



2018 Review of the model WHS laws

Discussion paper

Marie Boland

February 2018

Authors

This discussion paper has been prepared by the independent reviewer, Ms Marie Boland, and draws on information provided by Safe Work Australia.

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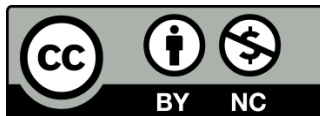
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Foreword

Everyone has the right to a safe and healthy workplace. The intention of the model work health and safety (WHS) laws is to support that right by providing workers in Australia with a consistent standard of health and safety protection wherever they work and whatever work they do. The model WHS laws are founded on the principle that workers and others should be given the highest level of protection through the elimination or minimisation of risks arising from work, so far as is reasonably practicable. Anyone who can influence health and safety should use that influence to achieve the best possible WHS outcomes for workers and those affected by work.

The model WHS laws provide the framework for a harmonised approach to the regulation of WHS in each Australian jurisdiction. Developed in 2009-10 following a comprehensive and independent national review, the model WHS laws have been implemented by the Commonwealth, the Australian Capital Territory, New South Wales, the Northern Territory, and Queensland (on 1 January 2012) and South Australia and Tasmania (on 1 January 2013). Victoria and Western Australia are yet to implement the model.

Ministers with responsibility for WHS matters (WHS ministers) have asked that the content and operation of the model WHS laws be reviewed every five years: this review (the Review) is the first. I feel privileged to have been appointed by Safe Work Australia as an independent reviewer and I look forward to conducting an open, inclusive and transparent process that considers the laws holistically – looking at the model WHS Act, model WHS Regulations, model Codes of Practice (model Codes) and the *National compliance and enforcement policy* (NCEP) as a package rather than individually.

Throughout the Review I will be focusing on 6 key questions:

What works?

Why does it work?

Will it continue to work as work practices and environments evolve?

What doesn't work?

Why doesn't it work? and

What could we do to make it work?

I will be gathering evidence to support the answers to these questions and I will consider the views of all participants in the Review. I will examine research findings on the operation of the model WHS laws, analyse relevant case law and review coroners' reports and recommendations that reference the model WHS laws. I will draw on the experience of WHS and legal practitioners, industrial magistrates, judicial officers and academics. I also want to hear from business owners and their representatives, workers, Health and Safety Representatives (HSRs), unions, families of those who have died and been injured at the workplace and WHS regulators. I will be asking people to provide evidence to support their opinions – examples, case studies and any available data. This will not only assist me to determine what is working and what isn't; it will also help me craft stronger recommendations for change where it might be needed.

This discussion paper marks the first stage in the Review process. Following the Terms of Reference (provided at Appendix A), it focuses on key provisions in the model WHS laws which were new to one or more jurisdiction and poses questions that you may wish to answer in a written submission. In responding to the issues raised and the questions asked, I encourage you to provide examples of situations where the model WHS laws have helped you to achieve good WHS outcomes in your workplace and examples of where they may have impeded good outcomes. The topics covered are not exhaustive and you are welcome to raise other issues in your written submission. Equally, you are not required to answer all of the questions posed in the discussion paper; you may address only those which are of particular relevance to you. There are also other ways you can be involved in the Review throughout the public consultation process.¹ I am very keen to hear your views in whatever way you want to contribute them.

¹ See page 7 for more details on the Review process.

In considering the merits of any calls for change, I will be guided by whether proposals would optimise WHS outcomes, strengthen harmonisation and reflect the collective wisdom and knowledge of those who are working with the model WHS laws on a day to day basis.

I hope that the Review will raise awareness of the importance of discussing WHS publicly and in our workplaces. I hope that it will reveal how we can build on the strong foundation of the model WHS laws to continuously improve our approach to managing WHS, ensuring that all Australians get home from work safely.

I am very grateful for the support of the Secretariat to the Review and for their work in assisting me with the production of this discussion paper.

Marie Boland

The Review process

WHS ministers asked Safe Work Australia to examine and report on the operation and content of the model WHS laws to ensure they are operating as intended. Terms of Reference for the Review are at Appendix A. The Review is being conducted by an independent reviewer on behalf of Safe Work Australia.

This discussion paper has been developed to inform a public consultation process in the first half of 2018. Comments received during public consultation will be used to inform a written report which will, if supported by relevant evidence, make recommendations to improve the model WHS laws or identify areas requiring more work.

The Review will be finalised by the end of 2018 when the final written report is provided to Safe Work Australia. Safe Work Australia will subsequently report to WHS ministers in early 2019.

How to contribute your views

You can share your views of and experiences with the model WHS laws at <https://engage.swa.gov.au/review-consultation>.

Chapters 3 to 8 of this discussion paper present issues for consideration which are within the Terms of Reference and scope of the Review. A complete list of the questions asked throughout the discussion paper is at Chapter 9. Written submissions addressing these questions can be made at Safe Work Australia's Engage site. At this site you can also participate in online discussion forums or raise other issues that are important to you.

If you would like to provide comments in a different format or have any questions, please contact Safe Work Australia at 2018Review@swa.gov.au.

All submissions and comments must be provided by 5pm (EST) 13 April 2018.

Submissions will be published and may be referred to in subsequent reports. You can request that your name be withheld, or that all or part of your submission to be treated as confidential, when you lodge your submission. Please be aware that even where you request information be treated as confidential, there may be circumstances in which Safe Work Australia is authorised or required by law to release that information, for example, in accordance with the *Freedom of Information Act 1982* (Cth) or for the purpose of parliamentary processes.

1 BACKGROUND

1.1. Introduction

The model WHS laws include a model WHS Act², model WHS Regulations and 24 model Codes. They are supported by the NCEP.

The model WHS laws provide the framework for a consistent approach to the regulation of WHS in each Australian jurisdiction. The Commonwealth, states and territories have responsibility for making and enforcing their own WHS legislation. In 2008, WHS ministers signed the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (IGA) which sets out the principles and processes for cooperation between the jurisdictions to implement model WHS legislation and in turn, achieve harmonisation of WHS laws.³

For the model WHS laws to be legally binding, each jurisdiction must separately implement them as their own laws. The Commonwealth, the Australian Capital Territory, New South Wales, the Northern Territory and Queensland implemented the model WHS laws in their jurisdictions on 1 January 2012. South Australia and Tasmania implemented the model WHS laws on 1 January 2013.

Western Australia is currently drafting a new Work Health and Safety Bill based on the model WHS Act. Victoria has not implemented the model WHS laws.⁴

The model WHS laws have delivered significant harmonisation of Australia's WHS legislation.⁵

1.2. Prior to the model WHS laws

Since the 1970s, Australia has followed Britain's Robens model for WHS regulation.⁶ The principles of the Robens model include:

- a single WHS Act with broad "general duties" for all parties including employers, the self-employed, occupiers, designers, manufacturers and suppliers of plant and substances and employees
- detailed regulations and Codes of Practice to support the Act
- an inspectorate with power to impose administrative sanctions (improvement and prohibition notices) and an ability to bring prosecutions (against corporate officers as well as corporate employers), and
- a framework built on "self-regulation", where employers are required to consult with workers and where the formation of Health and Safety Committees (HSCs) is encouraged (as opposed to the pre-1970s approach, where the jurisdiction determined all WHS requirements).

Although all Australian jurisdictional laws were based on the same principles, prior to the implementation of the model WHS laws, there were significant variations between jurisdictions, particularly in regard to duties of care, consultation, risk control mechanisms, record keeping, reporting, compliance regimes and penalties.

² The model WHS Act refers to the *Model Work Health and Safety Bill 2016*. It forms the basis of the WHS Acts that have been implemented in most jurisdictions across Australia.

³ Workplace Relations Ministers' Council, *Intergovernmental agreement for regulatory and operational reform in occupational health and safety* (2008).

