

NSW Work Health and Safety Regulators

Response to Safe Work Australia's Consultation Regulation Impact Statement *Recommendations of the 2018 Review of the Model Work Health and Safety Laws*

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1. Introduction

Work Health and Safety in NSW

The NSW *Work Health and Safety Act 2011* (the WHS Act) commenced on 1 January 2012.

In NSW, work health and safety (WHS) is overseen by two regulators:

- SafeWork NSW; and
- the NSW Resources Regulator.

SafeWork NSW is responsible for regulating work health and safety (WHS) at all workplaces except for mining workplaces. The Resources Regulator is the WHS regulator for mines and petroleum sites.

SafeWork NSW's strategies are underpinned by its *WHS RoadMap for NSW 2022*, which drives state-wide activities for improvement in WHS in NSW to protect workers from harm, reduce unnecessary compliance costs and secure safety standards in NSW workplaces. It sets the way forward not only for SafeWork NSW, but for stakeholders, employers and workers in NSW.

The NSW Resources Regulator *Strategic Approach 2017–2020* sets the direction for the Resources Regulator and details the priority areas it will focus on in order to achieve its vision of a safe and responsible mining, extractive and petroleum industry.

SafeWork NSW and the Resources Regulator collaborate on WHS matters. The two regulators operate independently to regulate WHS in NSW and consult regularly on policy and legislation issues.

Both regulators use a range of strategies when working with the people of NSW to prevent harm or promote recovery from a work-related injury or illness. These include:

- focusing on prevention;
- responding to workplace incidents and requests for service where required;
- promoting recovery at work;
- securing compliance with work health and safety legislation;
- using evidence to make informed decisions; and
- focusing efforts on those risks that have the potential of creating the greatest harm.

2. Executive summary

The Consultation Regulation Impact Statement (RIS) is welcomed by the NSW WHS Regulators (the NSW Regulators).

The purpose of the RIS is to canvass stakeholder views, supported with evidence where possible, on options to address the issues identified in the 2018 Review of the Model Work Health and Safety Laws (the 2018 Review).

The RIS expressly focuses on 12 of the 34 recommendations made in the 2018 Review

The initial assessment indicated that these 12 recommendations (either in part or in full) have one or more of the following features:

- an impact which is anticipated to be more than minor;
- complex implementation;
- a prominent issue for stakeholders requiring a policy change; or
- an alternative option which requires further consideration and consultation.

The 12 key recommendations are:

- Recommendation 2: Make regulations dealing with psychological health
- Recommendation 7a: New arrangements for health and safety representatives (HSRs) and work groups in small businesses
- Recommendation 8: Workplace entry of union officials providing assistance to an HSR
- Recommendation 9: Inspectors to deal with safety issue when cancelling a provisional improvement notice (PIN)
- Recommendation 10: HSR choice of training course
- Recommendation 13: Resolving outstanding disputes after 48 hours
- Recommendation 15: Remove 24-hour notice period for entry permit holders
- Recommendation 17: Production of documents and answers to questions
- Recommendation 23a: Enhance Category 1 offence and
Recommendation 23b: Create an industrial manslaughter offence
- Recommendation 26: Prohibit insurance for WHS fines
- Recommendation 27: Clarify the risk management process in the model WHS Act
- Recommendation 29a: Add a Safe Work Method Statement (SWMS) template to the WHS Regulations and
Recommendation 29b: Develop an interactive tool to support SWMS

The NSW Regulators' response to the RIS has considered the potential impacts, including costs and benefits, of these key recommendations and the proposed alternative options outlined in the RIS.

The underlying purpose of the proposals is to clarify the model WHS laws and provide practical guidance on their application. The NSW Regulators expect there will be significant benefit in providing additional practical guidance to persons conducting a business or undertaking (PCBUs).

The NSW Regulators note that to realise the anticipated benefits of the proposals relating to recommendations 8, and 15, the input and co-operation of other Commonwealth agencies will be required, as the regulation of workplaces from an industrial perspective extends beyond the remit of WHS regulators.

The remainder of the 2018 Review recommendations are considered at Appendix A. Of these recommendations:

- nine have been identified by Safe Work Australia as requiring further review before an assessment of impacts can be undertaken;
- 15 (in part or in full) have been identified as either relating to issues in need of clarification, with minor or no impacts anticipated or as proposing the development of additional guidance materials of minor benefit; and
- two have been identified as matters involving legislative amendment with no anticipated regulatory cost.

Of these, there are two recommendations (Recommendation 24 and Recommendation 30) which the NSW Regulators consider are likely to have more than a minimal impact. The NSW Regulators propose that further consideration be given to the issues raised in this RIS response prior to progressing these recommendations.

It is noted that Safe Work Australia will analyse the feedback received from the Consultation RIS process to develop a Decision Regulatory Impact Statement (RIS) that will identify the options with the greatest net benefit. The Decision RIS will be provided to WHS Ministers later in 2019 for their consideration and decision.

3. Psychosocial risks

Recommendation 2: Make regulations dealing with psychological health

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

Psychological health is an issue for all workplaces. Studies have ascertained that over half a million NSW employees have poor mental health.¹ With adults spending one third of their life at work, workplace strategies can help improve mental health and reduce the impact and severity of mental ill-health.

Although the definition of “health” in the model WHS Act makes clear that health includes psychological health, and therefore health and safety duties apply equally to psychological and physical health and safety, stakeholders such as businesses and workers have advised that they find it difficult to understand the requirements due to the lack of information in the regulations or a code of practice.

NSW Regulators anticipate that amendments to the WHS Regulation (as proposed by Option 2), could clarify what is required; improve understanding of PCBU obligations in relation to the risk of psychological injury in the workplace; improve efforts to build industry capability; and provide content around PCBUs’ obligations to ensure the psychological health of workers in the workplace.

Option 2 would support the work already being undertaken through the *NSW Mentally healthy workplaces strategy 2018–2022*. This strategy sets out a long-term vision for mentally healthy workplaces across NSW, with the key objectives of reducing the impact of mental illness on working age people, improving health and social outcomes, improving capability and reducing productivity costs to employers. The proposed legislative change in option 2 may lead to increased requests to regulators for assistance and advice either generally or in relation to the resolution of disputes in the workplace, meaning regulators may require more inspectors to manage the increased workload. This is also likely to have operational impacts for regulators involving additional training for current inspectors and the updating of guidance material and content for the new inspector training program. There may also be resourcing impacts for investigations. Additionally, there may be impacts on PCBUs and other stakeholders such as the development of training and education to ensure understanding of new duties; the updating of guidance material and other resources; and improving safety management systems.

Notwithstanding the anticipated regulatory impacts, Option 2 is anticipated to be of greater net benefit than preserving the status quo (Option 1). If Option 2 were to be progressed, the NSW Regulators suggest that a principle-based approach rather than a prescriptive approach be pursued, and that consideration also be given to the development of a model code of practice or other guidance material to support understanding and implementation of any new provisions. Practical guidance and support to PCBUs is viewed as integral to identifying and managing psychological risks.

It is anticipated such changes at the national level would benefit all Australian workplaces.

¹ University of Technology Sydney and University of Sydney, *Mentally healthy workplaces: a return-on-investment study* (2017); see also NSW Mentally Healthy Workplaces Strategy 2018-22, 2.

4. Work groups and HSRs in small businesses

Recommendation 7a: New arrangements for health and safety representatives (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 a 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.

The experience of the NSW Regulators suggests that providing increased practical guidance (as proposed by Option 3) is likely to have the greatest net benefit for small business. Small businesses are seeking updated practical guidance which can be provided by updating the existing model code of practice. This will help small businesses ensure they meet their consultation requirements in a reasonably practical way and reduce perceived complexity. This option could be pursued as a stand-alone measure in which case the current legislative framework would be maintained.

Evidence indicates that workers are not reluctant to request a HSR. Rather, the vast majority of small businesses opt not to use a HSR system, as direct consultation (known colloquially in NSW as 'other agreed arrangements') is reported to be more effective and appropriate. If a small business does use the HSR system, they generally have one HSR with no deputy HSR. Since commencement of the model WHS laws, SafeWork NSW has received very few requests for service seeking assistance in resolving a disagreement between the PCBU and workers about work groups and numbers of HSRs.

