBU regarding overhead or underground electric lines. All submissions supported the note in cl 166 (which confirms the “*Electricity (Consumer Safety) Act 2004* and the *Electricity Supply (Safety and Network Management) Regulation 2008* also apply to the PCBU).

## **Chapter 5: Plant and structures**

Chapter 5 of the *WHS Regulation* outlines obligations for PCBUs in relation to management and inspection of plant and structures.

Clause 235 of the *WHS Regulation* sets out requirements for the major inspection of registered mobile cranes and tower cranes and provides minimum qualification requirements for those deemed competent to undertake or supervise such inspections.

The majority of submissions recorded that the organisations or associations authorised under cl 235(4)(a)(ii) of the *WHS Regulation* to undertake or supervise major inspections were appropriate. One submission suggested that the clause should be amended to include the “Association of Professional Engineers”. This suggestion will be forwarded to SafeWork NSW for further consideration.

## **Chapter 6: Construction work**

The scope of the review focused on the NSW-specific provisions of the *WHS Regulation*. There are no NSW-specific provisions in Chapter 6 of the *WHS Regulation*.

## **Chapter 7: Hazardous chemicals**

Chapter 7 of the *WHS Regulation* sets out the obligations of manufacturers, importers, suppliers and PCBUs in relation to hazardous chemicals.



Clause 328 of the *WHS Regulation* applies to the use, handling and storage of hazardous chemicals at a workplace, the generation of hazardous substances at a workplace, and a pipeline used to convey a hazardous chemical. As authorised by the jurisdictional note, NSW has specified the *Gas Supply Act 1996*, the *Petroleum (Offshore) Act 1982*, the *Pipelines Act 1967* and the *Dangerous Goods (Road and Rail Transport) Act 2008* provide for exclusions to cl 328. The majority of submissions contended that the local NSW laws are appropriate.

### **Chapter 8: Asbestos**

Chapter 8 of the *WHS Regulation* outlines the requirements for the correct management and removal of asbestos. Cl 419 provides for prohibitions and exceptions for work involving asbestos or asbestos containing material. Cl 419(3)(e) exempts the transport and disposal of asbestos or asbestos waste in accordance with the *Protection of the Environment Operations Act 1997*.

The majority of submissions support the current exemption. However, one submission raised concerns about a gap in legislation that creates a regulatory and financial incentive to dump asbestos. The submission suggested that cls 419 and 452 should be amended to ensure that asbestos removal work is only carried out by licensed asbestos removalists and/or transported by licensed transport workers. Amending cls 419 and 452 as suggested would be a departure from the model laws and should therefore be considered as part of the national model law review in 2018.

Part 8.10, Division 3 of the *WHS Regulation* provides for the licensing requirements for asbestos removalists and assessors. This includes a requirement for the Regulator to be satisfied the applicant is able to ensure work will be done safely, competently and in compliance with the conditions of the licence. All submissions supported the current requirements and confirmed that no amendment was necessary.

### **Chapter 9: Major hazard facilities**

Chapter 9 regulates the operation of major hazard facilities (**MHF**) and requires the operator of a facility or proposed facility at which hazardous chemicals are stored to ensure that the hazardous chemicals do not exceed the specified threshold quantities outlined in Schedule 15. There are several NSW-specific provisions providing exclusions for certain facilities regulated by other legislation such as the *Offshore Petroleum and Greenhouse Gas Storage Act 2006*, the *Gas Supply Act 1996*, and the *Pipelines Act 1967*. The majority of submissions to the review advised these exclusions were appropriate.

The review also sought comment as to whether it was appropriate for consultation to be undertaken with Fire and Rescue NSW and the NSW Rural Fire Service in preparing emergency plans for MHFs, and whether the operator of a MHF should be required to provide the content for a safety case. The vast majority of submissions agreed with these requirements.

Feedback was also sought as to whether the NCAT was the appropriate forum for external review following the Regulator's decision to refuse to renew an MHF licence. The majority of submissions suggested the IRC was the appropriate forum for dealing with such matters. This issue is dealt with in section 5.4 "Appropriateness of various forums", below.

### **Chapter: 10 Mines**

The scope of the review focused on the NSW specific provisions of the *WHS Regulation*. There are no NSW specific provisions in Chapter 10 of the *WHS Regulation*. NSW has separate mines safety legislation.