⁴ *Harmonisation-style changes likely for Vic soon* (14 September 2017) OHS Alert <https://www.ohsalert.com.au/nl06_news_selected.php?selkey=54004>

⁵ While there is a high degree of consistency in the WHS Acts of the seven implementing jurisdictions, there are some variations. Key variations are published on the Safe Work Australia website.

⁶ Great Britain. Committee on Safety and Health at Work 1910- 1972, *Safety and health at work: report of the Committee, 1970-72* (1972) H.M. Stationery Office, London.

A move towards greater national consistency started in the 1980s with the development of National Standards and National Codes of Practice for a number of key areas. The National Standards and Codes of Practice were initially intended to act as model regulations for adoption in each jurisdiction; however, statutory requirements in jurisdictional legislation prevented this from occurring. While the National Standards delivered greater national consistency in the areas of hazardous chemicals, occupational licensing and noise, there were significant differences nation-wide regarding which National Standards were adopted, how jurisdictions drafted and applied them and whether they were adopted as a Code of Practice or regulation.

The process of harmonising what were then occupational health and safety (OHS) laws was initiated by the Council of Australian Governments (COAG) under the National Reform Agenda, which sought to reduce regulatory burden and create a seamless national economy. In 2008, COAG signed the IGA committing all jurisdictions to harmonising legislation by 1 January 2012. The IGA set out the principles and processes for cooperation between the Commonwealth, states and territories and authorised WHS ministers to make decisions about a model WHS Act, regulations and Codes of Practice and a consistent compliance and enforcement policy.

WHS ministers agreed model legislation was the most effective way to achieve harmonisation. An advisory panel was established to undertake a national review and report on the optimal structure and content of model OHS legislation capable of being implemented in all jurisdictions. This is referred to as the 2008 National review. The panel put forward 232 recommendations over two reports (the first in October 2008, the second in January 2009).⁷

In June 2009, WHS ministers formally responded to the 2008 National review's recommendations, setting the parameters for drafting the model WHS laws. On 1 July 2009, Safe Work Australia was formally established under the *Safe Work Australia Act 2008* (Cth). Progressing harmonisation was to be its primary focus, with the Act also providing a statutory role for Safe Work Australia in evaluating and, if necessary, revising the model WHS laws.

Safe Work Australia released a draft model WHS Act for public comment in September 2009. A total of 480 submissions were received, which resulted in a number of amendments. WHS ministers endorsed a revised version in December 2009 and, following some further technical and drafting amendments, a final version of the model WHS Act was published on the Safe Work Australia website in April 2010. It was followed by draft model WHS Regulations and two tranches of draft model Codes for public comment. The model WHS Regulations were finalised in November 2010 and 23 model Codes were published between December 2011 and July 2012. An additional model Code on managing risks in stevedoring was published in December 2016.

1.3. Previous reviews of the model WHS laws

There have been two national reviews of the model WHS laws, both focused on reducing unnecessary regulatory burden.

The first was initiated by COAG, which asked WHS ministers to investigate ways to reduce 'red tape' in the model WHS Act by the end of 2014. A number of amendments were agreed by WHS ministers (covering notice periods for WHS entry permit holders, the scope of Provisional Improvement Notices (PINs) and training for HSRs) and they were incorporated into the model WHS laws in August 2016. None of these amendments have been implemented in a jurisdiction.

The second review was initiated by WHS ministers, who asked the Safe Work Australia Agency in December 2014 to review the model WHS Regulations to identify unnecessary regulatory burden. WHS ministers subsequently agreed to 16 amendments to the model WHS laws which are currently being progressed.

In addition to the two national reviews, several states have undertaken reviews of the model WHS laws implemented in their jurisdiction, including New South Wales, South Australia and Queensland. Throughout this discussion paper, there are references to issues raised and recommendations made in these reviews.

⁷ Department of Education, Employment and Workplace Relations, *National Review into Model Occupational Health and Safety Laws, First Report* (2009); Department of Education, Employment and Workplace Relations, *National Review into Model Occupational Health and Safety Laws, Second Report* (2009).

1.4. The Review

When the model WHS laws were being developed, WHS ministers agreed that they should be reviewed every five years.⁸ The first five yearly review was initially scheduled for 2016, but was postponed on the grounds that: there was insufficient evidence available due to the infancy of the model WHS laws; interim jurisdictional reviews indicated that there were no fundamental issues with the laws; and a series of outstanding amendments to the model WHS laws had not been implemented in jurisdictions.⁹

The Review will be the first holistic review of the model WHS laws since their development. It will consider all aspects including the model WHS Act, the model WHS Regulations and the model Codes. It will also consider the NCEP.

The Terms of Reference for the Review are at Appendix A. In summary, the Review will investigate whether:

- a. the model WHS laws are operating as intended
- b. any areas of the model WHS laws have resulted in unintended consequences
- c. the framework of duties is effective at protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships
- d. the compliance and enforcement provisions, such as penalties and enforceable undertakings, are effective and sufficient to deter non-compliance with the legislation
- e. the consultation, representation and issue resolution provisions are effective and used by duty holders; and workers are protected where they participate in these processes, and
- f. the model WHS Regulations, model Codes and NCEP adequately support the object of the model WHS Act.¹⁰

In considering these matters, the Review is required to be evidence-based and propose actions that may be taken by WHS ministers to improve the model WHS laws, or identify areas of the model WHS laws that require further assessment and analysis following the Review. The Review will pay particular regard to the object of the model WHS Act (at Appendix B).

⁸ Department of Education, Employment and Workplace Relations, *National Review into Model Occupational Health and Safety Laws, Second Report* (2009) Recommendation 232, p 456.

⁹ Council of Australian Governments, *Improving the model work health and safety laws* (2017) <<http://ris.pmc.gov.au/2017/01/18/improving-model-work-health-and-safety-laws>>

¹⁰ It is important to note the performance of WHS regulators is outside the scope of this Review.

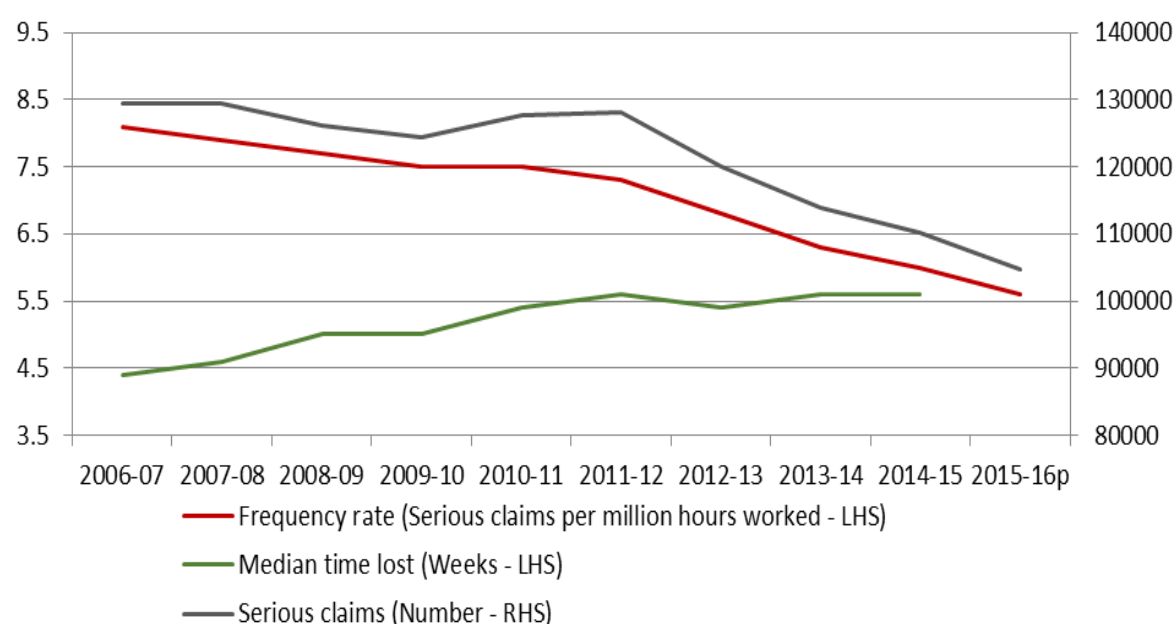
2 SETTING THE SCENE

WHS outcomes in Australia have improved considerably over the last decade, with both the rate of serious workers' compensation claims and the rate of worker fatalities falling significantly over this time. This chapter of the discussion paper provides a brief overview of key trends using available data.