NSW has undertaken extensive work with its stakeholders to enhance, promote and increase awareness regarding the consultation requirements under WHS legislation. SafeWork NSW launched its one-stop shop online toolkit in early January 2018, which is part of the Consultation at Work Strategy. It is designed to help improve WHS consultation practices in NSW workplaces. The toolkit includes videos, fact sheets and other material on consultation arrangements, work groups, case studies and dispute resolution, as well as targeted information for health and safety representatives. Option 3 would complement SafeWork NSW's Consultation at Work Strategy.

In reviewing the Consultation RIS, it is unclear how the proposed default arrangement of one work group represented by one HSR and one deputy HSR (Option 2) would provide a benefit as it appears it may increase small business costs by directing their method of consultation with their workers. In many cases this option may not be reasonably practicable. It would mean training for two workers, and small businesses may find the cost prohibitive, along with their workers being absent for the training (5 days each). There are also costs associated with the election process. The default option indicates that if other arrangements are agreed upon by workers, the default would not apply. However, these other arrangements, if agreed can be achieved within the current framework. If Option 2 were to be progressed, the NSW Regulators suggest that consideration be given to amending it to require the appointment of only one HSR unless otherwise agreed.

5. Workplace entry by HSR assistants

Recommendation 8: Workplace entry of union officials when providing assistance to a health and safety representative (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.

This recommendation addresses the interaction of provisions in the model WHS Act empowering HSRs to seek assistance from any person, with provisions in the *Fair Work Act 2009* (Cth) which require union officials to hold Fair Work Act entry permits to exercise a State or Territory OHS right.² Recent case law suggests that when a union official enters a workplace subject to the Fair Work Act to assist an HSR they are exercising a State or Territory OHS right within the meaning of the Fair Work Act and may therefore require a Fair Work Act permit.³ Most workplaces in NSW are subject to the Fair Work Act.⁴ In light of this, the NSW Regulators note that to a large extent this issue is a matter of Commonwealth industrial law and may need to be resolved by the Commonwealth.

On Option 1 (preserving the status quo) the NSW Regulators note that a reserved Federal Court decision may soon give further clarification on whether a union official requires a Fair Work Act entry permit to enter a workplace subject to the Fair Work Act to assist an HSR.⁵ They also note that under section 70(5) of the model WHS Act, PCBU's may refuse entry to assistants to an HSR on reasonable grounds. A belief that union officials are entering for an industrial purpose may provide reasonable grounds. In practice, the experience of NSW inspectors is that at present only union officials with current Fair Work entry holder permits are being asked to enter to assist HSRs.

If Option 2 (working with relevant agencies to ensure that union officials do not require Fair Work Act entry permits to enter to assist an HSR) were to be pursued, any amendments to the model WHS Act would need to be carefully drafted to ensure that any immediate right of entry for union officials can only be used to assist an HSR on a safety matter, and not for industrial purposes.

² *Fair Work Act 2009* (Cth) s 494(1).

³ *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89.

⁴ The *Industrial Relations Act 1996* (NSW) has limited application.

⁵ *Australian building and Construction Commissioner v CFMMEU* (QUD 238/2018); reserved 24 October 2018.

6. Cancelling a Provisional Improvement Notice (PIN)

Recommendation 9: Inspectors to deal with safety issue when cancelling a provisional improvement notice (PIN)

Amend the model WHS Act to provide that, if an inspector cancels a PIN for technical reasons under section 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 section 82 of the model WHS Act.

NSW Regulators agree that it is important that inspectors address any underlying safety issues when cancelling a PIN. Inspectors are already able to do this and for this reason Option 1 (preserving the status quo), appears to address the concerns raised in the 2018 Review.

The NSW Regulators do not receive a high volume of requests for review. NSW Regulators already have processes in place for review of a PIN upon receipt of a request for review, and inspectors are already able to address any safety issues raised by a PIN that is cancelled by issuing inspector notices. Inspectors are aware that although a further PIN cannot be issued for the same matter, they are still able to exercise their functions or powers to resolve outstanding WHS issues. NSW Regulators have put in place guidance material to assist inspectors in the exercise of their powers in relation to PINs. Internal reviews and court decisions have also provided an ongoing opportunity for refinement of internal guidance material, practice and procedure where appropriate.

The Consultation RIS proposes that the model WHS Act be amended to require inspectors to deal with safety issues when cancelling a PIN for technical reasons (Option 2). If Option 2 were to be pursued, the NSW Regulators consider that in dealing with any substantive safety issue, it should remain open to an inspector to take no action after due consideration. Further consideration would also need to be given to what constitutes a 'technical reason'. Some internal reviews have found that PINs have been issued for reasons or matters unrelated to safety. PINs have been cancelled where they are issued for problems which do not relate to the issuing HSR's workgroup; if they require audits to occur for issues which are not safety related; if they are not sufficiently specific; if there has been a lack of consultation; and if they do not correctly identify who the PIN is issued to and why.

The NSW Regulators' experience as to the range of reasons for cancellation of a PIN suggests that HSRs may benefit from more information and training on how and when to use PINs.

7. Choice of HSR training course

Recommendation 10: HSR choice of training course

Amend the model WHS Act to make it clear that for the purposes of section 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.

The NSW Regulators agree that greater clarity as to the HSR entitlement to choose a training course would be beneficial. In *Sydney Trains v SafeWork NSW* [2017] NSWIRComm 1009, the NSW Industrial Relations Commission found that “no party has a right to choose unilaterally one course or another”. Those proceedings arose from ambiguity in the words “chosen by” and “in consultation with” in s72(1)(c) of the NSW WHS Act. The wording of this provision has led to disputes between HSRs and PCBUs over whether the HSR can ultimately decide the issue, or whether the PCBU effectively has power of veto over it.

Since the commencement of the WHS Model laws, WorkCover NSW/SafeWork NSW has received approximately 36 requests for service relating to disagreements between PCBUs and HSRs about HSR training. In half of these instances, the dispute related to the choice of training provider.

However, although the proposed amendment (Option 2) will resolve the choice of training provider, a key issue in many disputes, it will nevertheless leave the regulator to determine the reasonable costs of the training course and attendance where there is disagreement between PCBUs and HSRs.

Whether Option 1 (preserving the status quo) or Option 2 is pursued, the NSW Regulators anticipate that the greatest net benefit would be realised by reviewing the Safe Work Australia ‘Worker Representation and Participation Guide’ and determining whether further practical guidance could be developed as to what are the “reasonable costs” of HSR training. Such guidance could include consideration of what training is geographically appropriate and extend to the inclusion of guidance on how PCBUs, HSRs and regulators may manage disputes captured by this recommendation. The development of practical guidance material on what ‘reasonable cost’ may look like would be of benefit to all stakeholders.

8. Referral of disputes

Recommendation 13: Resolving outstanding disputes after 48 hours

Amend the model WHS Act to provide for:

- disputes under sections 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
- a PCBU, a worker, a 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
- 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
- appeal rights from decisions of the court or tribunal to apply in the normal way.

This recommendation attempts to address the disparity between expectations on inspectors to resolve a WHS issue or cease work order and their powers to do so. Sections 82 and 89 of the model WHS Act contain dispute resolution processes which enable an inspector to ‘assist’ in resolving a WHS issue or cease work order, rather than to resolve the issue by making a determination. Inspectors may also use their existing compliance powers to address safety issues. Inspectors facilitate resolution between the parties in the first instance, using their compliance powers only where appropriate to resolve an outstanding safety issue. It is not the inspector’s role to act as a conciliator or mediator. At all times, the inspector’s focus is on resolving the WHS issues contained within the dispute in a timely manner and in a way that results in positive safety outcomes for the workplace.

