

**CONSULTATION
REGULATION IMPACT
STATEMENT - 2018
REVIEW OF THE MODEL
WORK HEALTH AND
SAFETY LAWS**

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NSW MINERALS COUNCIL



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Contents

1	Executive Summary	4
2	Recommendations	5
3	Recommendation 2: Make regulations dealing with psychological health	7
4	Recommendation 7a: New arrangements for HSRs and work groups in small businesses.....	9
5	Recommendation 8: Clarify workplace entry of union officials providing assistance to an HSR.....	10
6	Recommendation 9: Inspectors to deal with safety issue when cancelling a PIN	12
7	Recommendation 10: HSR choice of training course	13
8	Recommendation 13: Resolving outstanding disputes after 48 hours	14
9	Recommendation 15: Remove 24 hour notice period for entry permit holders..	15
10	Recommendation 17: Production of documents and answers to questions	16
11	The Category 1 offence and industrial manslaughter.....	18
12	Recommendation 26: Prohibit insurance for WHS fines	22
13	Recommendation 27: Clarify the risk management process in the model WHS Act.....	23
14	Safe Work Method Statements	24
15	Other recommendations.....	25
15.1	Recommendation 6: Provide practical examples of how to consult with workers	25
15.2	Recommendation 18: Clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the Model WHS laws outside of their jurisdiction	25
15.3	Recommendation 19: Enable cross-border information sharing between regulators..	25
15.4	Recommendation 20: Review incident notification provisions	26
15.5	Recommendation 21: Review National Compliance and Enforcement Policy	27
15.6	Recommendation 25: Consistent Approach to sentencing.....	27

1 Executive Summary

NSW Minerals Council (NSWMC) welcomes the opportunity to provide feedback on the Consultation Regulation Impact Statement (RIS) - Recommendations of the 2018 Review of the Model Work Health and Safety Laws (the 2018 Review).

NSWMC represents the State's \$27.3 billion mining industry. Work health and safety (WHS) is the number one priority of the minerals industry in NSW. A risk based, aligned and consistent legislative framework is important to delivering practical WHS outcomes.

While the model WHS laws go some way to achieving these outcomes, there remain a number of areas that could be amended to improve fairness, practicality and overall effectiveness of the laws.

The NSW mining industry operates under a tripartite WHS model in partnership with Government and unions. From an industry perspective, this has historically worked well and created a respectful, open relationship among the stakeholders to deliver strong WHS outcomes. This model is driven through the Mine Safety Advisory Council (MSAC) which reports to the Minister for Resources.

While this structure still exists, industry has observed a shift away from a collaborative approach towards a focussed compliance and enforcement regulatory model. This approach jeopardises the relationships developed through MSAC and can inadvertently shift the focus away from practically managing risk and proactively improving WHS performance.

As such, NSWMC advocates for an outcomes based, collaborative regulatory approach that is not litigiously focussed.

NSWMC encourages Safe Work Australia (SWA) to consider the merits of this approach along with the following key areas of concern:

- Recklessness is the appropriate criminal standard for Category 1 offences under s31 of the model WHS Act.
- Industrial manslaughter provisions are unnecessary and, would not improve safety outcomes. The industrial manslaughter offences overlap with the "traditional" manslaughter offences, which remain available under existing criminal legislation.
- Given the dynamic nature of the area of psychological health, it is more appropriate that information sits in guidance so that improvements can readily and swiftly be implemented.
- The Model WHS Act should be amended to clarify that if an HSR seeks assistance from a person, and that person is a union official, then he or she must hold a right of entry permit under the *Fair Work Act 2009* (Cth) and a WHS entry permit before clause 70 of the Model WHS Act will have the effect of requiring that the PCBU allow them access to a workplace.
- There is no logical justification for allowing HSRs to choose training under section 72 in circumstances where the general duty is on the PCBU to provide training in all other areas.
- The concept of 'reasonable practicability' should be applied universally in relation to all duties and obligations applicable to PCBUs under the Model WHS Act. Similarly, a suitable standard based on 'reasonableness' (whether positioned as a qualification or defence) should universally apply to all duties applicable to individual duty holders.

This submission sets out NSWMC's responses to the 12 recommendations highlighted in the RIS and answers the questions of relevance to the NSW mining industry. The submission also covers additional recommendations which the RIS viewed as likely to have nil or minor impacts but which NSWMC believe potentially will have a high impact on the mining industry. NSWMC welcomes ongoing engagement in the review.

2 Recommendations

1. NSWMC does not support Recommendation 23a to enhance the Category 1 offence. Recklessness is the appropriate criminal standard for Category 1 offences under s 31 of the model WHS Act.
2. An industrial manslaughter offence should not be introduced into the model WHS Act as it is already adequately addressed under local criminal laws and manslaughter offences.
3. NSWMC does not support the amendment of the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks. Given the dynamic nature of the area of psychological health, it is more appropriate that information sits in guidance so that improvements can readily and swiftly be implemented.
4. The Model WHS Act should be amended to clarify that if an HSR seeks assistance from a person, and that person is a union official, then he or she must hold a right of entry permit under the *Fair Work Act 2009* (Cth) and a WHS entry permit before clause 70 of the Model WHS Act will have the effect of requiring that the PCBU allow them access to a workplace.
5. NSWMC is of the view that it is not necessary to mandate that where a PIN is cancelled for technical reasons the underlying safety issue must be resolved in accordance with section 82 of the Model WHS Act. The inspector has the ability to confirm the PIN with changes.

However, if the model WHS Act was amended to provide that, if an inspector cancels a PIN for technical reasons under s 102 of the model WHS Act, the safety issue which led to the issuing of the PIN must be dealt with by the inspector under s 82 of the model WHS Act, appropriate provisions should be included to allow for a review mechanism for the inspector's decision.
6. There is no logical justification for allowing HSRs to choose training under section 72 in circumstances where the general duty is on the PCBU to provide training in all other areas.
7. NSWMC does not provide support for disputes under ss 82 and 89 of the model WHS Act to be referred to the relevant court or tribunal in a jurisdiction if the dispute remains unresolved 48 hours after an inspector is requested to assist with resolving disputes.