2.1. Serious claims

Since the introduction of the model WHS laws, the frequency rate of serious claims has fallen by 23 per cent¹¹ and there has been a dramatic reduction in the number of claims, down by 18 per cent (see Figure 1). The frequency rate of serious claims has also similarly fallen across all jurisdictions.

Figure 1: Serious workers' compensation claims – number, frequency rate and median time lost, 2006-07 to 2015-16



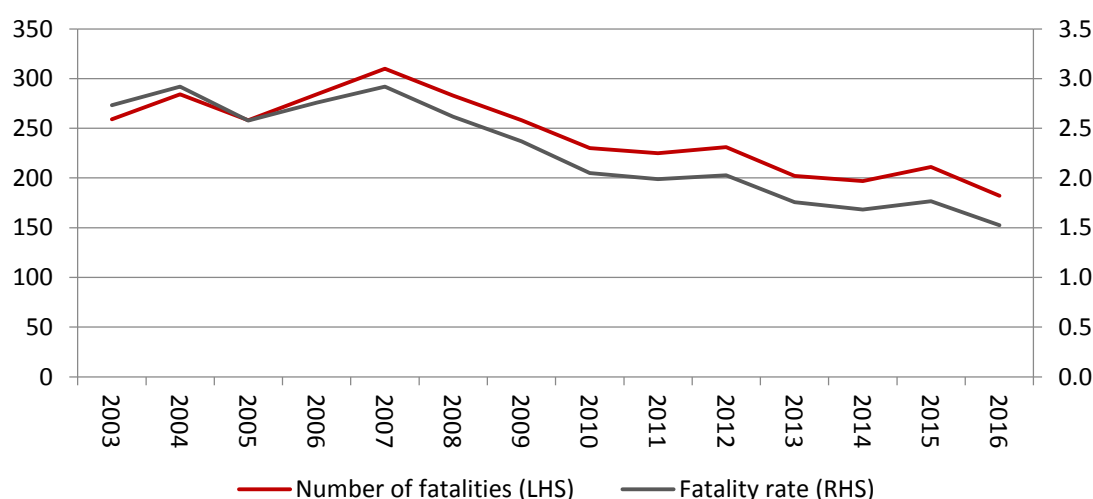
Source: Safe Work Australia, National Data Set for Compensation-based Statistics, 2015-16

2.2. Worker fatalities

Both the number and rate of worker fatalities have been trending down over the last decade. Since the peak in 2007, the number of worker fatalities has fallen by over 40 per cent, while the fatality rate has halved (see Figure 2).

¹¹ Decrease between 2011-12 and 2015-16.

Figure 2: Worker fatalities – number and fatality rate (fatalities per 100,000 workers), 2003 to 2016



Source: Safe Work Australia, Work-related Traumatic Injury Fatalities data set, 2016

2.3. Areas of risk

Almost 70 per cent of fatalities occur in just three industries: Transport, postal and warehousing (which at 47 fatalities accounted for more than a quarter of 2016 workplace deaths); Agriculture, forestry and fishing industry (44 fatalities) and the Construction industry (35 fatalities). The Agriculture, forestry and fishing and Transport, postal and warehousing industries also recorded the highest fatality rates in 2016 (14.0 fatalities per 100,000 workers and 7.5 fatalities per 100,000 workers respectively).

When it comes to workplace injuries and diseases, the Health care and social assistance industry accounted for the highest number of serious claims in 2015-16 (15 per cent), followed by Manufacturing (12 per cent) and Construction (12 per cent). Together, these industries accounted for almost 40 per cent of all serious claims, but represent less than 30 per cent of the workforce.

When controlling for workforce size, the frequency rate of serious claims was highest in the Agriculture, forestry and fishing industry (8.9 serious claims per million hours worked), followed by Manufacturing (8.4 serious claims per million hours worked) and Construction (8.0 serious claims per million hours worked).

2.4. Impacts for the future

Changes in the nature of employment across Australia may have an impact on WHS outcomes in the future.

Where people are employed is changing. Between 2012 and 2017 there has been significant growth in the service industries, with employment in the Health care and social assistance industry up by over 20 per cent. Given this industry's share of serious claims for workplace injuries and diseases, the predicted further growth could drive higher claim numbers over time.¹²

While 'blue collar' jobs are typically considered to be a shrinking portion of the economy, employment growth in Construction has increased by over 15 per cent over the same period, while in Transport, postal and warehousing and Agriculture forestry and fishing employment growth rates have been over 8 per cent. Should this continue, more workers will be employed in our highest risk workplaces.

¹² Department of Employment, *Employment Outlook to May 2022* (2017).

According to Department of Jobs and Small Business, employment rates are tipped to fall in the Manufacturing and Agriculture, forestry and fishing industries. While this could lead to reductions in the number of injuries and fatalities in these industries, it may also present WHS challenges stemming from greater workloads and a wider range of expectations being placed on remaining employees.

Beyond this, there is widespread recognition that the nature of work in Australia is changing. Globalisation, demographic and social change, rapid technological advancements and the development of new business and employment models are shaping the jobs and workplaces of tomorrow. Growth in technological capabilities is transforming supply chains, reshaping the workforce and redefining jobs.¹³

Digital technologies are enabling the development of 'platform technologies', such as Uber and Airtasker. The peer-to-peer economy is expanding into many areas and, while freelancing has not yet taken the same hold in Australia, it is a large and growing employment model in other countries.¹⁴ Greater access to augmented and virtual reality is on the horizon, with these technologies having the potential to reshape the ways people work.

At the same time other social and demographic trends are occurring within Australia. For instance older people are increasingly working longer before retiring. With the growth in administrative and service roles, work is becoming increasingly sedentary and screen-based. Already nearly two-thirds of Australian employees are overweight or obese and there are rising rates of type II diabetes, cardiovascular disease and other chronic illnesses.¹⁵ Reported rates of workplace stress and mental health issues are also increasing.

Other changes are seeing more people working remotely, using technology to work from home or another location and blurring the boundaries between work and home life. Although the Australian gig economy is still relatively small, peer-to-peer engagement is very different from traditional employment models.¹⁶

Together these changes have the potential to radically transform the nature of work, where work is undertaken, and the skills workers need to find and retain employment. It is also likely to have a significant impact on the nature of risks and hazards associated with work. As part of the Review, we need to consider whether the model WHS laws have the necessary flexibility to adapt to these changes.

¹³ CSIRO, *Tomorrow's Digitally Enabled Workforce: Megatrends and scenarios for jobs and employment in Australia over the coming twenty years* (2016) p 8.

¹⁴ Ibid.

¹⁵ Workplace Health Association Australia & Centre for Health Initiatives, University of Wollongong, *Health Profile of Australian Employees* (2014) p 2.

¹⁶ The gig economy (also referred to as the sharing economy, collaborative economy, access economy and peer economy) is the term commonly used to describe triangular business arrangements where for-profit companies create online digital platforms which act as intermediaries in linking individuals who can provide products or services to end users and consumers.

3 LEGISLATIVE FRAMEWORK

The starting point for reviewing the model WHS laws is to examine the legislative framework and to consider whether the current approach works and whether it can be improved.

Object of the model WHS Act: ¹⁷ (see s 3(1))	To provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces.
Term of Reference:	Whether the model WHS laws are operating as intended. Whether the model WHS Regulations and model WHS Codes adequately support the object of the model WHS Act.