In considering Option 2 (amend the model WHS laws to enable referral of outstanding disputes to a court or tribunal after 48 hours), NSW Regulators bear in mind the need to resolve for WHS disputes as quickly and effectively as possible between the parties, preferably at the workplace. It is understandable some want the ability to refer disputes to a court or tribunal to settle the dispute given that the inspector’s role is to ‘assist to resolve’ an issue rather than settle the dispute by making a determination. In NSW, approximately 353 requests for issue resolution under sections 82 and 89 have been made to WorkCover NSW/SafeWork NSW since the commencement of the model WHS laws on 1 January 2012. Of these requests, 25 were made under section 89 in relation to the cessation of work. Of these, 24 were resolved without requiring further action. This data suggests that the difficulties identified during consultation on the 2018 Review may not be as extensive as they appeared.

The NSW Regulators recognise the need for disputes involving the cessation of work to be resolved swiftly (section 89). A direction to cease work relies on an assessment that “the representative has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker’s health or safety, emanating from an immediate or imminent exposure to a hazard.”⁶

However, the scope of disputes that may be referred under section 82 of the model WHS Act is broader. The WHS issues and the potential consequences of disputes raised under this provision may not warrant the proposed expedited timeline.

⁶ *Work Health and Safety Act 2011* (NSW) s 85(1).

Option 2 would likely cause a range of potentially significant operational impacts for WHS Regulators, parties to the dispute and for the chosen court or tribunal system. Detailed consideration would need to be given to how a regulator could manage the resolution of section 82 and section 89 requests within 48 hours. A legislative mandate to meet this timeline would likely require the redeployment of resources allocated to existing and potentially more pressing issues of workplace safety. The NSW Regulators anticipate implications for operational resources, particularly in regional areas, where 48 hours may not be sufficient time for an inspector to attend a workplace to obtain relevant information and speak to all relevant parties. Knowing there is a 48-hour deadline could detrimentally affect the resolution process and create unintended consequences.

If Option 2 were to be progressed, further consideration would also be needed to identify the appropriate court or tribunal for referral. Relevant factors would include whether the proposed court or tribunal has expertise in WHS as well as capacity to hear these matters in the expedited timeframe required to achieve the anticipated benefits.

It appears unclear whether the proposed changes would result in stronger safety outcomes than those currently being achieved through inspector assistance. It may simply provide an expedited avenue to have the dispute settled quickly, regardless of the associated safety outcome. The NSW Regulators suggest that significant work is required before any decision could be made to progress Option 2 as proposed.

An alternative option may be to narrow the scope of Option 2 to the resolution of disputes under section 89 of the model WHS Act only, as it is acknowledged that any dispute regarding cessation of work needs to be resolved as quickly as possible. Given the data on these requests, the number of disputes that may be referred to a court or tribunal is anticipated to be minimal.

If Option 1 (preserving the status quo) is pursued, it may be beneficial to develop further guidance material on how to resolve issues in the workplace including clarification of the role of the inspector in 'assisting' the resolution of issues under sections 82 and 89. Another option may be to amend sections 82 and 89 of the model WHS Act to clarify what powers inspectors have to settle a dispute, if it is deemed appropriate after further investigation

The NSW Regulators suggest that to achieve the greatest net benefit further work should be undertaken to reconsider the scope of Option 2.

9. WHS entry permit holders – prior notice of entry

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

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

NSW has not adopted the model WHS Act amendment of 2016 to require WHS entry permit holders to give 24 hours' notice of entry to PCBU's when entering to investigate a suspected contravention of the model WHS Act. This means that at present, the *Work Health and Safety Act 2011* (NSW) authorises WHS entry permit holders to enter workplaces to inquire into a suspected contravention of the Act that relates to or affects a relevant worker (s117) by giving notice of the entry and the suspected contravention to the PCBU as soon as is reasonably practicable after entry (section 119). The permit holder is not required to give notice if giving the notice would either defeat the purpose of the entry or cause unreasonable delay in an urgent case. When entering for other permitted purposes the entry permit holder must give notice to the PCBU in the form prescribed by the regulations, during usual working hours, and at least 24 hours, and not more than 14 days, before the entry (section 122).

However, if a WHS entry permit holder is a union official, they must hold a permit under the *Fair Work Act 2009* (Cth) to exercise a State and Territory OHS right in a workplace subject to Commonwealth industrial law and must give written notice to the occupier or affected employer of their intention to exercise a State or Territory OHS right (such as a right of entry) at least 24 hours before exercising the right.⁷ This provision overrides the WHS Act provisions as to notice for many NSW workplaces. This means that in many cases, WHS entry permit holders who are union officials are already required to give at least 24 hours' notice when exercising their right of entry for any purpose, including to investigate a suspected contravention. This may not always be clear to permit holders or PCBU's.

NSW regulators note that it is important that these provisions strike a balance between the danger that WHS entry permit holders may misuse the power to enter without giving notice for industrial purposes, and the danger that requiring permit holders to give notice of entry to investigate a suspected contravention may compromise worker safety, especially in high-risk industries.

Option 2 (removing the 24-hour notice period for entry permit holders from the Model WHS Act) reflects the current position in NSW and appears likeliest to promote harmonisation.

⁷ *Fair Work Act 2009* (Cth) sections 494 and 495. See the discussion of the interaction of WHS notice provisions with FWA notice provisions in *Building and Construction Commissioner v Powell* [2017] FCAFC 89.

10. Inspectors' powers

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

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

The NSW Regulators support consideration being given to enabling inspectors to require production of documents and answers to questions up to 30 days after they or another inspector enter a workplace. This would likely provide for a more efficient investigative process, particularly in the early stages of an investigation. It is anticipated that amending the model WHS Act to allow inspectors to require information up to 30 days after entry (Option 2) would be of great benefit to regulators.

If Option 2 were to be progressed, this would also likely assist with investigations in regional NSW and may also assist work with cross-jurisdictional authorities. The proposed amendment would be a step forward in improving the efficiency and effectiveness of a Regulator's investigation. Concerns have previously been expressed by regulators that the use of section 155 notices has impacted on investigation time-frames as delay in response, inadequate response or failure to respond to notices affects the ability of regulators to complete investigations and determine whether to take enforcement action. In light of the recent findings of the Senate Education and Employment References Committee in their report *They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*, NSW Regulators are sensitive to the effect that delays in the completion of investigations can have on injured workers, their families and the families of deceased workers as well as their workplace colleagues and PCBU's.

The Consultation RIS suggests that Option 2 would be consistent with the amendments made to the WHS laws in Queensland in October 2017 but does not identify what provision in the Model WHS Act would be amended if Option 2 were to be progressed.

In considering the potential impacts of Option 2, the NSW Regulators have had regard to the approach taken by Queensland. If the Queensland wording is adopted, it would appear to provide an easier and quicker test for regulators to require a person to attend for questioning than is currently available under section 155. Section 155(4) currently prevents a regulator requiring a person to appear until one or more attempts have been made to obtain the information sought in writing. This practice currently impacts on investigation timeframes. Under section 171(1)(c) of the Queensland WHS Act, if an inspector has entered a workplace within the last 30 days, the inspector (or another inspector), may require a person at the workplace to meet at a reasonable time and place to answer questions.

11. The Category 1 offence and industrial manslaughter

Recommendation 23a: Enhance Category 1 offence

Amend section 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.

Of the four options proposed in the RIS, the NSW Regulators anticipate that there may be considerable benefit in pursuing Option 2 (including gross negligence as a fault element for the Category 1 offence). The experience of the NSW Regulators is that the current Category 1 threshold which requires proof of recklessness is a difficult evidentiary threshold to meet. A reduced threshold of “gross negligence” is anticipated to capture significant offending behaviour that generates a serious risk to health and safety independently of an outcome and potentially without the risk being realised through a serious workplace incident or fatality. Progressing Option 2 is also an approach which aligns with the risk-based framework of the WHS Act.

Owing to the current evidentiary threshold, SafeWork NSW has not yet brought a prosecution for a Category 1 offence. The NSW Resources Regulator has brought a successful prosecution against a company for a Category 1 offence which resulted in a fatality. A fine of \$900,000 was imposed following a guilty plea.⁸ SafeWork NSW has brought successful Category 2 prosecutions for breaches of WHS duties involving a fatality. Category 2 offences do not require proof of recklessness.