## **Chapter 11: General**

Chapter 11 identifies reviewable decisions made by the Regulator, the process for granting exemptions under certain chapters in the *WHS Regulation* and sets out the offences for which a penalty notice may be issued.

### **General**

The review sought comment on the NCAT being the forum nominated to hear and decide applications for external review of decisions. Some submissions contended that the IRC would be the most appropriate forum to hear these matters. This issue is dealt with in section 5.4 “Appropriateness of various forums”, below.

NSW has inserted a note in cl 699 of the *WHS Regulation* advising that the *Public Health Act 2010* also imposes obligations relating to the notification of certain medical conditions. All of the respondents advised they found this note helpful.

Clause 702 of the *WHS Regulation* lists legislation that has been prescribed for the easier exchange of information relating to the enforcement or administration of other laws. One comment of note from a union, and supported by three others, suggested all privacy and confidentiality provisions be amended to allow the primacy of the right to have safe work, balanced with the prohibitions for the misuse of this information as they currently apply. In response to this, SafeWork NSW has advised it is currently reviewing its privacy policies to ensure all confidentiality requirements are relevant.

### **Period for internal review**

Clauses 680 and 681 of the *WHS Regulation* provide that an internal reviewer has 21 days to make a decision on an internal review application. All other harmonised jurisdictions have a period of 14 days.

Only two submissions were received on this matter. One contended that the time should align with the model regulation (14 days) while the other stated 21 days was appropriate. SafeWork NSW has advised it proposes to raise for consideration as part of the national review of the model laws in 2018, an amendment to cl 680 and 681 in the model Regulations, to replace the term “days” with “working days”. As part of this proposed amendment, SafeWork NSW will further propose to reduce the number of days from “21 days” to “10 working days” in the *WHS Regulation*. No amendment to these clauses is therefore proposed at this time.

### **Penalties**

Many public submissions to the review suggested consideration be given to increasing the penalty notice amounts and extending the application of penalty notice offences to all licensed and unlicensed categories and even to all aspects of the *WHS Regulation*. SafeWork NSW has further advised that, during consultation for the development of the Roadmap, it became very clear from both business and workers that some companies were gaining a competitive advantage since the adoption of the model WHS legislation in 2012, as SafeWork NSW did not have all of the previous powers it had under the *OHS Regulation 2001*.

Action area II of the Roadmap relates to prioritising sectors, harms, workers and workplaces where the most significant WHS risks exist. This involves focusing on identified high risk sectors such as agriculture, manufacturing, transport and construction, and ensuring high risk workplaces meet compliance standards, especially where indicators of compliance are

poor or the nature of the work entails very high risk. A further strategic outcome of the Roadmap is that SafeWork NSW will enforce WHS laws to protect workers and ensure no competitive advantage through negligence.

The SafeWork NSW document “*Our approach to work health and safety regulation*” explains that SafeWork NSW takes a graduated approach to compliance and enforcement, by taking the level of risk, public interest and due diligence effort into consideration. This approach cannot be effectively achieved without the ability to issue penalty notices in high risk areas, such as those that cause or have the potential to cause serious harm, deal with serial offenders, and those unwilling to comply, or those capable of complying but choose not to.

There is currently no penalty notice offence provision in the *WHS Regulation* related to unlicensed high risk work activities. These typically occur in the identified high risk sectors of agriculture, manufacturing, transport and construction. This makes it difficult for SafeWork NSW to manage its approach to compliance and enforcement in targeting high risk areas and in dealing with serial offenders, as no action can be taken between verifying and securing compliance and enforcing compliance via prosecution of alleged breaches. The prosecution process does not provide an immediate disincentive for non-compliance, when compared to penalty notices, due to the time involved. Penalty notices send a quick and efficient signal to operators that the Regulator is serious about effecting behavioural change by those who breach their WHS obligations in situations where serious injury has not occurred (other such matters would generally still be prosecuted in the courts).

Therefore, the *WHS Regulation* should be amended to include the penalty notice offences listed below. In addition, there should be a review of the penalty notice amounts under the *WHS Act* and Safe Work Australia should consider the adequacy and effectiveness of the penalty notice regime as part of the 2018 national review of the model laws.

#### Requirements for authorisation of work

The Regulators should be authorised to issue penalty notices for all of the categories of unauthorised work related to s 43 of the *WHS Act*.