3.1. The model WHS laws

The model WHS laws framework is comprised of the model WHS Act, the model WHS Regulations and the 24 model Codes. The framework is intended to be broadly applicable to all organisations regardless of their size or industry. It is outcomes-based and allows organisations to tailor their approach to safety to suit their circumstances.

The model WHS Act:

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

The model WHS Regulations identify the control measures (the steps and processes) that must be applied to specific work activities and hazards in order to fulfil WHS duties. For example, there are specific Chapters in the model WHS Regulations which identify how duty holders must comply with the model WHS Act in the context of General Risk and Workplace Management, Hazardous Work, Plant and Structures, Construction Work, Hazardous Chemicals, Asbestos, Major Hazard Facilities and Mines.

The model Codes provide practical information on how the requirements of the model WHS Regulations may be met. Courts may regard a Code as evidence of what is known about a hazard, risk or control and may rely on the Code in determining what is reasonably practicable in the circumstances to which the Code relates. Compliance with the model WHS Act and Regulations may be achieved by following another method, if it provides an equivalent or higher standard of work health and safety than the Code.¹⁸

The IGA gives Safe Work Australia responsibility for coordinating development of the model Codes. Under the IGA, model Codes proposed by Safe Work Australia are provided to WHS ministers for approval. When ministers agree to a proposed model Code by consensus it becomes an agreed model Code which can then be adopted by individual jurisdictions under the model WHS laws. Under the model WHS Act an individual WHS minister may only approve, vary or revoke a model Code after following a process involving consultation between Commonwealth, state and territory governments, unions and employer organisations. The process can take up to 18 months from the time the content of the model Code has been settled to when it becomes an approved model Code.

¹⁷ See Appendix B – Object of the model WHS Act.

¹⁸ The Queensland review recommended that a specific legislative provision is required in the *Work Health and Safety Act 2011* (Qld) (Qld Act) to make it clear that Codes are the minimum standard and this amendment has been passed in that jurisdiction.

The 2014 COAG review examined the use of the model Codes and recommended that in the future, national guidance material be the preferred format to support duty holders, rather than model Codes. The review found that model Codes were perceived as being overly long and complex through trying to encompass all relevant information in a single source. COAG agreed that further model Codes could be developed, where Safe Work Australia identifies a need based on rigorous criteria agreed by WHS ministers.

Question 1: What are your views on the effectiveness of the three-tiered approach - model WHS Act supported by model WHS Regulations and model WHS Codes - to achieve the object of the model WHS laws?

Question 2: Have you any comments on whether the model WHS Regulations adequately support the object of the model WHS Act?

Question 3: Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?

Question 4: Have you any comments on whether the current framework strikes the right balance between the model WHS Act, model WHS Regulations and model Codes to ensure that they work together effectively to deliver WHS outcomes?

3.2. Scope and application

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

- cover non-traditional, new and evolving working arrangements by moving away from reliance on the traditional employer/employee relationship
- secure the health and safety of workers at work, and ensure that the health and safety of others is not put at risk from work
- provide a broad definition of 'workplace', making it clear that a place does not cease being a workplace simply because there is no work being carried out at a particular time, and
- make it clear that the Crown is bound by the model WHS laws.¹⁹

The model WHS Act also includes 'psychological health' under its definition of 'health'. The express reference to psychological health was new to most jurisdictions.

New safety laws

Since the introduction of the model WHS laws, new safety related laws have been implemented outside of the model WHS framework. For instance, with the growth of ride-sharing services like Uber, jurisdictions have responded (or intend to respond) by amending their relevant passenger transport

¹⁹ Prior to enacting the model WHS laws the Commonwealth jurisdiction had immunity for the Crown for OHS prosecutions. The Australian Capital Territory did not consider prosecution to be appropriate for the Territory's public sector. The model WHS laws do not provide for Crown immunity on the basis that all persons with responsibility for the health and safety of workers and others should be accountable and subject to the same legal consequences for failing to meet their duty of care obligations.

laws (to place safety responsibilities on those participating in that industry) rather than rely on the existing WHS laws.²⁰

Extraterritorial application

Jurisdictional notes in the model WHS Act provide the flexibility for jurisdictions to include their own extraterritorial provisions. It was intended that inspection powers (Parts 9 and 10 of the model WHS Act) and powers of inquiry (Part 7) would not have any extraterritorial application to workplaces outside a specific jurisdiction.²¹ However, it remains unclear the extent to which regulatory powers in the model WHS laws extend outside of a jurisdiction, including to offshore worksites and businesses operating from overseas.²²

There has been one case which considered the extraterritoriality issue. In *Perilya Limited v Nash*, the Supreme Court of New South Wales found that the regulator's power to issue a notice to obtain information under the NSW Act was not limited by state borders in the circumstances. The Supreme Court did not consider the fact that Perilya Limited is registered in Western Australia and the company has its office in Perth as decisive in deciding whether the regulator could issue the notice.²³

Public safety regulation

The question of where WHS regulation ends and public safety regulation begins remains complex. The Explanatory Memorandum to the model WHS Act states:

*The duties under the Bill are intended to operate in a work context and will apply where work is performed, processes or things are used for work or in relation to workplaces. It is not intended to have operation in relation to public health and safety more broadly, without the necessary connection to work; and these elements are reflected in the model Bill by the careful drafting of obligations and the terms used in the Bill and also by suitably articulated objects.*²⁴

A recent case in South Australia confirmed the health and safety duty to other persons is not limited to the time and location when the work was originally performed. Rather, the model WHS Act creates a wider duty to protect the public at large from the adverse health and safety consequences of work.²⁵

Since the introduction of the model WHS laws, questions have continued to arise about their application in the context of safe product design, and in recreational, leisure and sports activities. For example, the issue of quad bike safety has been debated in the context of both WHS and consumer laws.

Question 5: Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?

²⁰ Examples include: the *Point to Point Transport (Taxis and Hire Vehicles) Regulation 2017* (NSW) which supports a new safety framework under the *Point to Point Transport (Taxis and Hire Vehicles) Act 2016* (NSW); and Queensland's requirements in relation to safety and fatigue management applying to all persons in the chain of responsibility for taxi and booked hire services.

²¹ Explanatory Memorandum, model WHS Act.

²² The New South Wales Review recommended that its WHS laws' extraterritorial application should be authorised, to the extent the State's legislative power allows, including allowing the regulator to obtain records and issue notices outside of NSW in relation to work health and safety matters arising in NSW. This review highlighted that the need for regulators to obtain records or interview persons interstate has increased.

²³ *Perilya Limited v Nash* [2015] NSWSC 706.

²⁴ Explanatory Memorandum, model WHS Act p 10.

²⁵ *Boland v Safe is Safe Pty Ltd & Munro* [2017] SAIRC 17. The charges filed in this matter relate to the death of a young girl that occurred at the Royal Adelaide Show when she was ejected from an amusement device on 12 September 2014. The primary argument of the defendant was that the health and safety duty imposed by s 19(2) of the Act only exists whilst work is being carried out by the relevant business or undertaking and that it does not extend to the consequences or product of work after the work has been carried out or completed.

Question 6: Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in legislation which has other purposes)?

Question 7: Have you any comments on the extraterritorial operation of the WHS laws?

Question 8: Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?

Question 9: Are there any remaining, emerging or re-emerging WHS hazards or risks that are not effectively covered by the model WHS legislation?

4 DUTIES OF CARE

A duty holder is any person who owes a WHS duty under the model WHS Act. This includes a person conducting a business or undertaking (PCBU), which could be a corporation, partnership, unincorporated association, a self-employed person or a sole trader. Other duty holders include the Crown and public authorities including municipal governments, officers, workers and other people at a workplace such as visitors and customers. There are also 'upstream' duties for designers, manufacturers, importers, suppliers and installers of products or plant used at work. This chapter examines the duties of care under the model WHS laws.

Object of the model WHS Act: (see s 3(1)(a))	To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.
Term of Reference:	Whether the framework of duties is effective at protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships.