However, if any amendments were to be made to the model WHS Act to provide for disputes under ss 82 and 89 of the model WHS Act to be referred to the relevant court or tribunal in a jurisdiction if the dispute remains unresolved 48 hours after an inspector is requested to assist with resolving disputes there should be included a mechanism to "stay" any stop work decision in a similar way to the "stay" of a reviewable decision where internal review is sought under section 228 of the WHS Act.
8. The requirement in section 117(5) of the WHS Act for at least 24 hours' notice to be provided when a WHS entry permit holder is exercising an entry to inquire into suspected contraventions should be retained.
9. NSWMC does not oppose the recommendation to provide the ability for inspectors to require production of documents and answers to questions after the day they or another inspector enter a workplace, however are of the view that 7 days (rather than 30 days) is a more reasonable length or time in which to extend the ability. Additionally, the following protections should be provided for:
 - reasonable time to comply with the requirements in the notices.
 - protections should be considered against multiple and duplicative requests for information from multiple inspectors. As a general rule, a single inspector should handle all requests.

- protections against incrimination should be extended during the 7 days period.
 - any requests under the exercise of the power within the 7 days should be in a prescribed form that clearly identifies the request as connected to the initial entry, specify that documents and answers are being sought under the provisions and protections against incrimination apply.
10. It is recommended that it be a requirement that inspectors are trained on their powers to issue notices to address the variation in the knowledge of inspectors on the processes of issuing notices and the protections available when responding to compelled requests for information/documents.
 11. NSWMC supports Recommendation 27 so long as the qualification of 'so far as is reasonably practicable' is applied. Further, the concept of 'reasonable practicability' should be applied universally in relation to all duties and obligations applicable to PCBU's under the Model WHS Act. Similarly, a suitable standard based on 'reasonableness' (whether positioned as a qualification or defence) should universally apply to all duties applicable to individual duty holders.
 12. NSWMC does not support the introduction of a prescribed SWMS template. The PCBU should retain the ability under their general risk management framework to determine when SWMSs are required and what should be included within.
 13. Any amendments to the model Code of Practice: Work health and safety consultation, co-operation and co-ordination to provide practical examples of how to consult with workers will need to be carefully drafted to ensure they do not reduce flexibility in the way in which consultation can occur.
 14. Any proposed clarification that WHS regulators can obtain information relevant to investigations of potential breaches of the Model WHS laws outside of their jurisdiction or enabling cross-border information sharing between regulators, will require careful consideration to ensure protections existing in other jurisdictions are not inadvertently circumvented.

Additionally, the scope of an inspector's powers should be limited so as to facilitate reasonable searches for information, evidence and documents that are relevant to a particular incident, whilst limiting the potential for onerous requests for information, evidence and documents that are not directly relevant.
 15. Any proposals to include a trigger for the notification of psychological injuries will require detailed consideration to assess the operational impact of any proposed notification.
 16. The inclusion of any proposed decision-making frameworks to the National Compliance and Enforcement Policy will require careful assessment to verify that any framework is balanced and allows for an appropriate consideration of a range of enforcement options (where these are appropriate in the circumstances).
 17. NSWMC does not consider the introduction of sentencing guidelines to be necessary. The judiciary is well-equipped to determine the appropriate quantum of penalties on a case-by-case basis.

3 Recommendation 2: Make regulations dealing with psychological health

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

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

NSWMC supports maintaining the status quo.

As explained in the RIS, under section 17 of the model WHS Act the duty to ensure health and safety requires the PCBU to eliminate risks, so far as is reasonably practicable. The definition of ‘health’ in the model WHS Act makes clear that health includes psychological health. If it is not reasonably practicable to eliminate risks, the PCBU must minimise those risks, so far as is reasonably practicable.

Maintaining the status quo allows businesses flexibility in how they can manage risks to achieve the best outcome for their workplace. Given the dynamic nature of the area of psychological health, it is more appropriate that information sits in guidance so that improvements can readily and swiftly be implemented. As noted in the RIS, in the last year alone, there has been a significant increase in the information available to assist duty holders to comply with their obligations and to create mentally safe workplaces. Other available resources include MATES in Mining, Lifeline, Beyond Blue, the Mentally Healthy Workplace Alliance, Black Dog Institute and MCA Blueprint for Mental Health and Wellbeing.

NSWMC member organisations manage psychological risks through their risk-based processes, including use of the existing resources. Investing in the promotion of existing guidance would provide a better solution to the issues identified by the 2018 Review in relation to psychological risks than amending the WHS Regulations to include prescriptive regulations on psychological risks.

It is noted that Recommendation 2 makes reference to psychological “injury” – this conveys the impression of an acute or one off occurrence rather than a word such as “illness” which is typically associated with psychological issues and conveys something longer term. It is unclear whether this was the intention and psychological injuries are intended to be dealt with and control measures implemented in a similar way to other injuries. This lack of clarity provides further support to dealing with psychological risks in guidance rather than the WHS Regulations.

Do you have suggestions for what prescriptive psychosocial regulations might look like?

In the event any regulations were to be introduced, the detail of any proposed regulations would need to be understood in order to assess the impact that they may have. In particular, an assessment would be required of whether any proposed regulations are unduly prescriptive and potentially restrict innovation and flexibility in the way in which psychological risks are eliminated or minimised by duty holders. As acknowledged in the RIS, prescriptive regulations may prevent PCBUs from implementing innovative and more effective control measures as the state of knowledge improves, resulting in unnecessary regulatory burden.