Section 43 of the *WHS Act* links to the following clauses in the *WHS Regulation*:

- clause 81 - Licence required to carry out high risk work;
- clause 113 - Accreditation required to assess competency for high risk work licence;
- clause 114 - Accredited assessor must act in accordance with accreditation;
- clause 380 - Using, handling and storing prohibited carcinogens;
- clause 381 - Using, handling and storing restricted carcinogens;
- clause 382 - Using, handling and storing restricted hazardous chemicals;
- clause 485 - Requirement to hold a Class A asbestos removal license;
- clause 487 - Requirement to hold Class B asbestos licence; and
- clause 489 - Requirement to hold asbestos assessor licence.

In creating new penalty notice offences for authorisation of work, SafeWork NSW will be able to more efficiently and effectively undertake compliance and enforcement activities. An incentive will also be created for workers to be licensed, as currently there are penalties for PCBUs engaging unlicensed workers, (such as those undertaking asbestos removal work), but no penalties for the actual unlicensed worker.

### **Recommendation 10**

- (i) Amend the *WHS Regulation* to authorise the Regulators to issue penalty notices for breaches of s 43 of the *WHS Act* 'requirements for authorisation of work'.
- (ii) Review the adequacy of the penalty notice amounts specified in the *WHS Regulation* and; consider whether any other penalty notice offences should be introduced.

### Falls from heights

With the introduction of the *WHS Act*, penalty notice offences related to heights (cl 78 of the *WHS Regulation*) were removed. Since that time, there has been an increase in notifiable falls from a three year average of 358 (from the early part of the decade) to 785 in 2016.

There are high recidivism rates in the construction industry. Some PCBUs that receive an improvement/prohibition notice related to heights are continuing to commit similar breaches and receive further notices. It may be thought that this is because there is a gap in the SafeWork NSW compliance approach, where no action can be taken between verifying and securing compliance and court sanctions.

Higher level sanctions are only occurring after incidents, and, because incidents now measure around 785 annually, it will probably be more effective for certain offences to be dealt with by way of penalty notices to send an early signal to non-compliant PCBUs that non-compliance is unacceptable. Penalty notices send a quick and efficient signal to operators that the Regulator is serious about changing the behaviour of operators who breach their WHS obligations.

Working at heights is also a key component of SafeWork NSW's "*Towards Zero*" campaign due to it being a high risk activity that continues to fatally and seriously injure workers.

### **Recommendation 11**

Amend the *WHS Regulation* to allow for a new penalty notice offence for breaches of Part 4.4 of Chapter 4 of the *WHS Regulation* "Falls".

## 5.4 Appropriateness of various forums

Currently, the District Court, the Local Court, the IRC and the NCAT have powers under the *WHS Act* and the *WHS Regulation*. Various discussion paper questions sought comments in relation to the appropriateness of these forums as provided for in Parts 6, 10, 11, 12, 13 and Schedule 3 of the *WHS Act* and Chapters 9 and 11 of the *WHS Regulation*.

Many of submissions suggested the *WHS Act* should be amended to provide for different courts and tribunals to be empowered to deal with particular matters, or for a new forum to be created to deal with certain matters under the WHS legislation. These submissions do not contain any compelling reason or sufficient evidence for the particular forums to be changed.

Unions and workers generally assert the functions of the District Court should be undertaken by the IRC, while professional, industry and employer associations generally agree the current functions of the District Court are appropriate. Some submissions also suggest the referral of certain functions to the FWC.

Any proposal to change the forum to deal with matters under the WHS legislation would be a matter for the Attorney General. It was also a decision of the Government in 2011 to confer concurrent jurisdiction on the District Court.

A comparison of disposal times between the Industrial Court and the District Court indicates an improvement in the time taken for matters to be determined since the change in legislation. This comparison is set out below:

### NSW District Court – Civil Disposal Times (NSW Total)

Within 12 months:

2013: 51%; 2014: 60%; 2015: 58%

Within 24 months:

2013: 87%, 2014: 90%, 2015: 88%

### Industrial Court – Time from commencement to finalisation (Prosecutions under OHS legislation)

Within 12 months:

2009: 59.1%, 2010: 30%, 2011: 47.5%, 2012: 31.8%

Within 24 months:

2009: 85.9%, 2010: 78%, 2011: 81.9%, 2012: 73.9%

Note: Due to the different ways the respective courts report, this comparison is of overall criminal cases in the District Court as opposed to OHS specific cases in the Industrial Court.