In their successful section 31 prosecution, the Resources Regulator laid Category 1 and 2 charges in the alternative. If SafeWork NSW did seek to prosecute a Category 1 offence, it would likely look to similarly plead Category 1 and 2 in the alternative.

The benefits of introducing an offence of industrial manslaughter in the model WHS Act (Option 3) are less apparent to the NSW Regulators. Manslaughter by criminal negligence is already an offence in NSW that can be committed by both natural persons and corporations. Under the *Crimes Act 1900* (NSW) manslaughter carries a maximum penalty of 25 years’ imprisonment for a natural person, and a fine of up to 2,000 penalty units (\$220,000) for a corporation. The NSW Police undertake investigations and prosecutions of this offence, including in contexts involving a workplace fatality.

It is difficult to be certain about the impacts or effect on NSW regulators of introducing an industrial manslaughter offence to the model Act. Industrial manslaughter provisions in other Australian jurisdictions are either relatively new or unused. The ACT provisions have been in place since 2004 but have not yet been used. A new industrial manslaughter offence would require SafeWork NSW and the Resources Regulator to develop new protocols for responding to, investigating and prosecuting workplace fatalities as well as to build capability in their inspectorates to investigate and gather evidence to a different threshold. Consideration would need to be given to how introducing an offence based on outcome would affect the risk-based framework of the WHS laws. Factors which would influence NSW regulators’ use of any industrial manslaughter offence include: whether there is demonstrable gross negligence on the part of duty holders; whether it may be

⁸ *Stephen James Orr v Cudal Lime Products Pty Ltd* [2018] NSWDC 27.

more appropriate to bring prosecutions under NSW's existing criminal manslaughter laws or under sections 31 or 32 of the WHS Act; in the case of corporations, what conduct can be attributed to the corporation and its officers; what penalties are available and how they compare to those available for other offences; and the resources required to bring a prosecution for the offence.

NSW regulators note that concerns about the level of penalties imposed for WHS offences involving a fatality could also be addressed by the development of sentencing guidelines to ensure a consistent approach to sentencing across jurisdictions (see recommendation 25), and by considering increasing penalty levels in the model WHS Act for existing offences (see recommendation 22). Concerns about the deterrent effect of the laws may also be addressed by recommendation 26 (prohibit insurance for WHS fines).

12. Prohibit insurance for WHS fines

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.

NSW Regulators do not hold data on the prevalence of insurance and indemnity arrangements for breaches of the WHS laws but are aware that such insurance is available and commonly used.

The availability of insurance or indemnities for liability for monetary penalties for work health and safety breaches may have the potential to undermine the operation of the model WHS laws. If those who breach work health and safety duties are able to escape the financial consequences of their actions, the deterrent effect of the law may be lessened. This may affect regulators' efforts to promote workplace safety and decrease the occurrence of incidents. NSW Regulators therefore consider that there may be considerable benefits to pursuing Option 2, including strengthening the deterrent power of the model WHS laws. A prohibition may encourage safe behaviour, decrease the occurrence of incidents and promote due diligence by officers.

If Option 2 were to be pursued, regulators would need to consider how to enforce the prohibition and how to investigate and prosecute the new offences. This would involve consideration of what resources and tools would be needed to gather evidence or identify the existence of an insurance policy and its terms. Consideration would also need to be given to how the prohibition would affect corporate behaviour. For example, corporations may be more likely to dissolve either because they are unable to pay the fine, or to avoid paying the fine.

13. The risk management process

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

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

The need for improvement in general understanding of risk management processes and how to implement them is a common matter identified by NSW Regulators when providing advice to PCBU, visiting workplaces or when investigating a dispute or workplace incident.

Recommendation 27 attempts to resolve some of the issues experienced by small business as identified in the 2018 Review as arising from uncertainty about how to apply the overarching principles that apply to health and safety duties and confusion about the requirements to manage risk using the hierarchy of control measures.

Two options have been identified in the RIS to clarify the risk management process in the model WHS – either preserving the status quo (Option 1) or amending the model WHS Act to include a hierarchy of controls with subsequent amendment of the WHS Regulations for alignment purposes (Option 2). However, the benefits of pursuing Option 2 in addressing the concerns raised are not clear. It appears that some of the confusion may stem from the model WHS Regulations requiring compliance with Part 3.1 where there is a specific duty to manage risks to health and safety under the WHS Regulations as there is no express requirement in the model WHS Act for PCBU to apply the risk management requirements in Part 3.1 of the model WHS Regulations to manage risk more broadly.

Although the provisions on managing risks to health and safety in the WHS Regulation could be moved to the model WHS Act, this alone may not be of benefit if in effect the same or similar provisions are being replicated in a higher tier of the model law framework. If there is a difficulty in interpretation or understanding, it may be possible to clarify the risk management process through other means, including in the Regulation, or through codes and guidance material. Clarifying the risk management process in a code would best suit the needs of NSW WHS Regulators and PCBU. Raising the provisions from the WHS Regulation to the Act would remove flexibility, and the level of detail appears better suited to the Regulation than the Act.

Pursuing Option 2 may make compliance with health and safety issues easier to enforce but may not assist PCBU in assessing what is ‘reasonably practicable’ and therefore may not improve health and safety outcomes. The hierarchy of controls is useful but does not always fit well with psychosocial risks, risks from working with animals, traffic accidents, or risks arising from fatigue. Perhaps further consultation with small business stakeholders prior to committing to either proposed option would further identify the cause of the stated uncertainty which would then allow the development of a more targeted solution

14. Safe work method statements (SWMS)

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

Amend the model WHS Regulations to prescribe a SWMS template.

Implementation involves including a basic SWMS template in the WHS Regulations to assist duty holders in the construction industry understand the format and type of information to be included in a SWMS. Adding a SWMS template would not amend or create any additional requirements under the model WHS Regulations.

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

Safe Work Australia develop an intuitive, interactive tool that provides clear guidance on what information and actions are required to complete each section of the SWMS template. This tool would reinforce existing requirements, for example consulting with workers when preparing SWMS and increase knowledge and understanding of the practical purpose of SWMS. The SWMS template would not be prescribed in the model WHS Regulations.

There is anecdotal evidence to suggest that there is some confusion in the industry about when it is necessary to complete a SWMS and what information is required. Option 1 recommends preserving the status quo. However, this approach does not seem likely to address the concerns raised by the 2018 Review that SWMS were being developed for work that is not considered high risk.

Elevating the SWMS template from the model Code of Practice to the Model WHS Regulations (Option 2) is similarly unlikely to address or resolve the concerns raised by the 2018 Review. The NSW Regulators' experience is that some PCBUs struggle to develop appropriate content for a SWMS. It is anticipated that the greatest improvement in PCBU capability to complete SWMS would be achieved by pursuing Option 3, (developing an interactive guidance tool for the preparation of SWMS) in that it may improve PCBUs understanding of the purpose and scope of SWMS. A well designed interactive and intuitive tool would assist businesses by ensuring that they have thought through the hazards and risks specific to the construction task. It may be worth consulting with businesses in designing such a tool to ensure that it meets business needs and increases awareness by elevating the completion of SWMS from a 'tick and flick exercise'.

The NSW Regulators' submission to the 2018 Review supported the use of technology as the channel of delivery for Codes. Early experience with NSW's recently launched *Easy to do WHS* online toolkit suggests such tools are well received by industry. The toolkit provides information, templates and other tools to assist workplaces in conducting a self-assessment to improve health and safety. The uptake has surpassed the expected download targets, indicating that there is a demand. Feedback about the toolkit has praised the user-friendly interface. The tool was designed with input from behavioural insights and communication experts to make it as easy as possible for business to understand their WHS obligations. NSW is itself considering developing industry-specific toolkits (including for the construction industry).