The nature and complexity of psychological health means that a range of contributing factors may be outside the workplace, and outside the ability of duty-holders to both control and assess. Any alternative regulation would need to recognise the difficulty in assessing this hazard, the role of risks outside the workplace, and the limits of a duty-holder’s control – and accordingly that any alternative regulation not be unduly prescriptive.

However, as discussed above, NSWMC's position is that given the dynamic nature of the area of psychological health, it is more appropriate that information sits in guidance. If a decision is made to implement prescriptive regulations, NSWMC would appreciate the opportunity to comment further on the nature of such regulations.

Recommendations

- NSWMC does not support the amendment of the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks. Given the dynamic nature of the area of psychological health, it is more appropriate that information sits in guidance so that improvements can readily and swiftly be implemented.

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

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

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

NSWMC supports this recommendation to ensure that worker representation is not unduly complex or burdensome.

5 Recommendation 8: Clarify workplace entry of union officials providing assistance to an HSR

Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the *Fair Work Act 2009* (Cth) or another industrial law.

What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

If Recommendation 8 were to be adopted there is potential that HSRs could take advice from people who are not appropriately qualified. The impact of this includes:

- Potential creation of, or failure to address, safety issues.
- Disruption and disturbance to business operations.
- Costs associated with productivity loss.
- Diversion of resources away from real safety issues.

Is it important that appropriate safeguards are in place to verify that persons providing assistance to HSRs are appropriate persons and a framework exists to ensure this is the case.

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

NSWMC supports maintaining the status quo.

There are no compelling reasons why the interpretation of the Full Court in *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89 should be varied by legislative change. In particular, there is no justification for varying the finding that:

“There is no reason of policy or common sense why one would distinguish between differently worded conditions that by their operation provided a right to enter premises for occupational health and safety reasons, to require a permit if the official has a reasonable suspicion of a contravention of a State or Territory or Commonwealth law about occupational health and safety, but not to require a permit if the official is asked to assist an [HSR] deal with an issue about occupational health and safety, which may or may not have a connection with such a contravention.”¹

If any proposed amendments were to be considered, it will be necessary to consider the safeguards that are put in place to verify that persons providing assistance to HSR are appropriate persons and that there is a mechanism to raise concerns regarding inappropriate behaviour by persons assisting HSRs.

Safeguards will also need to be considered to allow a PCBU to deny entry in circumstances where the person assisting the HSR does not have sufficient knowledge of WHS matters to assist the HSR.²

¹ *Powell* per Allsop CJ, White and O’Callaghan JJ at [57].

² See for example section 70(1) of the *Occupational Health and Safety Act 2004* (Vic) which provides that a person assisting a HSR must be permitted to access the workplace “unless the employer

The safeguards to prevent potential for misuse of the provisions would also require careful review. This will include safeguards against misuse to facilitate entry of persons that have previously been disqualified from holding a permit or whom have had a permit suspended or revoked. These protections are currently provided in section 71(4) of the WHS Act and the notice requirements in clause 20A(2) of the WHS Regulations. Any proposed amendments must be considered so that there is not a circumvention of these exceptions from the obligation to permit access to a person assisting a HSR.

A preferred option is that the Model WHS Act be amended to clarify that if an HSR seeks assistance from a person, and that person is a union official, then he or she must hold a right of entry permit under the *Fair Work Act 2009* (Cth) and a WHS entry permit before clause 70 of the Model WHS Act will have the effect of requiring that the PCBU allow them access to a workplace.

There are both policy and practical drivers for such a change. At a level of policy, the regime for the issue of entry permits is an important safeguard to ensure that where WHS laws limit employers' right to determine who enters their premises, union officials exercise their rights responsibly and for proper purposes. It is not appropriate that this protection can potentially be evaded by the mechanism of HSRs requesting assistance from union officials and asserting a right to enter the workplace in that capacity, in circumstances where an official would otherwise require a WHS entry permit to gain access.

At a practical level, an amendment of the kind described above would allow the Model WHS Act to operate more harmoniously with the law as it stands following *Australian Building and Construction Commissioner v Powell* (2017) 251 FCR 470; [2017] FCAFC 89. Expressly providing in the Model WHS Act that union officials who assist HSRs must hold a federal permit will assist in ensuring that they can readily know all of the requirements which apply.

It is noted that HSRs have qualifications that they have obtained through training and additionally, as a worker, also have the option of seeking the assistance of the regulator. Inspectors are appropriately qualified and can provide technical assistance. The powers inspectors have been granted under WHS Laws make them the best placed to assist with the resolution of WHS issues and achieve safety outcomes.

Recommendations

- The Model WHS Act should be amended to clarify that if an HSR seeks assistance from a person, and that person is a union official, then he or she must hold a right of entry permit under the *Fair Work Act 2009* (Cth) and a WHS entry permit before clause 70 of the Model WHS Act will have the effect of requiring that the PCBU allow them access to a workplace.

considers that the person is not a suitable person to assist the representative because of insufficient knowledge of occupational health and safety”.

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

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

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

It is not necessary to mandate that where a PIN is cancelled the issue must be resolved in accordance with section 82 of the Model WHS Act as:

- The power of an inspector to confirm the PIN with changes (section 102(1)(b) of the Model WHS Act) provides a mechanism to resolve technical errors in a PIN.
- Where there are grounds to issue a PIN (i.e. because the PCBU is contravening or has contravened the Model WHS Act) the inspector has sufficient expertise and discretion to confirm the PIN, issue an improvement notice or issue a prohibition notice.

Where no action is taken by the inspector following the cancellation of a PIN it seems self-evident that the belief that the person who issued the PIN had in relation to the contravention is unfounded because otherwise the inspector would take some action which would seek to remedy the contravention.

Section 82 of the WHS Act is about referral of an issue to the regulator for resolution by an inspector and allows an inspector to exercise any of the inspector's compliance powers under the WHS Act in relation to the workplace once they have attended the workplace.