Improved disposal times give greater certainty to regulators, defendants and the victims of workplace incidents as well as their families. Accordingly, no change to the forums is necessary, at this time.

## **5.5 Summary of Codes of Practice**

The review also focused on the current NSW-specific Codes of Practice (Appendix 2). These were developed under the former NSW OHS laws, but were in force when the *WHS Act* commenced on 1 January 2012, and are now taken to have been made under the *WHS Act*.

They have been incorporated as part of the review as they have not been replaced by National Codes, there is no scheduled review mechanism in place and they cannot be varied or revoked without tripartite consultation.

A number of respondents submitted that 11 of the 20 NSW-specific Codes are still being used on a regular basis, with some Codes identified as needing to be updated. Some respondents submitted that parts of some of the Codes are unclear or confusing and cover the same subject matter as other guidance material. Some submissions also indicated there were some areas covered by the Codes where additional guidance was needed.

Further analysis of the submissions received will be undertaken by SafeWork NSW to determine what action (if any) is appropriate for each Code, and the priority for any further consultation or review.

## 6. Recommendations

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### **Recommendation 1**

The Government to consider amending the *WHS Act* to authorise extraterritorial application of the *WHS Act*, to the extent the State's legislative power allows, including to obtain records and issue notices outside of NSW.

### **Recommendation 2**

That the term "facsimile" be removed from the *WHS Act*.

### **Recommendation 3**

Amend section 166(1) of the *WHS Act* so reference to "section 165" is replaced with "section 163".

### **Recommendation 4**

Amend the *WHS Act* to permit the recording of interviews by the Regulators without consent, subject to the interviewee being given notice that his or her interview is being recorded.

### **Recommendation 5**

Consult with the Department of Justice to determine whether a reference to the Attorney General is required in section 230(5) of the *WHS Act*.

### **Recommendation 6**

Amend the *WHS Act* to clarify that penalty notices may be served electronically in accordance with the *Fines Act 1996*.

### **Recommendation 7**

Amend the *WHS Act* to address concerns raised by regulators about technical arguments regarding the validity of appointments and delegations in criminal proceedings, which detract from the substantive issues of the case, and delay and increase the cost of the proceedings.

### **Recommendation 8**

Undertake a review of the manner and form of stakeholder consultative mechanisms and, in consultation with key stakeholder organisations, develop a model for tripartite consultation.

### **Recommendation 9**

Amend the *WHS Regulation* to clarify the identity of duty holders for the storage and handling of certain dangerous goods, or for the operation or use of specified high risk plant affecting public safety, when not at a workplace or not used in carrying out work.

### **Recommendation 10**

- (i) Amend the *WHS Regulation* to authorise the Regulators to issue penalty notices for breaches of section 43 of the *WHS Act* 'requirements for authorisation of work'.
- (ii) Review the adequacy of the penalty notice amounts specified in the *WHS Regulation* and consider whether any other penalty notice offences should be introduced.

### **Recommendation 11**

Amend the *WHS Regulation* to allow for a new penalty notice offence for breaches of Part 4.4 of Chapter 4 of the *WHS Regulation* "Falls".



## 7. Appendices

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- Appendix 1 List of respondents who provided a submission to the statutory review via the public consultation process
- Appendix 2 The 20 pre-WHS Codes applicable in NSW under the current NSW WHS laws
- Appendix 3 Assessment methodology for public submissions
- Appendix 4 Indicative summary of comments on Discussion Paper questions to be forwarded to Safe Work Australia for consideration in the national review of the model WHS laws
- Appendix 5 Sources

***List of respondent who provided a submission to the statutory review via the public consultation process***

Below is a list of 32 of the 39 respondents who provided a submission to the statutory review via the public consultation process. There were seven submissions received that are to remain confidential at the request of the respondents, and have therefore not been listed below.