Pursuing Option 3 would appear to render Option 2 unnecessary. Relocating the SWMS template into the WHS Regulations as per Option 2 would also reduce flexibility and ease in adapting the SWMS template as work practices evolve. The NSW Regulators consider that it may be more

useful to keep the existing template in the model code of practice for construction work, which is freely available on WHS regulator websites. It currently appears in both PDF and Microsoft Word format on the SafeWork NSW website alongside a sample. The SafeWork NSW template is among the most downloaded items on the website with over 4000 hits in the 2018-19 financial year.

15. Consultation RIS - Appendix A

The NSW Regulators have reviewed the proposed approach set out for the balance of the 2018 Review recommendations.

Safe Work Australia has proposed that the 2018 Review recommendations 1, 3, 20, 21, 25, 31a, 32, 33 and 34b undergo further review before impacts can be assessed. In the table below, the NSW Regulators have expressed a view as to the anticipated benefits of that further work.

Safe Work Australia has considered and assessed the impacts of 2018 Review recommendations 4, 5, 6, 7b, 11, 12, 14, 16, 18, 19, 28, 30, 31b and 34a as matters either of clarification with no impact or involving the development of additional guidance. The 2018 Review recommendations 22 and 24 are identified as matters requiring legislative amendment with “no regulatory cost”. In the table below the NSW Regulators have expressed a view in relation to the anticipated impacts and benefits of these proposals with the exception that the proposals for Recommendations 24 and 30 are separately addressed as the NSW Regulators seek to detail impacts and proposed measures for their mitigation for further consideration by Safe Work Australia.

Recommendation 24: Improve WHS regulator accountability for investigation progress

The NSW Regulators are committed to transparency and accountability in their respective investigations. Each regulator has in place mechanisms to ensure that injured workers and their families and the families of deceased workers receive support and advice as to the investigative process and are kept informed of the progress of an investigation.

As noted in the 2018 Review, the investigation of a workplace incident and the making of a decision whether to bring a prosecution can often exceed 12 months. This can mean the accountability mechanism in section 231 of the Model WHS Act is unavailable to injured workers or the families of deceased or seriously injured workers.

At present section 231 of the Model WHS Act permits a person to request an investigation, and information about a decision not to prosecute, up to 12 months after the occurrence of an act, matter or thing. If a request is made under this section, it can also trigger eligibility for a review process by the Director of Public Prosecutions (DPP) as to whether a prosecution is brought and ensures the affected person is informed about the investigation and decisions. However, the effectiveness of this mechanism relies on an investigation being completed within the stipulated timeframe of 12 months after the occurrence of the act, matter or thing.

There is a two-year statute of limitation period after the offence first comes to the notice of the Regulator, in which to bring a prosecution for a breach of the WHS Act subject to the power to extend the limitation period where there is a related coronial inquest or coronial report pending under section 232 of the Model WHS Act.

In responding to Recommendation 24, Safe Work Australia proposes the removal of the 12-month time limit. The NSW Regulators note that although the 12-month time limit is proving inadequate, the absence of a time limit is anticipated to prove problematic having regard to the

review role of the DPP as well as the potential impact on resources should a request arise where a workplace incident has not progressed to full investigation by the regulator. The NSW Regulators propose that consideration be given to extending the existing time limit within s231 of the Model WHS Act and anticipate that extending it from 12 to 18 months would likely achieve the greatest net benefit to all affected by this review mechanism.

The 2018 Review also recommended adding a provision requiring regulators to provide regular updates on the investigation within three months of receiving a request under this provision until a decision is made on whether a prosecution will be brought. There is strong ongoing commitment by the NSW Regulators to considering how best to support and inform those affected by a workplace incident (family of injured or deceased worker or injured worker/ PCBU) during an investigation.

Recommendation 30: Photographic ID on white cards

The 2018 review found that there is confusion for stakeholders caused by inconsistent photo ID requirements between high risk work (HRW) licences and construction induction (White) cards. Recommendation 30 proposes to amend the model WHS Regulations to require photographic ID on White Cards consistent with high risk work licences.

The NSW Regulators note that there is a significant distinction between a HRW licence and a White Card. A White Card is issued as proof that a worker has undergone general construction induction training. The White Card is perpetual once issued. Unlike a HRW licence, it does not come up for renewal.

SafeWork NSW began issuing White Cards in March 2004. Prior to that registered training organisations issued the card. GLS records advise that approximately 2.1 million White Cards have been issued since March 2004. There is no easy way to identify how many of these White Cards are actively used or relied on by workers. It is anticipated that many White Card holders are likely to have changed address since their card was issued.

Although it is accepted that a photograph may assist with identity issues and would align the White Card with HRW licences which do require photographic identification, any proposal to update all existing cards to include photographic identification would have significant operational and cost impacts for regulators and potentially costs for card holders in updating their White Cards. It is not yet known if this recommendation would extend to all existing White Cards as well as those issued in the future. There is a need for further consideration of the costs and benefits of this proposal. There remain other means by which PCBUs can verify identity. The NSW Regulators are concerned that this proposal may result in an unwarranted increase in regulatory burden without net benefit to workplace health and safety.

NSW WHS Regulator's comments on Appendix A

Recommendation	2018 Review findings	Anticipated impacts	Summary	NSW WHS Regulators Response
1: Review the model WHS Regulations and model Codes Review the model WHS Regulations and model Codes against agreed criteria on the purpose and content of the second and third tiers of the model WHS laws as they relate to the seven priority industries in the <i>Australian Work Health and Safety Strategy 2012-2022</i>.	The Review Report identifies limitations with the model WHS Regulations and Codes in that business find them complex, confusing and lacking practical detail. It considers there is a disconnect between the model WHS Act and the Regulations and Codes and that there may be gaps in the coverage leading to a perception that areas not specifically covered by Regulations or a Code there are no WHS duties. Many small businesses say it is difficult to work out what parts of the Regulations and Codes are applicable to them.	This recommendation would require a significant investment of time and resources to implement. The criteria against which the model WHS Regulations and Codes are to be assessed would need to be developed and agreed by Safe Work Australia Members, following a comprehensive assessment of the duties prescribed by the model WHS Act. Reviewing the Regulations and Codes against the criteria for each of the seven priority industries will require the involvement of those with appropriate WHS expertise in each industry. The conduct of this review would have no impact: an assessment of any impact can only be made once the findings from the review are available.	No impact – further work recommended	The opportunity to clarify and reduce complexity in WHS Regulations and Codes by examining them through an industry-specific lens is expected to benefit both regulators and PCBUs.
2: Make regulations dealing with psychological health	See Chapter 3 of this Consultation RIS.			
3: Continuously assess new industries, hazards and working arrangements Safe Work Australia develop criteria to continuously assess new and emerging business models, industries and hazards to identify if there is a need for legislative change, new model WHS Regulations or model Codes.	The Review Report found the model WHS laws establish a robust framework for new and emerging work arrangements. While Safe Work Australia already identifies and assesses the evolution of new workplace risks, there are no set criteria around how this is done. The criteria envisaged by this recommendation would be developed by Safe Work Australia Members, in	There would be no impact on business from the creation of 'assessment criteria'. While the application of such criteria could lead to consideration of changes to the model WHS laws, any impacts on business could only be assessed once specific problems and options have been identified.	No impact – further work recommended	The opportunity to consider the development of criteria to continuously assess new and emerging business models, industries and hazards to identify if there is a need for legislative change is expected to benefit both regulators and PCBUs.