If this recommendation were to be adopted consideration will need to be given to the extent to which any proposed provisions will interact with the decisions which are "reviewable decisions" under section 223 of the WHS Act to allow for an appropriate review mechanism of an inspector dealing with an issue referred to them under section 82 of the WHS Act. This will provide for the ability to review the reasons the inspector chose to cancel the PIN.

Recommendations

- NSWMC is of the view that it is not necessary to mandate that where a PIN is cancelled for technical reasons the underlying safety issue must be resolved in accordance with section 82 of the Model WHS Act. The inspector has the ability to confirm the PIN with changes.
However, if the model WHS Act was amended to provide that, if an inspector cancels a PIN for technical reasons under s 102 of the model WHS Act, the safety issue which led to the issuing of the PIN must be dealt with by the inspector under s 82 of the model WHS Act, appropriate provisions should be included to allow for a review mechanism for the inspector's decision.

7 Recommendation 10: HSR choice of training course

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

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

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

NSWMC supports maintaining the status quo.

An element of the general duty of a PCBU under section 19(3)(f) of the WHS Act is:

“the provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the conduct of the business or undertaking.”

There is no logical justification for allowing HSRs to choose training under section 72 in circumstances where the general duty is on the PCBU to provide training in all other areas (where a worker does not have a right to select the training course).

Further, there is a risk that a course chosen by HSRs may not be appropriately scheduled to meet operational requirements or not cover content that the PCBU has identified as necessary to enable the PCBU to meet its duties. The PCBU who pays for the training will want to be satisfied that the training meets the required criteria and standards, as well as representing appropriate value for money without compromising training capability. The PCBU may want to integrate the training into their existing learning program.

Recommendations

- There is no logical justification for allowing HSRs to choose training under section 72 in circumstances where the general duty is on the PCBU to provide training in all other areas.

8 Recommendation 13: Resolving outstanding disputes after 48 hours

Amend the model WHS Act to provide for:

- a) disputes under ss 82 and 89 of the model WHS Act to be referred to the relevant court or tribunal in a jurisdiction if the dispute remains unresolved 48 hours after an inspector is requested to assist with resolving disputes
- b) a PCBU, a worker, an HSR affected by the dispute or any party to the dispute to notify the court or tribunal of the unresolved issue they wish to be heard
- c) the ability for a court or tribunal to exercise any of its powers (including arbitration, conciliation or dismissing a matter) to settle the dispute, and
- d) appeal rights from decisions of the court or tribunal to apply in the normal way.

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

NSWMC supports maintaining the status quo.

An object of s3(1)(b) of the model WHS Act is:

“providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety”

Any steps which seek to refer a dispute to a court or tribunal may be inconsistent with the objective of effective (being quick and uncostly) resolution of disputes. The referral of matters to a court or tribunal is typically an option of last resort due to the cost, time and effort involved in legal proceedings. Whilst legal proceedings may be appropriate in some circumstances, the majority of disputes ought be dealt with outside of a court or tribunal to facilitate the efficient resolution of disputes in accordance with the objects of the Model WHS Act.

If any proposed changes are considered, an issue that should be considered is that any proposed amendments provide a mechanism to “stay” any stop work decision in a similar way to the “stay” of a reviewable decision where internal review is sought under section 228 of the WHS Act. This will prevent disruption occurring and allow for production to continue until a decision is determined.

Recommendations

- NSWMC does not provide support for disputes under ss 82 and 89 of the model WHS Act to be referred to the relevant court or tribunal in a jurisdiction if the dispute remains unresolved 48 hours after an inspector is requested to assist with resolving disputes. However, if any amendments were to be made to the model WHS Act to provide for disputes under ss 82 and 89 of the model WHS Act to be referred to the relevant court or tribunal in a jurisdiction if the dispute remains unresolved 48 hours after an inspector is requested to assist with resolving disputes there should be included a mechanism to “stay” any stop work decision in a similar way to the “stay” of a reviewable decision where internal review is sought under section 228 of the WHS Act.

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

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

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

NSWMC supports maintaining the status quo.

The requirement in section 117(5) of the WHS Act for at least 24 hours' notice to be provided when exercising an entry to inquire into suspected contraventions has not been adopted in any jurisdiction. However, the justification for the inclusion of this requirement set out in the 2014 review of the WHS Act are matters which remain valid. In particular, any amendment to the notice period should seek to address:

- The scope for abuse by union officials to use the lack of notice as potential means of inappropriate access to workplaces.
- Unexpected disruption to business operations, and associated loss of productivity and increased production costs, from union officials entering workplaces for alleged WHS purposes and interrupting scheduled work.
- Confusion among employers associated with inconsistency in notice periods across different types of entry by permit holders (i.e. the difference between entry to consult and advise workers and entry to inquire into suspected contraventions).
- The inability of employers and workers to take full advantage of the range of provisions in the WHS Act to resolve safety concerns without third party intervention, including through consultation, issue resolution and HSRs, which may otherwise be not be exhausted prior to a WHS entry permit holder entering a workplace the purpose of inquiring into a suspected contravention of this Act.³

Furthermore, it is unnecessary to remove the 24 hour notice period because:

- Inspectors are typically available on a 24 hour basis through a roster system. The powers afforded to regulators under the Model WHS Act indicate that the regulator is best placed to assist with the resolution of WHS issues and achieve safety outcomes. Workers have the ability to directly engage with the regulator to seek satisfaction on an unresolved WHS issue through regulators' safety hotlines and other communication methods.
- The Model WHS Act provides that workers themselves have the right to cease unsafe work under section 84.

Recommendations

- The requirement in section 117(5) of the WHS Act for at least 24 hours' notice to be provided when a WHS entry permit holder is exercising an entry to inquire into suspected contraventions should be retained.