4.1. Duty of PCBUs

A key objective of the model WHS laws is to cover non-traditional, new and evolving working arrangements; extending the primary duty of care beyond the traditional employer and employee relationship. This objective is achieved through the inclusion of the PCBU concept. Identifying 'a PCBU' as the primary duty holder was one of the key changes in the model WHS Act and was new to most jurisdictions. It was intended that the definition of PCBU would be broad enough and flexible enough to incorporate new industries, new ways of working and new risks arising from work into the model WHS framework.

Major advances in technology, including in the areas of digitisation, automation and artificial intelligence, are challenging the current legislative framework. The emergence of the gig economy, with the associated difficulties of characterising the participants as employers, independent contractors and/or workers, has arguably posed the first real test of the broad definition of PCBU since the implementation of the model WHS laws.²⁶

Section 19 of the model WHS Act sets out the primary WHS duty which applies to PCBUs. There are also particular duties of care for certain PCBUs including designers, manufacturers, suppliers, importers of plant, substances or structures.²⁷ Each duty placed on a duty holder under the model WHS Act is subject to a qualifier. For PCBUs, the qualifier is 'so far as is reasonably practicable'. The 2008 National review intended that the definition of reasonably practicable should be simple and easy to understand and that it should be a standard or outcome to be met, rather than a process to be followed.²⁸

Section 18 of the model WHS Act provides meaning and guidance about what is 'reasonably practicable' when complying with duties to ensure health and safety under the model WHS laws.

To determine what is (or was at a particular time) reasonably practicable in relation to managing risk, a person must take into account and weigh up all relevant matters, including:

- the likelihood of the relevant hazard or risk occurring
- the degree of harm that might result

²⁶ For a discussion of the potential coverage of gig economy participants by the model WHS laws see: A Stewart & J Stanford, 'Regulating work in the gig economy: What are the options?' (2017) 28.3 *The Economic and Labour Relations Review* pp 420-37.

²⁷ Model WHS Act, ss 20-26.

²⁸ It identified that the standard should be established in the model WHS Act and that the risk management process should be outlined in the model WHS Regulations with further practical guidance contained in a model WHS Code of Practice.

- what the person knows or ought reasonably to know about the hazard or risk and the ways of eliminating or minimising the risk, and
- the availability and suitability of ways to eliminate or minimise the risk.

After taking into account these matters, only then can the person consider the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.²⁹

Question 10: Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?

Question 11: Have you any comments relating to a PCBU's primary duty of care under the model WHS Act?

Question 12: Have you any comments on the approach to the meaning of 'reasonably practicable'?

4.2. Duty of officers

The 2008 National review noted that a company cannot comply with a duty of care placed upon it unless those who manage the company make appropriate decisions and ensure necessary actions are taken. It therefore recommended that a duty be placed on officers to ensure the company complies with the model WHS Act.

'Officer' is defined at s 4 largely by reference to s 9 of the *Corporations Act 2001* (Cth) which includes "a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the corporation".³⁰

An officer's duty (s 27 of the model WHS Act) is to exercise due diligence to ensure the PCBU complies with its health and safety duties. A list of the steps that must be taken to meet this standard is provided at s 27(5) of the model WHS Act. The list is not meant to be exhaustive. Depending on the circumstances, an officer may need to take other steps in order to meet the standard. Officers are only required to take reasonable steps in exercising due diligence. What is reasonable will depend on the particular circumstances.

The courts have considered what due diligence means. In *McKie v Al-Hasani and Kenoss Contractors Pty Ltd (in liq)*, Mr al-Hasani was found not to be an officer, so the Magistrate did not have to decide whether or not he had breached the duty of due diligence.³¹ However, in discussing the standard of due diligence, the Magistrate referred to the case of *WorkCover Authority (New South Wales) (Inspector Mansell) v Daly Smith Corporation (Aust) Pty Ltd and Smith*, where it was observed that due diligence:

"is not done by merely hoping others would or could do what they were told, but also ensuring they have the skills to execute the job they are required to do and then ensuring compliance with that in accordance with the safe standards established. Compliance requires a process

²⁹ Explanatory Memorandum, model WHS Act pp 11-12.

³⁰ The High Court in *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465 clarified what constitutes 'participating in making decisions'. It held that whether an individual falls within the definition in s 9(b)(i) requires analysis of the role that the person plays in the corporation. Participating requires the individual being closely involved in the formulating of significant decisions and does not require the individual to be the ultimate decision maker.

³¹ *McKie v Al-Hasani and Kenoss Contractors Pty Ltd (in liq)* [2015] ACTIC 1.

*of review and auditing, both formal and random, in order to ensure that the safe standards established are in fact being adhered to and under ongoing review”.*³²

In Safe Work New South Wales v Austral Hydroponics Pty Ltd and Eang Lam, Mr Lam pleaded guilty to an offence of failing to exercise due diligence as an officer of a company, which included failing to take reasonable steps to ensure compliance with relevant model Codes.³³

Officers' duties have also been the subject of consideration by governments. The 2014 COAG review of the model WHS laws examined whether officers' duties created a disincentive to take up officer roles. Determining this was not the case, COAG suggested that further guidance be provided.³⁴

Interestingly, research seeking the views of senior managers in very large businesses found that the model WHS laws' due diligence, officer and penalty provisions raised their general level of health and safety awareness.³⁵

Question 13: Have you any comments relating to an officer's duty of care under the model WHS Act?

4.3. Duty of workers

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

Workers have a duty to take reasonable care for their own health and safety while at work and also to take reasonable care so that their acts or omissions do not adversely affect the health and safety of other persons at the workplace. Workers must also comply, so far as they are reasonably able to, with any reasonable instruction that is given by the PCBU to allow compliance with the Act and co-operate with any reasonable policy or procedure relating to WHS that has been notified to them.

Two recent Queensland cases demonstrate how these duties may be breached. In the first case, an operations manager was fined for authorising workers to bypass a safety device on a plastic extrusion machine and failing to comply with written procedures requiring the faulty machine to be removed from service until repaired. A worker's hands were subsequently injured when the machine was started by a colleague as he was manually feeding plastic into the machine.

In the second case, an employee of a plumbing products company pleaded guilty to failing to ensure his acts or omissions did not adversely affect the health and safety of others after he used an aerosol can and lighter to spray flames on the legs of a colleague.³⁶

Question 14: Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?

Question 15: Have you any comments relating to a worker's duty of care under the model WHS Act?

³² *WorkCover Authority (New South Wales) (Inspector Mansell) v Daly Smith Corporation (Aust) Pty Ltd and Smith* [2004] NSWIRComm 349.

³³ *Safe Work NSW v Austral Hydroponics Pty Limited and Eang Lam* [2015] NSWDC 295.

³⁴ Council of Australian Governments, Department of the Prime Minister and Cabinet, *Improving the model work health and safety laws* (2017) <<http://ris.pmc.gov.au/2017/01/18/improving-model-work-health-and-safety-laws>>

³⁵ Gunningham & Associates, WorkSafe WA *Impacts of work health and safety harmonisation on very large businesses* [unpublished report] (2013).

³⁶ *Manager and first-aid officer fined over injuries and prank*, OHS Alert, (12 January 2018).

4.4. Duty of other persons at the workplace

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

Question 16: Have you any comments relating to the ‘other person at a workplace’ duty of care under the model WHS Act?

4.5. Principles applying to duties

Sections 13-16 of the model WHS Act set out principles that apply to all duties and were included to guide duty holders, regulators and the courts in applying and interpreting duties of care.

These principles are:

- a duty cannot be transferred to another person
- a person can have more than one duty (for example by being both a worker and an officer)
- more than one person can have the same duty at the same time (for example a labour hire company that facilitates the placement of a worker at a host company and the host company where a worker is placed), and
- if more than one person has the same duty, they each must comply with that duty to the extent to which they have the capacity to influence and control the relevant work health and safety matter.³⁷

Section 17 of the model WHS Act specifies that a duty holder must ensure health and safety by managing risks, which requires:

- eliminating the risks, so far as is reasonably practicable, and
- if eliminating the risk is not reasonably practicable—to minimise the risks, so far as is reasonably practicable.