Recommendation	2018 Review findings	Anticipated impacts	Summary	NSW WHS Regulators Response
	consultation with other stakeholders.			
4: Clarify that a person can be both a worker and a PCBU Amend section 5(4) of the model WHS Act to make clear that a person can be both a worker and a PCBU, depending on the circumstances.	The 2018 Review found stakeholders are unclear as to whether a person can be both a worker and a PCBU for the purposes of the model WHS laws.	Implementing the recommendation would involve adding an express provision, likely a legislative note, to section 5(4) of the model WHS Act stating that a person can be both a worker and a PCBU. This is already the case under the model WHS Act. This would support sections 15 and 16 of the model WHS Act, which states a person can have more than one duty and more than one person can have the same duty respectively. As this amendment only clarifies the existing operation of the model WHS Act no impacts are expected.	No impact – clarification	This clarification is anticipated to be of benefit in avoiding any doubt, and no impacts are expected.
5: Develop a new model Code on the principles that apply to duties Develop a model Code to provide practical guidance on how PCBUs can meet the obligations associated with the principles contained in sections 13–17 (the Principles), including examples of: - the application of the Principles to labour hire, outsourcing, franchising, gig economy and other modern working arrangements, and - processes for PCBUs to work co-operatively and cohesively to discharge	The 2018 Review found that core principles underpinning WHS law, like the requirement for duty holders to consult with other persons who share responsibilities for WHS, are difficult to apply in practice. The Review Report states that the model WHS Act is not operating as intended because PCBUs are unsure about when, how and to what extent they must consult, co-operate and co-ordinate with other persons who have a duty in relation to the same matter. In other words, there is confusion about the interaction of the principles in sections 13-17 and the duty to consult, co-operate and co-ordinate in section 46.	The recommendation to develop a standalone model Code with practical examples that illustrate how duties can be met will not increase regulatory burden on business. This material is already contained in a model Code; it would just be separated out into a standalone Code under this recommendation. The Code would cover existing duties and only provide additional explanation, not additional obligations. There are no statutory changes associated with this recommendation. There may be a minor benefit if material is easier to find and provides greater clarity on existing provisions.	Minor benefit – additional guidance	Practical guidance for PCBUs which clarifies: - how duties apply within the supply chain and modern working arrangements; - roles and responsibilities of PCBUs operating in the same environment; and - how to comply with duties to consult; is anticipated to be of benefit.

Recommendation	2018 Review findings	Anticipated impacts	Summary	NSW WHS Regulators Response
their duties (in the context of the duty to consult, co-operate and co-ordinate with other duty holders—section 46 of the model WHS Act).	This is particularly the case in relation to modern working arrangements, such as labour hire, outsourcing, franchising and the gig economy.			
6: Provide practical examples of how to consult with workers Update the model Code of Practice: Work health and safety consultation, co-operation and co-ordination to include practical examples of how meaningful consultation with workers can occur in a range of traditional and non-traditional settings.	The 2018 Review found that genuine consultation is not always occurring as required under the model WHS law. This may be impacting on safety outcomes as consultation provides the opportunity for workers to raise safety issues as well as ensuring the PCBU can draw on the expertise of workers in managing risks.	There is already a model Code on consultation, co-operation and co-ordination. This recommendation aims to improve the useability of that Code through the inclusion of practical examples illustrating how meaningful consultation can be achieved in different workplaces. Implementing the recommendation would not place any additional duties on business: the recommendation merely seeks to improve the ability of duty holders to meet their existing obligations.	Minor benefit – additional guidance	Practical guidance as to how to consult with workers is anticipated to be of benefit.
7a: New arrangements for HSRs and work groups in small businesses	See Chapter 4 of this Consultation RIS.			
7b: Work group is negotiated with proposed workers Amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group.	Under the current arrangements for forming work groups to elect HSRs, it may be difficult for a PCBU to identify who they must negotiate with. The model WHS Act states the workers who must be party to the negotiations are those who will form the group, the identification of which is the subject of the negotiations. This issue was raised in the case of <i>NSW Fire Service v</i>	This option would amend the model WHS Act for consistency with the language used in the Explanatory Memorandum – that is that PCBUs must negotiate with the workers who are proposed to form the work group or their representatives. This option would provide clarity for PCBUs on which workers they must negotiate with when forming work groups. This is likely to result in less time required to clarify the duties in the model WHS Act and lower consultation costs if PCBUs are undertaking further consultation during the process to ensure all workers are captured. It may also reduce costs to the	No impact – clarification	On the evidence presented as to the cost impact of this provision, the proposed clarification of the provision is anticipated to be of benefit to PCBUs.

Recommendation	2018 Review findings	Anticipated impacts	Summary	NSW WHS Regulators Response
	<i>SafeWork NSW [2016] NSWIRComm 4.</i> The 2018 Review found this issue could be addressed by clarifying that the negotiations must be with workers <i>proposed</i> to form the work group, which aligns with language used in the Explanatory Memorandum to the model WHS Bill. The extent of the problem is unknown but thought to impact PCBUs at workplaces where multiple work groups are formed.	PCBU if it prevents the need for specialist advice where PCBUs are unable to determine their obligations.		
8: Workplace entry of union officials when providing assistance to an HSR	See Chapter 5 of this Consultation RIS.			
9: Inspectors to deal with safety issue when cancelling a PIN	See Chapter 6 of this Consultation RIS.			
10: HSR choice of training provider	See Chapter 7 of this Consultation RIS.			
11: Provide examples of HSC constitutions, agendas and minutes Update the model Codes and guidance with examples of Health and Safety Committee (HSC) constitutions, agendas and minutes.	The 2018 Review found stakeholders are confused about the administration of HSCs and that the rules can be onerous for smaller businesses: e.g. developing a constitution, agendas and minutes can be onerous for smaller businesses.	This recommendation aims to assist those establishing and servicing HSCs by adding practical information to existing model Codes. Implementing the recommendation would not place any additional duties on business: the recommendation merely seeks to improve the ability of duty holders to meet their existing obligations.	Minor benefit – additional guidance	Practical guidance to supplement the model Codes and guidance with examples of Health and Safety Committee (HSC) constitutions, agendas and minutes is anticipated to be of benefit to smaller PCBUs.
12: Update guidance on issue resolution process and participants Update the Worker representation and	The 2018 Review found stakeholders are confused about how to identify 'parties' to a WHS issue and have difficulties in understanding and	This recommendation aims to improve understanding of the model WHS laws dispute resolution provisions by adding practical examples to existing guidance.	Minor benefit – additional guidance	Updating existing guidance material with practical examples to support understanding and compliance with obligations

Recommendation	2018 Review findings	Anticipated impacts	Summary	NSW WHS Regulators Response
participation guide to include: - practical examples of how the issue resolution process works, and - a list of the various representatives entitled to be parties in relation to the issues under section 80 of the model WHS Act as well as ways of selecting a representative and informing the other parties of their involvement.	applying the model WHS laws issue resolution process.	Implementing the recommendation would not place any additional duties on business: the recommendation merely seeks to improve the ability of duty holders to meet their existing obligations.		in the worker representation and participation guide is anticipated to be of benefit to PCBUs.
13 Resolving outstanding disputes after 48 hours	See Chapter 8 of this Consultation RIS.			
14: Clarify court powers for cases of discriminatory or coercive conduct Amend the model WHS Act to make it clear that courts have the power to issue declaratory orders in proceedings for discriminatory or coercive conduct.	The 2018 Review found that there is uncertainty over whether the model WHS laws allow a court to make a declaratory order under the model WHS laws' discriminatory and coercive conduct provisions following <i>Thornburn v Safe Work SA</i> [2014] SAIRC 29. This problem only affects workers seeking a declaratory order for discrimination under the WHS laws in their jurisdiction.	This recommendation would clarify that discriminatory orders are able to be granted by courts in matters relating to discriminatory or coercive conduct. The courts ability to issue declaratory orders for breaches of the discriminatory and coercive conduct provisions supports individual's ability to access procedural fairness by ensuring the use of a mechanism that is considered an efficient and flexible way of resolving matters. As this amendment only clarifies the existing operation of the model WHS Act no impacts are expected.	Minor benefit –clarification	This clarification is anticipated to be of benefit in avoiding any doubt, and no impacts are expected.
15: Remove 24-hour notice period for entry permit holders	See Chapter 9 of this Consultation RIS.			