³ Decision Regulation Impact Statement, Improving the model Work Health and Safety Laws, December 2014, p. 10, https://ris.pmc.gov.au/sites/default/files/posts/2017/01/decision_ris.pdf

10 Recommendation 17: Production of documents and answers to questions

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

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

While NSWMC does not oppose this recommendation, if this recommendation is to be adopted, appropriate protections should be considered to provide persons served with notices reasonable time to comply with the requirements in the notices. Further, protections should be considered against multiple and duplicative requests for information from multiple inspectors. Consideration should be given to a requirement that, as a general rule, a single inspector handle all requests for consistency and clarity, with deviations from this general rule only for justified exceptions.

The industry is supportive of a collaborative framework to resolving health and safety issues and acknowledges there may be times when inspectors require additional documents and answers following entry to a workplace. However, 7 days (rather than 30 days) should be a sufficient time in which to require the production of documents and answers and provides a more reasonable timeframe on how long to extend the inspector's powers under section 171. Section 155 of the WHS Act is available to the regulator to obtain information where the regulator has reasonable grounds to believe that a person is capable of giving information, providing documents or giving evidence in relation to a possible contravention of the WHS Act or that will assist the regulator to monitor or enforce compliance with the WHS Act. Providing 7 days will allow sufficient time for the regulator to develop reasonable grounds to believe that a person is capable of giving information, providing documents or giving evidence and hence if further documents or answers are required, they can be obtained using section 155.

It should be made clear that the protections and safeguards against incrimination should be extended during the 7 day period. Any requests under the exercise of the power within the 7 days should be in a prescribed form and clearly identify the request as connected to the initial entry.

It is recommended that it be a requirement that inspectors are trained on their powers to issue notices to address the variation in the knowledge of inspectors on the processes of issuing notices and the protections available when responding to compelled requests for information/documents.

If Option 2 is adopted, should exercise of the power within 30-days after entry by an inspector be limited to only obtaining information that is related to the reason that inspector first entered the workplace?

Yes. There is no justification in providing for the obtaining of information that is unrelated to the reason that the inspector first entered the workplace. Without this limitation the power becomes unfettered and overly broad.

Recommendations

- NSWMC does not oppose the recommendation to provide the ability for inspectors to require production of documents and answers to questions after the day they or another inspector enter a workplace, however are of the view that 7 days (rather than 30 days) is a more reasonable length or time in which to extend the ability. Additionally, the following protections should be provided for:

- reasonable time to comply with the requirements in the notices.
- protections should be considered against multiple and duplicative requests for information from multiple inspectors. As a general rule, a single inspector should handle all requests.
- protections against incrimination should be extended during the 7 days period.
- any requests under the exercise of the power within the 7 days should be in a prescribed form that clearly identifies the request as connected to the initial entry, specify that documents and answers are being sought under the provisions and protections against incrimination apply.
- It is recommended that it be a requirement that inspectors are trained on their powers to issue notices to address the variation in the knowledge of inspectors on the processes of issuing notices and the protections available when responding to compelled requests for information/documents.

11 The Category 1 offence and industrial manslaughter

Recommendation 23a: Enhance Category 1 offence

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

Recommendation 23b: Industrial Manslaughter

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

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

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

What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

Adoption of Recommendations 23a and 23b would lower the bar on the criminal standard for a Category 1 offence and introduce a new offence of industrial manslaughter. The impact of this on the mining industry includes:

- Increasing the difficulty of attracting appropriately qualified people to the industry. This is already a challenge with mining being a high hazard industry. The lowering of the bar for culpability of offences would exacerbate this.
- The NSW mining industry operates under a tripartite WHS model in partnership with Government and unions. From an industry perspective, this has historically worked well and created a respectful, open relationship among the stakeholders to deliver strong WHS outcomes and a collaborative approach to share learnings. Lowering the threshold for a Category 1 offence to gross negligence and introducing industrial manslaughter will be counterproductive to the collaborative approach as it will encourage the adoption of defensive legal strategies and hinder the sharing of learnings.

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

NSWMC strongly supports maintaining the status quo.

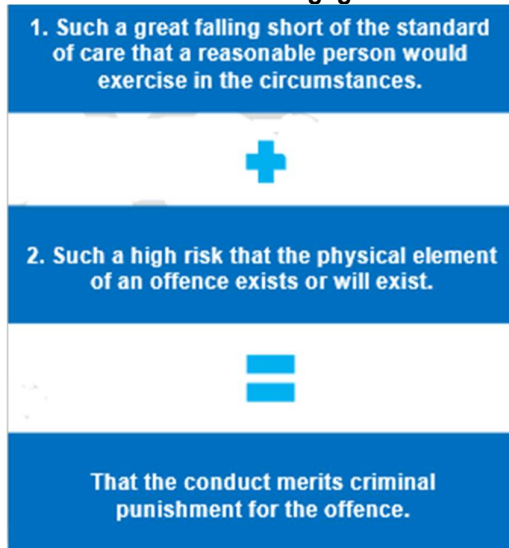
Recommendation 23a: Enhance Category 1 offence

The recommendation appears to propose that the criminal standard at which a Category 1 offence may be committed be lowered. NSWMC's position is that recklessness remains the appropriate test for a Category 1 offence.