Question 17: Have you any comments relating to the principles that apply to health and safety duties?

³⁷ An example of how the principles apply can be found in *Boland v Big Mars Pty Ltd* [2016] SAIRC 11 where Industrial Magistrate Lieschke explicitly applied the principle that duties are not transferrable (s 14). He noted that a labour hire agency cannot ignore its primary duty of care to workers on its books or transfer the duty to the host business. In *Rockhampton Regional Council v Cosgrove & Ors* [2015] QSC 22 Justice McMeekin dismissed a regional council's argument that its general duty of care under the Qld Act could be transferred to a third party (a successor regional council).

5 CONSULTATION, REPRESENTATION AND PARTICIPATION

This chapter examines the consultation, representation and participation provisions in the model WHS laws. Importantly, the model WHS laws require a PCBU to consult, co-operate and coordinate activities with other PCBUs where they have a concurrent duty of care relating to the same work activity or project. They also require a two-way flow of information between PCBUs and their workers about WHS matters.

Object of the model WHS Act: (see s 3(1)(b) and (c))	Providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety. Encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safe working environment.
Term of Reference:	Whether the consultation, representation and issue resolution provisions are effective and used by duty holders, and workers are protected where they participate in these processes.

5.1. Consultation with other PCBUs

Under s 46 of the model WHS Act, a PCBU has the duty to consult with any other PCBU who holds a concurrent duty. An example of this situation includes construction projects where there are likely to be a range of businesses, labour hire firms, contractors and sub-contractors involved in completing a project.

Each PCBU in these situations retains a primary duty of care for all workers involved in the project. However, each PCBU will have a particular role and specific ability to influence or direct particular matters relevant to health and safety. To avoid duplication of effort and/or an absence of effort due to presumptions that other PCBUs are managing risks, s 46 of the model WHS Act places a duty on multiple duty holders to properly consult, co-operate and co-ordinate their activities to ensure the health and safety of workers and other persons affected by the work of the project.

In *Boland v Big Mars Pty Ltd*, a labour hire company was convicted for breaching s 46 of the SA Act by failing to consult with the host business to identify the tasks and activities a labour hire worker would be required to undertake so as to ensure sufficient training had been provided for the worker to safely undertake those tasks.³⁸

At the end of 2017, a Queensland Court confirmed that consultation between PCBUs should be proactive. In this case, a company which provided geotechnical advice to a construction project was prosecuted and fined for breaching s 46 of the Qld Act, with the Court noting that its consultation and co-ordination with the PCBU responsible for site management was reactive, falling short of what was reasonable.³⁹

Research about the perceptions of the model WHS laws found that the laws appeared to have improved WHS awareness for those businesses subject to requirements from their supply chain (for example, small businesses noted that they were required by their government or large businesses clients to provide Safe Work Method Statements, inductions and proof of competency documentation

³⁸ *Boland v Big Mars Pty Ltd* [2016] SAIRC 11.

³⁹ WorkCover Queensland, *First prosecution under s 46 – failure to consult with other duty holders* (Queensland Government, December 2017) <<https://www.worksafe.qld.gov.au/forms-and-resources/newsletter/esafe-newsletters/esafe-editions/esafe/december-2017/first-prosecution-under-s46-failure-to-consult-with-other-duty-holders>>

for tenders and contracts). However, there was also a view that meeting these requirements often focused primarily on completing paperwork.⁴⁰

In 2017, the Centre for Construction Work Health and Safety Research issued its *Final Report into Work Health and Safety Culture in the ACT Construction Industry* where it found participants perceived that principal contractors could do more to help subcontractors to improve their WHS capability and drive performance improvements in their supply networks.⁴¹

Question 18: Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?

5.2. Consultation with workers

A PCBU has a duty to consult with workers and HSRs⁴² who carry out work for it and who are likely to be directly affected by a health and safety matter arising from the work. That consultation can take many forms as long as it is consistent with the relevant provisions of the model WHS Act and model WHS Regulations. The duty to consult is qualified by the term 'so far as is reasonably practicable'.

Research on the model WHS laws found that consultation between managers and workers about health and safety decisions occurs in many but not all businesses.⁴³

The model WHS Act reinforces the value of worker participation and representation in improving health and safety performance at the workplace. Processes and procedures supporting effective consultation with workers through the election and training of HSRs and the establishment of HSCs are contained in the model WHS Act and model WHS Regulations, and are supported by a model Code.⁴⁴ While all jurisdictions had provision for HSRs before implementing the model WHS laws, there were differences in their functions, rights and powers. Provision for the establishment of work groups was new to New South Wales, Western Australia and Tasmania.

Research also suggests that a majority of medium-sized and large businesses, but only a minority of small businesses, have an HSR.⁴⁵

HSRs have a range of powers and functions which enable them to fulfil their representative role; including the power to issue PINs and to direct unsafe work to cease in certain circumstances, once they have completed approved training.⁴⁶

The 2014 COAG review asked jurisdictions to examine HSR powers to direct unsafe work to cease and their ability under s 68(2)(g) to request assistance from 'any person'.⁴⁷ The 2014 COAG review led to an amendment to s 68 of the model WHS Act to include new sections 3A and 3B and a new

⁴⁰ National Research Centre for OHS Regulation, Australian National University, *The Efficacy of Safe Work Method Statements and WHS Management Plans in Construction: Report to Safe Work Australia* [unpublished report] (February 2017).

⁴¹ RMIT University, Centre for Construction Work Health and Safety Research, *Work Health and Safety Culture in the ACT Final Report* (September 2017) p 113.

⁴² Health and Safety Representatives are workers elected for three years to represent the health and safety interests of their work group, monitor risk control measures, investigate WHS complaints and inquire into any perceived health or safety risks.

⁴³ Safe Work Australia, *Evaluation of the model work health and safety laws: synthesis of findings* [unpublished report] (2015).

⁴⁴ Model WHS Act ss 46-79; model WHS Regulations regs 16-21; *Work Health and Safety Consultation, Cooperation and Coordination: Model Code of Practice* pp 11-16.

⁴⁵ Safe Work Australia, *Evaluation of the model work health and safety laws: synthesis of findings* [unpublished report] (2015).

⁴⁶ Model WHS Act ss 68, 85, 90.

⁴⁷ Council of Australian Governments, *Improving the model work health and safety laws* (2017) <<http://ris.pmc.gov.au/2017/01/18/improving-model-work-health-and-safety-laws>> pp 13-15.

regulation (20A) which require a person assisting an HSR under s 68(2)(g) to give at least 24 hours' notice of their entry with a failure to provide this notice representing a reasonable ground for a PCBU to refuse entry.

Other amendments to the model WHS Act relevant to HSRs are the removal of s 74(2) which means that PCBUs would no longer be required to provide lists of elected HSRs to the regulator and an amendment to s 93 with HSRs no longer having the ability to include directions but only recommendations on the PINs they issue to a PCBU. None of these amendments to the model WHS laws have been implemented by the jurisdictions.⁴⁸

The HSR and HSC model of consultation came out of the traditional workplace where there were relatively stable groups of employees who worked for a single employer. The effectiveness of the HSR framework is being challenged in an environment of changing work arrangements where many workers are not permanently employed by a single employer, flying in and out of their workplaces or having minimal contact with other workers or the PCBU which engaged them.

Question 19: Have you any comments on the role of the consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety?

Question 20: Are there classes of workers for whom the current consultation requirements are not effective and if so, how could consultation requirements for these workers be made more effective?

Question 21: Have you any comments on the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work?