Recommendation	2018 Review findings	Anticipated impacts	Summary	NSW WHS Regulators Response
16: Align the process for the issuing and service of notices under the model WHS Act to provide clarity and consistency Amend the model WHS Act to align the service of notices under section 155 and section 171 with those in section 209 of the model WHS Act dealing with improvement, compliance and non-disturbance notices.	The 2018 Review found that provisions in the model WHS laws dealing with the service of notices is inconsistent and therefore impractical.	This recommendation would clarify the way notices under section 155 and section 171 of the model WHS Act are served and ensure consistency across harmonised jurisdictions, but is unlikely to result in significant impacts. This is because service of notices issued under section 155 and section 171 in harmonised jurisdictions is currently similar to service as required in section 209 of the model WHS Act.	Minor benefit –clarification	The opportunity to align the process for the issuing and service of notices under the model WHS Act is anticipated to be of benefit to regulators by providing clarity and consistency.
17: Provide the ability for inspectors to require production of documents and answers to questions for 30 days after they or another inspector enters a workplace	See Chapter 10 of this Consultation RIS.			
18: Clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the model WHS laws outside of their jurisdiction Amend the model WHS Act to clarify that the regulator's power to obtain information under section 155 has extraterritorial application.	The 2018 Review found that co-operation between regulators is restricted in cases where inspectors need to perform their functions in another jurisdiction. This is because there is uncertainty as to whether inspectors can gather information for the purpose of suspected breaches outside their jurisdiction. This affects WHS regulators seeking information outside their industry or geographical jurisdiction.	This recommendation would put beyond doubt that a regulator can issue a section 155 notice to a person outside of its jurisdiction. As this amendment only clarifies the existing operation of the model WHS Act no impacts are expected.	No impact – clarification	NSW has already adopted section 155A in the NSW <i>Work Health and Safety Act 2011</i> to obtain records and issue notices outside NSW and has realised the benefits of that provision. It is anticipated that the broader application of such a provision nationally will be of benefit to other WHS Regulators.
19: Enable cross-border information sharing between regulators	The 2018 Review found that regulators are concerned that they are restricted in sharing	This recommendation would put beyond doubt that regulators may share information across jurisdictions.	No impact – clarification	For the avoidance of doubt, it is anticipated that this clarification will be of benefit

Recommendation	2018 Review findings	Anticipated impacts	Summary	NSW WHS Regulators Response
Amend the model WHS Act to include a specific power enabling regulators to share information between jurisdictions in situations where it would aid them in performing their functions in accordance with the model WHS laws.	information across jurisdictions due to the confidentiality provisions in the model WHS Act. This problem affects WHS regulators who have been asked to provide information to a regulator with a different jurisdiction (e.g. industry or geographical jurisdiction).	As this amendment only clarifies the existing operation of the model WHS Act no significant impacts are expected. However, it may improve information sharing and ensure investigations proceed more efficiently.		to regulators in improving information sharing and supporting the efficient progress of investigations.
20: Review incident notification provisions Review incident notification provisions in the model WHS Act to ensure they meet the intention outlined in the 2008 National Review, that they provide for a notification trigger for psychological injuries and that they capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements.	The 2018 Review found the incident notification provisions in the model WHS laws are not operating as intended. They are often misunderstood by business and do not capture all relevant incidents, particularly psychological injuries.	A review of the incident notification provisions would be undertaken by Safe Work Australia and would draw on the views of a range of stakeholders including PCBUs, workers, Health and Safety Representatives, union officials, inspectors and WHS experts/academics. The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.	No impact – further work recommended	The opportunity to review incident notification provisions in the model WHS Act with a view to ascertaining whether and how they might be clarified or expanded to best support health and safety outcomes is anticipated to be of benefit.
21: Review the National Compliance and Enforcement Policy (NCEP) Review the NCEP to include supporting decision-making frameworks relevant to the key functions and powers of the regulator to promote a nationally consistent approach to compliance and enforcement.	The 2018 Review identified inconsistent approaches to enforcement and compliance across jurisdictions and concludes the NCEP: - provides insufficient detail for regulators and inspectors, and - insufficient information for duty holders about how and when a regulator	The review of the NCEP would be undertaken by Safe Work Australia, in consultation with other stakeholders. The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.	No impact – further work recommended	The opportunity to review the NCEP is anticipated to be of benefit by clarifying and/or expanding detail for regulators and inspectors and by promoting a nationally consistent approach to compliance and enforcement across regulators.

Recommendation	2018 Review findings	Anticipated impacts	Summary	NSW WHS Regulators Response
	might use enforcement tools.			
22: Increase penalty levels - Amend the penalty levels in the model WHS Act to reflect increases in consumer price index and in the value of penalty units in participating jurisdictions since 2011, and - Review the increased penalty levels as part of future reviews of the model WHS Act and model WHS Regulations to ensure they remain effective and appropriate.	The 2018 Review found that current penalty levels (in place since 2011) do not act as an effective deterrent, especially for larger companies.	Increasing penalty levels to align with increases in the consumer price index would ensure that penalties under the WHS laws retain their real value as a deterrent. This will contribute to improving worker health and creating a safer working environment as businesses and their officers are encouraged to take a best practice approach to their WHS obligations so as to avoid penalties. Improved work health and safety may also increase the business' operational performance and productivity. The increases are not expected to result in significant increased costs to business overall, as only those business who breach their obligations are subject to the penalties.	No regulatory cost. Legislative amendment required.	The proposed adjustment of penalty levels to align with increases in the consumer price index to ensure their real value as a deterrent is retained is integral to ensuring health and safety outcomes.
23a: Enhance Category 1 offences	See Chapter 11 of this Consultation RIS.			
23b: Industrial manslaughter	See Chapter 11 of this Consultation RIS.			
24: Improve WHS regulator accountability for investigation progress Amend the model WHS Act to remove the 12-month deadline for a request under section 231 that the regulator bring a prosecution in response to a Category 1 or Category 2 offence and to ensure ongoing accountability to the person	The 2018 Review found the 12-month deadline to request a prosecution is brought often lapses before an investigation is complete. This leaves the injured parties and their families without an avenue for recourse. The 2018 Review found there may be negative consequences to the 12-month deadline for a person to	A person with an interest or connection to an investigation would be able to request the regulator to bring a prosecution at any time, not just within 12 months of an occurrence. They will also be kept informed until a decision is made on bringing a prosecution. There is a potential benefit to the community in this approach, as it increases transparency and accountability. It could also benefit the community and workers if greater	No regulatory cost. Legislative amendment required.	Please refer to comments above, on page 20.

Recommendation	2018 Review findings	Anticipated impacts	Summary	NSW WHS Regulators Response
who made the request until a decision is made on whether a prosecution will be brought.	request the regulator to bring a prosecution in response to a Category 1 or Category 2 offence if no prosecution has been brought within six to 12 months of the occurrence (section 231). In particular, any delay or inaction in making a decision on prosecution may result in a person not being able to request the regulator to bring a prosecution.	transparency in the progress of investigations results in more timely prosecutions and an increase in safety standards through deterrence. There would be potential resource costs to the regulator in responding to requests and keeping persons informed of investigations. These resource costs are ultimately borne by the taxpayer.		
25: Consistent approach to sentencing Safe Work Australia work with relevant experts to develop sentencing guidelines to achieve the policy intention of Recommendation 68 of the 2008 National Review. As part of this process, any unintended consequences due to the interaction of local jurisdictional criminal procedure and sentencing legislation should also be considered.	The 2018 Review found that stakeholders were concerned that there are inconsistent and inadequate sentences across jurisdictions for WHS offences.	The development of sentencing guidelines would be a complex undertaking due to variations in general sentencing law, criminal procedure legislation and courts across the jurisdictions. Given the complexities involved, Recommendation 25 would be treated as a recommendation for Safe Work Australia, working with relevant experts, to undertake a review into the feasibility of developing national WHS sentencing guidelines. The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.	No impact – further work recommended	The proposed consideration of the development of sentencing guidelines is acknowledged to be a complex undertaking due to variations in general sentencing law, criminal procedure legislation and courts across jurisdictions.
26: Prohibit insurance for WHS fines	See Chapter 12 of this Consultation RIS.			
27: Clarify the risk management process in the model WHS Act	See Chapter 13 of this Consultation RIS.			
28: Improved recording of amusement device infringements and operator training	The 2018 Review found that the requirements for log books for amusement devices may not provide sufficient	Operators are already required to keep log books for amusement devices. This recommendation suggests expanding the content of the log books which may result	Minor costs – new record keeping process	The opportunity to consider amendment of regulation 242 in expanding the content of log books for