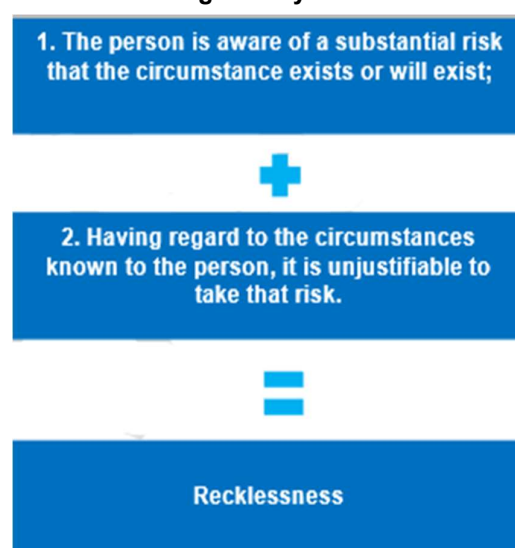
Whilst not consistent between the jurisdictions, the offences of gross negligence and recklessness may, at a high level, be summarised as:

- **Gross negligence:** A departure from the standard of care a reasonable person would exercise as to merit criminal punishment (e.g. Criminal Code (Cth) s 5.5). It is an assessment of the defendant's conduct, rather than their thinking. It is an objective test.
- **Recklessness:** Has a subjective element to it which directs attention to the defendant's knowledge. In the Criminal Code (Cth), a person is reckless as to a result if they are aware of a substantial risk that the result will occur, and that having regard to the circumstances known to the person, it is unjustifiable to take the risk.

Threshold for criminal negligence



Factors dictating liability in recklessness



The area is complex because the criminal laws are not consistent across the jurisdictions. For the purposes of the general criminal law the jurisdictions can be grouped in to:

- The common law jurisdictions: Victoria; New South Wales; and South Australia.
- The “traditional code jurisdictions”: Queensland; Western Australia; and Tasmania.
- The “modern code jurisdictions”: the Commonwealth; Australian Capital Territory and the Northern Territory.

The RIS acknowledges the Workplace Relations Ministers’ Council did not accept the recommendation made by the 2008 review into model occupational health and safety laws that cases of very high culpability should involve gross negligence. The reason for not accepting this recommendation was that:

“‘gross negligence’ offences should be dealt with outside the model Act as they would otherwise cut across local criminal laws and manslaughter offences.”

NSWMC agrees with the assessment of the Workplace Relations Ministers’ Council.

If there were to be any proposals to amend the WHS Act to include an offence of gross negligence it would require detailed analysis as to how the proposed offence will interact with state and territory laws. In particular, because offences of “gross negligence” and “recklessness” are not consistent

across all jurisdictions and clarity must be obtained as to how jurisdictional variations will be managed. Consideration should also be given to whether other options may be preferable e.g. expressing the nature of an offence in the WHS Act as opposed to relying on concepts of criminal law that are complex, vary between jurisdictions and are potentially not well understood by duty holders.

An example of how the requirements of the offence may be expressed within the drafting of the provisions is provided by s. 318 of the *Crimes Act 1958* (Vic), which relates to culpable driving causing death.

“(2) For the purposes of subsection (1) a person drives a motor vehicle culpably if he drives the motor vehicle—

(a) recklessly, that is to say, if he consciously and unjustifiably disregards a substantial risk that the death of another person or the infliction of grievous bodily harm upon another person may result from his driving; or

(b) negligently, that is to say, if he fails unjustifiably and to a gross degree to observe the standard of care which a reasonable man would have observed in all the circumstances of the case”

The 2018 Review considered there is a risk that the threshold to prove the fault element of recklessness is too high, and thus difficult to establish and there are limitations to dealing with work-related deaths through general manslaughter offences in the criminal law. However recent prosecutions under the Category 1 offence include:

- The decision of the District Court in *Stephen James Orr v Cudal Lime Products Pty Ltd; Stephen James Orr v Simon Shannon* [2018] NSWDC 27 where Cudal Lime Products Pty Ltd was fined \$900,000 after pleading guilty following the death of a worker's *de facto* partner who was electrocuted when she came into contact with a metallic flexible shower hose in the cottage they lived in 200m from the mine. Electricity was supplied to the mine and the nearby cottage through the same system. The metallic fixtures of the cottage were dangerously electrified as a result of a fault in the low voltage system of the mine which transferred to the cottage via the cable supply between the mine and the electrical sub-board of the cottage. This incident occurred after a series of electrical faults at the mine over the course of many years.
- In February 2019, Mr Lavin was found guilty by a Queensland District Court jury following the death of Whareheepa Te Amo who fell almost six metres to his death while working on the edge of a roof without protection. During the week-long trial, jurors were told Mr Lavin had chosen not to erect safety rails at the site to save money. The court heard Mr Lavin and his workers had agreed to use safety harnesses and two scissor-lifts instead, but they were not used by the workers on the day of the incident. Mr Lavin was sentenced to one year in prison to be suspended after spending four months in custody, and his company was fined \$1 million, to be paid within six months. The conviction was later quashed, and a retrial ordered.

Recommendations

- NSWMC does not support Recommendation 23a to enhance the Category 1 offence. Recklessness is the appropriate criminal standard for Category 1 offences under s 31 of the model WHS Act.

Recommendation 23b: Industrial Manslaughter

NSWMC strongly opposes the introduction of an industrial manslaughter offence into the model WHS Act.

It remains unclear how the 2018 Review came to a conclusion of recommending the adoption of an industrial manslaughter offence in light of clearly articulated views by bodies such as the Law Council

of Australia, who continually advocate against a specific industrial manslaughter offence being introduced into the Model WHS Laws, given existing criminal law and WHS offences (which already include offences that can give rise to jail sentences for those who recklessly cause death at a workplace). Similarly, the Bar Association of Queensland expressed strong concerns when industrial manslaughter offences were proposed in Queensland. The industrial manslaughter recommendation is worrying as it is inconsistent with accepted principles of criminal law. It is a generally accepted principle of criminal law that recklessness is arguably a higher standard than negligence.

Introducing an industrial manslaughter offence into the model WHS Act would be unnecessary and inappropriate as there are already existing manslaughter offences in each jurisdiction under the general criminal law. For example, under the *Crimes Act 1900* (NSW), a charge of manslaughter has a maximum penalty of 25 years imprisonment.

Successful prosecutions for workplace deaths in recent years, under the general crime of manslaughter include:

- In April 2017 a 12-year jail sentence was imposed on the company director of a transport company by the South Australian Supreme Court after he was found guilty of manslaughter in relation to the death of a truck driver.
- In March 2018, a company director was sentenced to seven years' jail for manslaughter by the Queensland Supreme Court, following the electrocution of a 20-year-old worker.