5.3. Issue resolution

There will be times when WHS issues raised at a workplace cannot be resolved through the HSR, HSC or other consultation processes. To assist in resolving issues, the model WHS Act provides that a PCBU, worker or their representative may ask for an inspector's assistance. Prior to requesting the attendance of an inspector, it is expected that the parties will make reasonable efforts to resolve the issue themselves. Where a workplace has not developed its own WHS issue resolution procedure, a default process is provided in the model WHS Regulations.⁴⁹ Prior to the implementation of the model WHS laws, most jurisdictions had requirements to resolve WHS issues within the workplace, however, the processes for doing so differed.

Question 22: Have you any comments on the effectiveness of the issue resolution procedures in the model WHS laws?

⁴⁸ The recent Queensland review recommended amending its Act to reinstate the repealed provisions relating to the requirement for a PCBU to provide a list of HSRs and Deputy HSRs to the regulator, requiring mandatory training for HSRs within six months of their election and that training being refreshed on a three-yearly basis, and requiring PCBUs to send a copy of any PINs issued by an HSR to the regulator. It also suggested that the election of an HSR should be permissible as evidence that a duty holder has taken steps to mitigate work health and safety risks; Lyons T, *Best Practice Review of Workplace Health and Safety Queensland: Final Report* (2017) WorkSafe Queensland.

⁴⁹ Model WHS Regulations regs 22-23.

5.4. Discriminatory, coercive and misleading conduct

The model WHS Act aims to protect workers and encourage them to be involved as HSRs or HSC members or to raise WHS issues as they arise. It does this by prohibiting discrimination, victimisation and coercion of workers because they have been involved in or raised WHS issues.⁵⁰ Such prohibited conduct can be addressed through civil or criminal proceedings and is subject to fines up to \$500,000 in the case of corporate bodies and \$100,000 in the case of individuals. A court may also make remedial orders, including compensation and re-employment or re-engagement of a worker.

There is a question about limitations associated with the existing provisions. In proceedings relating to a claim of discriminatory conduct in South Australia, the Court held that it can only make a declaratory order in discrimination proceedings if Parliament expressly conferred that power. Section 112 of the model WHS Act does not expressly confer such a power.⁵¹ Effectively, the court cannot hear an application that is solely seeking a ruling on a person having been discriminated against. To be heard, the person must also seek compensation, or something else that the court could grant as a remedy, for that discrimination.

Question 23: Have you any comments on the effectiveness of the provisions relating to discriminatory, coercive and misleading conduct in protecting those workers who take on a representative role under the model WHS Act, for example as an HSR or member of an HSC, or who raise WHS issues in their workplace?

5.5. Workplace entry by WHS entry permit holders

The model WHS laws recognise that involvement by unions in WHS matters at the workplace remains important for the effective operation of consultation and participation mechanisms for workers.

The model WHS Act and model WHS Regulations outline the requirements and processes for workplace entry by WHS entry permit holders and the powers of a WHS entry permit holder on entry.⁵²

A permit holder may enter a workplace to:

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

The model WHS Act places limits on when entry may be sought, and requires at least 24 hours' notice ahead of entry to inspect records and to consult and advise workers. It also specifies where a WHS permit holder may go on exercising the right of entry and how he or she must behave.⁵³

Workplace access by a WHS entry permit holder is supported by prohibitions on a person who is unreasonably refusing, delaying, hindering or obstructing entry. There are also prohibitions against a WHS entry permit holder intentionally and unreasonably delaying, hindering or obstructing any person or disrupting work at a workplace and using or disclosing information for a purpose that is not related to the WHS enquiry or rectification of the WHS contravention. Penalties for breaches of these provisions are civil penalties. Civil penalty provisions relating to WHS entry permits are consistent with the national workplace relations laws generally, with prohibitions attracting maximum civil penalties of \$10,000 in the case of an individual and \$50,000 in the case of a body corporate. The exception is if a

⁵⁰ Model WHS Act ss 104-115.

⁵¹ *Thorburn v SafeWork SA* [2014] SAIRC 29.

⁵² Model WHS Act ss 116-151; model WHS Regulations regs 25-31.

⁵³ It is noted that South Australia has some specific arrangements which are unique to that jurisdiction requiring WHS permit holders to contact the Regulator in certain circumstances prior to exercising the WHS right of entry.

WHS entry permit holder contravenes the conditions of the WHS entry permit, which can result in a maximum civil penalty of \$20,000 in the case of an individual. Disputes about WHS entry by WHS entry permit holders may be referred to an inspector or the authorising authority.⁵⁴

The 2014 COAG review noted that:

*WHS Ministers have been asked to consider the powers of union officials under the model WHS laws and whether they should be subject to further limitations. This follows allegations of misuse of union powers under the WHS Act in some jurisdictions, including Queensland, which recently amended its WHS laws to address some of the perceived issues.*⁵⁵

The COAG review led to an amendment to the model WHS Act to require at least 24 hours' notice for entry to enquire into a suspected contravention and another amendment that increases penalties for contravening WHS permit conditions to \$20,000. No jurisdictions⁵⁶ have implemented these amendments. Queensland had amended the *Work Health and Safety Act 2011* (Qld) (Qld Act) to require at least 24 hours' notice for entry to enquire into a suspected contravention (it subsequently repealed that provision taking its law back to the original model provision).

A number of court cases have raised issues relating to WHS entry permit holders since the implementation of the model WHS laws. In *Construction, Forestry, Mining and Energy Union (CFMEU) v Bechtel Construction (Australia) Pty Ltd* the Federal Court highlighted a 'serious issue' in the interaction of the *Fair Work Act 2009* (Cth) (Fair Work Act) and the model WHS Act. The court questioned whether a WHS permit holder who has entered a site under Fair Work Act provisions would need to physically leave and re-enter a site under WHS provisions to investigate a suspected WHS contravention.⁵⁷

In *Ramsay & Anor v Menso & Anor*, the Court found that WHS inspectors did not have the power to adjudicate or make a decision on the proper interpretation of the legislation when assisting parties to resolve a WHS right of entry dispute.⁵⁸ In *Australian Building and Construction Commissioner v Powell*, the Full Federal Court held that a union official must have an entry permit under the Fair Work Act to enter a workplace to assist an HSR under the *Occupational Health and Safety Act 2004* (Vic).⁵⁹ This appears to have implications for the model WHS Act given it contains similar provisions to the Victorian legislation.

Question 24: Have you any comments on the effectiveness of the provisions for WHS entry by WHS entry permit holders to support the object of the model WHS laws?

⁵⁴ Jurisdictional notes allow each jurisdiction to decide who the authorising authority should be. The authorising authority issues WHS entry permits. For example in Queensland the authorising authority is an individual registrar under the *Industrial Relations Act 1999* (Qld). In New South Wales the authorising authority is the Industrial Relations Commission of New South Wales.

⁵⁵ Council of Australian Governments, Department of the Prime Minister and Cabinet, *Improving the model work health and safety laws* (2017) <<http://ris.pmc.gov.au/2017/01/18/improving-model-work-health-and-safety-laws>> p 10.

⁵⁶ The SA Act had already been amended to increase the fine to \$20 000 during the passage of the legislation through that State's Legislative Council. No other jurisdiction has made the COAG Review's recommended change.

⁵⁷ *Construction, Forestry, Mining and Energy Union (CFMEU) v Bechtel Construction (Australia) Pty Ltd* [2013] FCA 667. The court questioned whether a permit holder under the WHS Act who has lawfully entered a site under a s 484 notice under the *Fair Work Act 2009* to hold discussions with workers, and in doing so becomes aware of a possible safety contravention would need to leave the site and then exercise a right of entry on the basis of a reasonably held suspicion under the relevant State or Territory OHS law.

⁵⁸ *Ramsay & Anor v Menso & Anor* [2017] FCCA 1416. As a result of this decision, the Qld Act has been amended to enable inspectors to make a determination about whether the WHS entry permit holder has a valid right of entry or has complied with notice requirements under ss 119 or 122 of the Qld Act.

⁵⁹ *Australian Building and Construction Commissioner v Powell* [2017] FCAFC 89. The High Court subsequently refused WorkSafe Victoria and the union official special leave to appeal against this decision.