Recommendation	2018 Review findings	Anticipated impacts	Summary	NSW WHS Regulators Response
Amend regulation 242 of the model WHS Regulations to ensure that details of statutory notices issued by any WHS regulator and evidence of operator training and instruction are included in the device's log book.	information to assess whether a ride is safe, and the operator competent to operate it.	in minor additional cost to businesses that do not already voluntarily retain the records on operator training or notices issued. This recommendation would not change WHS duties relating to amusement devices, but may reinforce existing requirements to make relevant information available to enable informed decisions on the safety of amusement devices and to provide training and instruction to operators. Implementation of this recommendation may result in some improvement in health and safety outcomes, if it increases availability of information and training.		amusement devices is anticipated to result in some improvement in health and safety outcomes and warrants further evaluation.
29a: Add a SWMS template to the WHS Regulations	See Chapter 14 of this Consultation RIS.			
29b: Develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS	See Chapter 14 of this Consultation RIS.			
30: Photographic ID on White Cards Amend the model WHS Regulations to require photographic ID on White Cards consistent with high-risk work licences.	The 2018 Review found that there is confusion for stakeholders caused by inconsistent photo ID requirements between high risk work (HRW) and construction induction (White) cards.	Amending the WHS Regulations to require photo identification on White Cards is expected to help ensure that the White Card holder is the person who completed the white card training, which is anticipated to improve safety in the construction industry. This requirement will also ensure consistency with HRW licences. However, this option may involve transitional compliance costs for businesses or individuals holding an existing White Card which may need to be reissued. Additionally, individuals may face costs associated with either providing a photo or travelling to a physical location	Minor benefit – if implemented to minimise transitional costs of the new process	Please refer to comments on page 22.

Recommendation	2018 Review findings	Anticipated impacts	Summary	NSW WHS Regulators Response
		to have the licence issued. These costs will depend on how the card is re-issued. There are also potential costs to the regulator to establish or extend an existing system to issue photographic White Cards.		
31a: Consider removing references to Standards in model WHS Regulations Review the references to Standards in the model WHS laws with a view to their removal and replacement with the relevant obligations prescribed within the model WHS Regulations.	Australian Standards (standards) are currently referenced in the model WHS Regulations (15 standards) and model Codes (160 standards). The 2018 Review identifies stakeholder concerns with the use of standards in the model WHS laws, primarily the currency of standards referenced, the cost of accessing standards and whether compliance with a standard is mandatory.	The recommendation proposes reviewing the references to the standards and identifying where they can be replaced with a prescribed duty in the Regulations or Codes. The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.	No impact – further work recommended	The proposed review and consideration of the method and placement of references to standards within Regulations or Codes would provide a basis for a consideration of the costs and other impacts of adopting any amended practice. That review, and assessment will likely determine whether further consideration of an amended practice would be of benefit to both regulators and PCBU's. NSW WHS Regulators note that Standards Australia have advised that Standards will no longer be distributed exclusively through SAI Global. Standards Australia are currently consulting on their Distribution and Licensing Policy Framework Discussion Paper, which seeks to address many of the concerns identified by the 2018 Review. Any consequent changes to the Standards Australia distribution model are likely

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				to be relevant to further consideration of this issue.
31b: Compliance with Standards not mandatory unless specified Amend regulation 15 of the model WHS Regulations ('Reference to Standards') to make it clear that compliance with Standards is not mandatory under the model WHS laws unless this is specifically stated.	The 2018 Review found that there is confusion among stakeholders about when compliance with a standard is voluntary or mandatory under the model WHS laws. Additional confusion can arise when the referenced standards are updated or withdrawn by Standards Australia. As the model WHS Regulations refer to a specific published standard, the originally referenced version remains in force until the model and jurisdictional WHS laws are amended. Stakeholders may be uncertain about which version applies.	This recommendation intends to clarify that compliance with standards is not mandatory under the model WHS laws unless this is specifically stated. All standards referenced in the model WHS Regulations are already mandatory in the circumstances to which the regulations apply. As this amendment only clarifies the existing operation of the model WHS Act, no impacts are expected.	No impact – clarification	This clarification is anticipated to be of benefit in avoiding any doubt, and no impacts are expected.
32: Review Major Hazard Facility (MHF) Regulations Review the model WHS Regulations dealing with MHFs, with a focus on administrative or technical amendments to ensure they meet the intended policy objective.	The 2018 Review found inconsistencies in the application of jurisdictional WHS Regulations for Major Hazard Facilities (MHFs), with impacts especially felt by businesses operating across multiple jurisdictions. The 2018 Review notes the difficulties in achieving national consistency in MHF regulation (which often overlaps with regulation of explosives and mining).	This recommendation proposes reviewing the MHF chapter in the model WHS Regulations with a focus on administrative or technical amendments. The intention is to improve the usability of the MHF regulations, without impacting external industries or other regulatory schemes. The review would be undertaken by Safe Work Australia, in consultation with stakeholders, and drawing on appropriate external expertise. The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.	No impact – further work recommended	The proposed review of the MHF chapter in the model WHS Regulations with a focus on administrative or technical amendments may prove to be a complex undertaking given the interrelationship of regulation of MHFs with regulation of explosives and mining. The review will clarify whether any amendments are appropriate, including an assessment of the costs and other impacts of any

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				proposed amendments for regulators and PCBUs.
33: Review crane licence classes Review the high-risk work licence classes for cranes to ensure that they remain relevant to contemporary work practices and equipment.	The 2018 Review found that high-risk licences may not be keeping up with modern requirements, based on concerns raised by the Crane Industry Council of Australia.	This recommendation proposes a review to investigate whether the licensing classes for cranes are appropriate in light of crane capacity and incident rates. It would be undertaken by Safe Work Australia and follow the established process for reviewing high-risk work licence classes. The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.	No impact – further work recommended	The opportunity to review high-risk work licence classes for cranes to ensure they remain appropriate is anticipated to be of benefit to regulators and PCBUs.
34a: Improving the quality of asbestos registers Amend the model WHS Regulations to require that asbestos registers are created by a competent person and update the model Codes to provide more information on the development of asbestos registers.	The 2018 Review found stakeholders were experiencing issues with quality and consistency of the information in the asbestos registers. This may be affecting asbestos management plans and workers' ability to know where asbestos is located and what its condition is.	This recommendation would increase costs for business from engaging a competent person to complete their asbestos register. This cost may be less if the engagement occurred as part of the asbestos identification process, which a competent person is already required to perform. The impact could also be reduced by implementing the new requirement after the review of existing requirements for competent persons (Recommendation 34b) is completed, and time allowed for any new training to be established and to build capacity in the work force to meet market demand. The costs may be offset by improvements in safety through increased quality of information on the register.	Minor benefit – if implemented after the review (Rec 34b)	Subject to consideration of Rec 34b, the opportunity to review existing requirements as to the development of asbestos registers and consider whether any amendments are appropriate, including an assessment of the costs and other impacts of any proposed amendments is anticipated to be of benefit for regulators and PCBUs.
34b: Competent persons in relation to asbestos Review existing requirements for competent	The 2018 Review found that stakeholders consider the definition of what constitutes a 'competent person' unclear	This recommendation proposes a review to be undertaken by Safe Work Australia in consultation with stakeholders. It would examine the existing requirements in the	No impact – further work recommended	The opportunity to review existing requirements for competent persons and consider whether any

Recommendation	2018 Review findings	Anticipated impacts	Summary	NSW WHS Regulators Response
persons, including consideration of amendments to the model WHS Regulations to provide specific competencies for asbestos-related tasks or requirements for further guidance on the skills and experience required for all asbestos-related tasks.	with regard to who should or must perform certain asbestos-related tasks and what e skills and experience a competent person should hold.	model WHS Regulations for a competent person and identify whether specific competencies, skills and experience should be prescribed for all asbestos related tasks. The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.		amendments are appropriate is anticipated to be of benefit for regulators and PCBUS.

Regulatory Policy

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