- Australasian Faculty of Occupational and Environmental Medicine
- Australian Industry Group
- Australian Manufacturing Workers Union
- Australian Meat Industry Council
- Australian Road Transport Industrial Organisation
- Australian Security Industry Association Ltd
- Civil Contractors Federation
- Norman Cook
- Federation of Hunting Clubs
- Rob Fisher
- Focused Quality Systems
- Game and Pest Management Advisory Board
- Health Services Union
- Housing Industry Association
- Laing O'Rourke
- Esa Laukka
- The Law Society of NSW
- Local Government NSW
- NSW Business Chamber
- NSW Department of Industry
- NSW Health
- NSW Minerals Council
- NSW Nurses and Midwives' Association
- NSW Teachers Federation
- Outdoor Media Association
- RnB Solutions
- Julian Richards
- Belinda Sinclair
- Shop, Distributive and Allied Employees' Association NSW Branch of the Shop Assistants and Warehouse Employees' Federation of Australia (Newcastle and Northern Branch)
- South East Timber Association
- Owen Thomas
- Unions NSW

***The 20 pre-WHS Codes applicable in NSW under the current NSW WHS laws***

- Amenity tree industry
- Cash in transit
- Collection of domestic waste
- Control of work-related exposure to hepatitis and HIV (blood-borne) viruses
- Cutting and drilling concrete and other masonry products
- Formwork
- Moving plant on construction sites
- Overhead protective structures
- Safe handling of timber preservatives and treated timber
- Safe use and storage of chemicals (including pesticides and herbicides) in agriculture
- Safe use of bulk solids containers and flatbed storage including silos, field bins and chaser bins
- Safe use of pesticides in non-agricultural workplaces
- Safe use of synthetic mineral fibres
- Safe work on roofs part 1 – commercial industrial
- Safety aspects in the design of bulk solids containers including silos, field bins and chaser bins
- Safety in forest harvesting operations
- Sawmilling industry
- Technical guidance
- Tunnels under construction
- Working near overhead power lines

### ***Assessment methodology for public submissions***

The public submissions were reviewed, analysed and summarised by categorising responses for each discussion paper question into one of ten group types as follows:

- Community Association
- Employer Association
- Government Representative
- Industry Association
- Large Business PCBU
- Medium Business PCBU
- Small Business PCBU
- Professional Association
- Union
- Worker

Categorising the responses in this way enabled key themes, differences and issues for the various group types to be identified and examined.

As the scope of the review was limited to the NSW-specific provisions of the *WHS Act* and *WHS Regulation*, analysis of each submission was undertaken against the provisions of both the NSW WHS legislation and the model laws, to determine whether it was within scope of the review, partially within scope or out of scope of the review.

Consideration was also given as to whether the content of some submissions should be forwarded to one or both of the NSW WHS Regulators for information and/or consideration of operational solutions or interventions.

The following was taken into consideration when determining the draft recommendations for submissions that were assessed as being within the review scope:

- The number of submissions that commented on each question;
- The number of submissions responding positively or negatively to each question;
- The group type and/or author of the submission;
- Information and advice from the WHS Act Statutory Review Steering Committee, DFSI Legal and the WHS Regulators in relation to particular issues/submission content; and
- The principles for Better Regulation.

### ***Assessment methodology for matters raised for consideration by the WHS Regulators***

Matters raised for consideration by the Regulators were reviewed against the provisions of both the NSW WHS legislation and the model laws, to determine whether or not they were within scope of the review.

The following were also taken into consideration for those matters within scope of the review:

- Reasons provided by the Regulators for consideration of the matter;
- Whether or not public submissions had been received relating to the same matter;
- Information and advice from the WHS Act Statutory Review Steering Committee in relation to matters raised;
- Whether or not proposed recommendations constituted a “material departure” from the model laws and whether or not consultation with the appropriate Commonwealth body would be required;
- Alignment with the “*Work Health and Safety Roadmap for NSW 2022*” and the SafeWork NSW document “Our approach to work health and safety regulation”; and
- The principles for Better Regulation.

***Indicative summary of comments on Discussion Paper questions to be forwarded to Safe Work Australia for consideration in the national review of the model WHS laws***

**The *WHS Act* Part 1 - Preliminary**

Many suggestions were received on enhancements that could be made to the objects of the *WHS Act*. These included simplifying the objects, highlighting physical and psychological risks, the need to eliminate high consequence risks, and establishing tripartite oversight.

Many submissions indicated the terms of the *WHS Act* could be improved to achieve the stated objectives in such ways as evaluating the term “reasonably practicable”, highlighting physical and psychological risks, strengthening consultation with workers, focusing on violence, bullying and harassment, increasing emphasis on risk management and providing clearer definitions of the role of PCBUs.