NSWMC supports the views set out below by the Australian Government response to the Senate Education and Employment References Committee report: *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia* (Senate Inquiry into Industrial Deaths).

The Australian Government's response to the Senate Inquiry into Industrial Deaths (which made a similar recommendation for the inclusion of an industrial manslaughter offence albeit not on identical terms because it argued the Queensland provisions should be used as a starting point) was:

"A separate industrial manslaughter offence in the model WHS laws is unlikely to achieve justice for families who have lost a loved one in the workplace."

"The Government believes that a more effective approach, that would be more likely to achieve better outcomes, is to focus on addressing the critical issues that have been identified in relation to the enforcement of existing laws, in particular, the way in which investigations into workplace deaths are conducted."

"The Government's view is that the current offences in the model WHS laws, together with current criminal manslaughter laws, are able to address workplace deaths provided they are applied appropriately. Where there has been a workplace death, all of those responsible can be prosecuted under the existing offences regime and the general criminal manslaughter provisions."

The Australian Government also noted that based on the ACT experience, which has had an industrial manslaughter offence since 2014 but no prosecutions under the offence to date, it is questionable whether an industrial manslaughter offence will be used. There have, however, been prosecutions under the ACT's general manslaughter provisions. There is also no evidence that the ACT's industrial manslaughter laws have resulted in fewer workplace deaths. The number of workplace deaths in the ACT has remained constant since 2003 when industrial manslaughter offences were introduced.

Additionally, including industrial manslaughter provisions into the model WHS laws would change the focus of the legislation from one that is about the level of risk to one where the outcome becomes the determinant.

There should be the opportunity for detailed debate on whether the inclusion of the offence assists in meeting the underlying policy intentions of improving standards in work health and safety.

Recommendations

- An industrial manslaughter offence should not be introduced into the model WHS Act as it is already adequately addressed under local criminal laws and manslaughter offences.

12 Recommendation 26: Prohibit insurance for WHS fines

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

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

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

NSWMC has no comment on Recommendation 26, save that, if the prohibition is introduced, consideration should be given to whether clarity is provided on whether an insurance policy can respond to fund the cost of a WHS undertaking entered into in lieu of prosecution.

Additionally, it should be ensured that there is no infringement on an individual's right to defend themselves. If any amendments were proposed it should be made clear that the prohibition of insurance is limited to indemnification of monetary penalties under the model WHS Act but does not affect legal or court costs involved in defending a person. To restrict a defendant's right to avail themselves of an appropriate defence in circumstances of a criminal prosecution would risk offending the principles of justice.

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

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

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

The 2018 Review acknowledged that in implementing the recommendation, *“there may be necessary consequential amendments to the definition of ‘reasonably practicable’ in s18 of the WHS Act with the effect that the definition would apply to a risk management process.”*

If any such amendments were to be drafted, they would require detailed consideration. It would be necessary to consider safeguards to avoid unintended consequences of:

- Imposing an unqualified requirement to eliminate or minimise all risks with the application of the hierarchy of controls.
- Not recognising the need to prioritise the elimination or minimisation of risks to health and safety.

Whilst some of the substantive duties set out in the Model WHS Act incorporate the qualification, ‘so far as is reasonably practicable’, the use of this qualification across all duties set out in the current Model WHS Act is inconsistent. The concept of ‘reasonable practicability’ should be applied universally in relation to all duties and obligations applicable to PCBU’s under the Model WHS Act. Similarly, a suitable standard based on ‘reasonableness’ (whether positioned as a qualification or defence) should universally apply to all duties applicable to individual duty holders.

NSWMC supports Recommendation 27 so long as the qualification of ‘so far as is reasonably practicable’ is applied.

Recommendations

- NSWMC supports Recommendation 27 so long as the qualification of ‘so far as is reasonably practicable’ is applied. Further, the concept of ‘reasonable practicability’ should be applied universally in relation to all duties and obligations applicable to PCBU’s under the Model WHS Act. Similarly, a suitable standard based on ‘reasonableness’ (whether positioned as a qualification or defence) should universally apply to all duties applicable to individual duty holders.

14 Safe Work Method Statements

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

Amend the model WHS Regulations to prescribe a SWMS template.

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

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

What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.

Many sites have developed a SWMS template which is tailored to their own specific circumstances and has been developed in consultation with workers. Amending the model WHS Regulations to prescribe a SWMS template would be overly prescriptive. It would also remove the flexibility and discretion of the PCBU under their general risk management framework to determine when SWMSs are needed or not and what should be included in it.

What is your preferred option and why will it be best for you, your organisation and your stakeholders?

NSWMC supports maintaining the status quo.

Were a prescribed template to be developed it would require customisation for every industry in order to be effective. There is a risk that any such template would be overly prescriptive and hinder the ability of PCBUs to determine whether a SWMS is needed and what should be in it.

In the event a prescribed SWMS were recommended the detail of any proposed template will need to be understood in order to assess the impact that it may have. In particular, an assessment will be required of whether any proposed template is unduly prescriptive and potentially restrictive of innovation and flexibility in the way in which SWMS are completed.

Should SWA proceed with the introduction of a SWMS template, NSWMC supports the suggestion in the RIS that businesses that have their own template or pro-forma SWMS in place be permitted to use their own SWMS documents, as long as they incorporate the requirements of the prescribed template.

Recommendations

- NSWMC does not support the introduction of a prescribed SWMS template. The PCBU should retain the ability under their general risk management framework to determine when SWMSs are required and what should be included within.