Suggestions were also provided on how the objectives of the *WHS Act* could be achieved in ways that reduce costs for business. These included consideration of further participation by unions, the objectives being amended to be less restrictive towards innovation, and emphasising reduction of paperwork.

While submissions indicated section 4 of the *WHS Act* is working effectively, it was suggested the definitions be expanded to include psychological illness and psychosocial risks. In addition, some recommended further clarification of PCBUs and voluntary organisations and the expansion of the classification of medical treatment to include treatment by other registered health practitioners.

One submission further suggested the strict liability provision should be amended to include a two tiered strict liability regime for natural persons and corporations with health and safety duties, implementing a reverse onus defence for corporations.

**The *WHS Act* Part 6 – Discriminatory, coercive and misleading conduct**

One submission proposed adding a note to section 108 of the *WHS Act* to clarify consultation requirements are reduced where there is a need to conduct an emergency operation.

**The *WHS Act* Part 7 – Workplace entry by WHS Entry Permit Holders**

A submission suggested an amendment to section 82 of the *WHS Act* would enable the IRC to handle health and safety compliance disputes.

**The *WHS Act* Part 12 – Review of Decisions**

One submission maintained it would be beneficial if the 2018 review of the model WHS laws considered how the various nominated bodies manage these reviews, and if it was found a particular type of jurisdiction gave the best outcomes, it could be recommended that jurisdictions adopt a consistent approach.

**The *WHS Act* Part 14 – General**

One Submission indicated a preference to amend the *WHS Act* to enable the Regulator to enforce provisions within the entire supply chain, especially in circumstances where a task has been contracted out or sub-contracted, to enable principal contractors to reduce their responsibility at the expense of smaller companies. It was also suggested a provision should prohibit detriment against a small business from a principal contractor for adhering to or attempting to improve WHS at work.

Several concerns were also raised in relation to enhancement of harmonisation, mutual recognition of interstate health and safety representatives and entry permit holder training, greater clarification of the term PCBU, and legislating a power for unions to take photographs and videos as part of an investigation.

One submission further identified the need for greater consistency between jurisdictions, especially in the regulation of working at heights. It was also suggested Safe Work Australia evaluate the efficacy of State Regulator responses to various WHS scenarios.

#### **The *WHS Regulation* Chapter 1 - Preliminary**

Submissions made comments on the need to consider the relationship between members of community boards and employees, WHS requirements for owners of assets once construction has been completed, and expanding the definition of asbestos removal work.

A submission further recommended the current dangerous goods risk control provisions should mirror the former national dangerous goods standard and code of practice, as found in the previous *OHS 2001*.

#### **The *WHS Regulation* Chapter 5 – Plant and Structures**

A submission indicated NSW did not appear to be addressing the intent of the jurisdictional note in clause 235, as references to professional organisations refer to membership of national organisations. It was noted NSW was not the only jurisdiction to have taken this approach and as such the submission recommended this issue be considered by Safe Work Australia during the 2018 review of the model WHS laws.

#### **The *WHS Regulation* Chapter 8 – Asbestos**

One submission supported by four others raised concerns regarding a gap in the legislation that creates a regulatory and financial incentive to dump asbestos. This submission suggested amending clauses 419 and 452 of the *WHS Regulation* to ensure asbestos removal work is only carried out by licensed asbestos removalists and/or transported by licenced transport workers.

## Sources

- *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (2008)
- Department of Finance, Services and Innovation, *Statutory review of the Work Health and Safety Act 2011 discussion paper*, (2016)
- *Work Health and Safety Bill 2011 Second Reading Speech* (2011)
- Department of Finance, Services and Innovation, *NSW Guide to Better Regulation* (2016)
- SafeWork NSW, *Work Health and Safety Roadmap for NSW 2022* (2016)
- *Productivity Commission, Impacts of COAG Reforms: Research Report* (2012)
- *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384,408 (Brennan CJ, Dawson, Toohey and Gummow HH)
- *Lacey v Attorney-General (QLD)* (2011) 242, 592 [44] (French CJ, Gummow, Hayen, Crennan, Kiefal and Bell JJ)
- *Carr v Western Australia* (2007) 232 CLR 138 [5]
- SafeWork NSW, *Our approach to work health and safety regulation* (2016)