15 Other recommendations

Recommendation 6: Provide practical examples of how to consult with workers
Recommendation 18: Clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the Model WHS laws outside of their jurisdiction
Recommendation 19: Enable cross-border information sharing between regulators
Recommendation 20: Review incident notification provisions
Recommendation 21: Review National Compliance and Enforcement Policy
Recommendation 25: Consistent approach to sentencing

There are a number of Recommendations that were included in *Appendix – Recommendations likely to have nil or minor impacts* of the RIS that NSWMC believe could potentially have a high impact on the mining industry. Further details are discussed below.

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

The 2018 Review identifies examples of the workplaces that may be included as examples in the proposed updates to the model *Code of Practice: Work health and safety consultation, co-operation and co-ordination* (Code). This includes workplaces with fly-in-fly-out workers and workers with English as their second language.

The detail of the proposed amendments to the Code will need to be understood and assessed. There is a risk that the inclusion of examples in a Code may reduce flexibility in the way in which consultation can occur. The Code may be used in evidence as to what a duty holder knows or ought reasonably to have known about eliminating or minimising a risk to health and safety. A reduction in flexibility may have operational impacts on sites. Inclusion of prescription could potentially limit innovation and development.

Recommendations

- Any amendments to the model *Code of Practice: Work health and safety consultation, co-operation and co-ordination* to provide practical examples of how to consult with workers will need to be carefully drafted to ensure they do not reduce flexibility in the way in which consultation can occur.

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

15.3 Recommendation 19: Enable cross-border information sharing between regulators

The proposed amendments will require careful consideration to identify if any amendments may inadvertently seek to circumvent protections that exist in other jurisdictions. The specific interaction between the different protections in the jurisdictions will require detail consideration. As examples:

- The protection against self-incrimination of an individual under section 172 of the *Work Health and Safety 2012* (SA) (which differs from the Model WHS Act) in providing that a person is excused from providing information or documents on the ground that the information or document, may tend to incriminate that individual or expose that individual to a penalty.

- The protection afforded a natural person under section 9(3) of the *Occupational Health and Safety Act 2004* (Vic) to refuse or fail to give any information if giving the information would tend to incriminate him or her.

Additionally, the scope of an inspector's powers should be limited so as to facilitate reasonable searches for information, evidence and documents that are relevant to a particular incident, whilst limiting the potential for onerous requests for information, evidence and documents that are not directly relevant. Whilst regulators may understandably require certain information from company head offices or management facilities in other jurisdictions in relation to a particular site-level safety incident, in some instances onerous requests for irrelevant documents and information can redirect time and attention away from safety reviews and incident response measures which would otherwise improve safety outcomes throughout the business or undertaking.

In particular and by way of example, the scope of an inspector's request under section 155 of the Model WHS Act (or mainstream WHS legislation) can be drafted broadly and therefore be difficult to comply with in respect of the timeframes provided to respond to the request. In order to enhance the effectiveness of an inspector's powers, a request for information, evidence and documents should be qualified and limited by time, subject and/or other suitable wording to restrict the information, evidence and documents requested to a reasonable scope, while still remaining suitable for the inspector's purpose.

Recommendations

- Any proposed clarification that WHS regulators can obtain information relevant to investigations of potential breaches of the Model WHS laws outside of their jurisdiction or enabling cross-border information sharing between regulators, will require careful consideration to ensure protections existing in other jurisdictions are not inadvertently circumvented.

Additionally, the scope of an inspector's powers should be limited so as to facilitate reasonable searches for information, evidence and documents that are relevant to a particular incident, whilst limiting the potential for onerous requests for information, evidence and documents that are not directly relevant.

15.4 Recommendation 20: Review incident notification provisions

The 2018 Review identified that the inclusion of a notification trigger for psychological injuries "*will require some further assessment and analysis to ensure that everyone is clear about what should and should not be notified in this context*".

Any proposals to include a trigger for the notification of psychological injuries will require detailed consideration to assess the operational impact of any proposed notification. In particular, expert opinion might be required on whether it is appropriate to include circumstances that expose a person to a risk of psychological injury (as opposed to injury occurring) and, if so, how duty holders will be equipped to make this assessment to facilitate notification.

Recommendations

- Any proposals to include a trigger for the notification of psychological injuries will require detailed consideration to assess the operational impact of any proposed notification.

15.5 Recommendation 21: Review National Compliance and Enforcement Policy

The detail of any proposed decision-making framework to the National Compliance and Enforcement Policy will require careful assessment. This assessment should seek to verify that any framework is balanced and allows for an appropriate consideration of a range of enforcement options (where these are appropriate in the circumstances). This would include appropriate guidance on the consideration of offers to enter into WHS undertakings.

Recommendations

- The inclusion of any proposed decision-making frameworks to the National Compliance and Enforcement Policy will require careful assessment to verify that any framework is balanced and allows for an appropriate consideration of a range of enforcement options (where these are appropriate in the circumstances).

15.6 Recommendation 25: Consistent Approach to sentencing

NSWMC does not consider the introduction of sentencing guidelines to be necessary. The judiciary is well-equipped to determine the appropriate quantum of penalties on a case-by-case basis. The Courts also have adequate scope under the existing regime to consider alternative orders including adverse publicity orders, WHS orders and training orders, and NSWMC does not support the introduction of sentencing guidelines which may limit the flexibility of the Courts to consider the appropriate orders and sentencing on its merits.

Were sentencing guidelines to be proposed, they would require careful consideration. The 2018 Review refers to the UK Sentencing Council Guidelines for Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences. These guidelines direct the Court to “*focus on the organisation’s annual turnover or equivalent to reach a starting point for a fine.*” Adoption of similar proposals would not be appropriate in the context of the Australian criminal legal system where judges have the discretion and who are best placed to assess the appropriateness of a penalty in the specific circumstances of a case. Adopting the UK approach could potentially increase penalties significantly without giving due consideration to the specific circumstances of a case.

Recommendations

- NSWMC does not consider the introduction of sentencing guidelines to be necessary. The judiciary is well-equipped to determine the appropriate quantum of penalties on a case-by-case basis.