6 COMPLIANCE AND ENFORCEMENT

Securing compliance and enforcement is central to the effective regulation of WHS. This chapter examines the compliance and enforcement options available under the model WHS laws and presents some recent data on compliance and enforcement activities.

Object of the model WHS Act: (see s 3(1)((d)-(h)))	Promoting the provision of advice, information, education and training in relation to work health and safety. Securing compliance with the model WHS Act through effective and appropriate compliance and enforcement measures. Ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under the model WHS Act. Providing a framework for continuous improvement and progressively higher standards of health and safety. Maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.
Term of Reference:	Whether the compliance and enforcement provisions are effective and sufficient to deter non-compliance with the WHS legislation.

6.1. Regulator functions

Parts 8-12 of the model WHS Act set out the regulator's functions and powers and identify the circumstances in which the powers may be used in the performance of those functions.

There has been continued debate about how much emphasis the regulator should place on its various functions; most notably balancing the education function with the compliance and enforcement function.

Research on the views of many small and medium-sized businesses has found that they would prefer a more collaborative relationship with the regulator, including an incremental approach to achieving WHS compliance.⁶⁰ Similarly, many participants in the 2014 review of the SA Act reported that they were unclear about how to meet their duties particularly where there were multiple duty holders. Underpinning this concern was uncertainty about how the regulator would apply the relevant provisions in practice.⁶¹ In response, the review proposed that the South Australian regulator be given the power to issue non-binding guidelines on how it sees the legislation applying to a class of persons or set of circumstances.

SafeWork SA's functions were also clearly split between 'the Regulator' and 'the Educator', with the education functions being provided by officers who were not inspectors. This sought to overcome any hesitancy businesses might have to ask inspectors for advice in case it prompted compliance action once an inspector visited a workplace. The South Australian model freed up inspectors to focus purely on compliance and enforcement action – but did not prevent inspectors providing advice on how to comply with the laws consistent with the national compliance and enforcement policy.

Alternatively, the 2017 Queensland review recommended that there should be less emphasis by the regulator on education and more emphasis on what it termed 'hard compliance'.⁶²

⁶⁰ Instinct & Reason, *Evaluation of model work health and safety (WHS) laws: non-employing, small and medium business interviews* [unpublished report] (2014) Safe Work Australia.

⁶¹ SafeWork SA, *Report of the Review of the Operation of the Work Health and Safety Act 2012 (SA)* (2014) pp 48-49.

⁶² See Lyons T, *Best Practice Review of Workplace Health and Safety Queensland: Final Report* (2017) WorkSafe Queensland pp 93-94.

Question 25: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator (ss 152 and 153) to ensure compliance with the model WHS laws?

6.2. Inspectors' powers and functions

Parts 9 and 10 of the model WHS Act provide for the appointment of inspectors and for their functions and powers. The 2008 National review summarised what it saw as the minimum range of functions required for inspectors to enable them to ensure compliance with the model legislation:

We consider that the model Act should explicitly recognise (preferably in one place) at least the following roles and functions of an inspector:

- *providing information and advice to duty holders;*
- *undertaking specific industry, occupational or hazard and risk based --interventions (e.g. advice, risk management and enforcement in relation to the industry, occupation or hazard and risk concerned);*
- *assisting in the resolution of issues at workplaces;*
- *reviewing PINs and the appropriateness of work stoppage on safety grounds;*
- *securing compliance with the model Act and regulations through the exercise of various powers, including the issuing of notices and giving directions; and*
- *investigating suspected breaches and assisting in the prosecution of offences.*⁶³

Both the New South Wales review and the Queensland review made recommendations relevant to inspectors' functions and powers. The New South Wales review recommended that the NSW Act be amended to permit the recording of interviews by the regulator without consent, subject to the interviewee being given notice that his or her interview is being recorded.

The Queensland review found that the wording of the power to require production of documents or answers to questions (s 171) has raised some practical issues and may have unintended consequences about how inspectors' powers are used. It recommended that the Qld Act be amended to provide that:

- the exercise of the power extended to an inspector who has entered a workplace on a previous occasion
- the requirement to produce a document apply where a document is located at any place, not just the workplace
- the production of the document to be made at any place, not just the workplace
- a relevant person be required to answer questions at any time and place convenient, and
- anything done by an inspector who has not entered a workplace is lawfully done if another inspector has entered the workplace.

The relationship between sections 155 and 171 (the regulator's power to obtain information and the inspectors' power to require answers to questions respectively) was examined in *Hunter Quarries Pty Ltd v State of New South Wales (Department of Trade & Investment)*.⁶⁴ The Court confirmed that an inspector could interview witnesses under s 171 before the regulator issued written notices under s 155, reinforcing the broad application of inspectors' powers under s 171.

⁶³ Department of Education, Employment and Workplace Relations, *National Review into Model Occupational Health and Safety Laws, Second Report* (2009) Recommendation 232, p 281.

⁶⁴ *Hunter Quarries Pty Ltd v State of New South Wales (Department of Trade & Investment)* [2014] NSWSC 1580 (12 November 2014). Section 155 provides for regulators to seek information or documents in writing before interviewing a person.

In South Australia, a review into the investigation and prosecution arrangements for offences under the SA Act raised questions around the ability to use 15 powers once proceedings for a breach of the WHS laws had commenced.⁶⁵

Question 26: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?

6.3. Internal and external review of decisions

Part 12 of the model WHS Act and Part 11.1 of the model WHS Regulations establish the procedures for the review of decisions that are made under the model WHS laws. In general, reviewable decisions under the model WHS Act are those that are made by:

- inspectors—these are reviewable by the regulator internally at first instance, and then may go on to external review, and
- the regulator—these go directly to external review.⁶⁶

Reviewable decisions under the model WHS Regulations primarily deal with decisions about licensing, authorisation and exemption applications.

Internal and external reviews are merits reviews, which mean they are a hearing de novo, in which the reviewer ‘stands in the shoes’ of the decision-maker and may only exercise those powers that were available to that decision-maker. The reviewer is not restricted to the facts and law which existed at the date of the original decision, and the parties are entitled to begin again and adduce new evidence. This has been confirmed in multiple decisions.⁶⁷

Question 27: Have you experience of an internal or external review process under the model WHS laws? Do you consider that the provisions for review are appropriate and working effectively?

6.4. Exemptions

Part 11.2 of the model WHS Regulations provides capacity for the regulator to exempt a person or class of persons from compliance with any of the model WHS Regulations, either on its own initiative or on the written application from one or more persons.

Question 28: Have you experience of an exemption application under the model WHS Regulations? Do you consider that the provisions for exemptions are appropriate and working effectively?

⁶⁵ SafeWork SA, *Investigation and Prosecution Arrangements at SafeWork SA* (Government of South Australia, October 2017) <https://www.safework.sa.gov.au/show_page.jsp?id=116644>

⁶⁶ Explanatory Memorandum, model WHS Act p 78.

⁶⁷ *NSW Rural Fire Service v SafeWork NSW* [2016] NSWIRComm 4, *Automotive Food Metals Engineering Printing and Kindred Industries Union New South Wales Branch and WorkCover Authority of New South Wales* [2012] NSWIRComm 143 *Australian Postal Corporation v Comcare* [2014] FWC 3228.

6.5. Cross-jurisdictional co-operation

Currently, cross border co-operation between regulators appears to rely on the use of s 156(d) (Appointment of Inspectors) and s 271 (Confidentiality of Information) of the model WHS Act. Inspectors from other jurisdictions may be appointed under s 156(d) of the model WHS Act (as a person who is appointed as an inspector under a corresponding WHS law), and information may be shared across jurisdictions under s 271(3)(v) (being required for the exercise of a power or function under a corresponding WHS law). Whilst there are many positive examples of cooperative compliance and enforcement activities between WHS regulators across jurisdictions (both geographic and industry specific), from a legal perspective there is no clear authority for inspectors in one jurisdiction to use their powers in another.

Question 29: Have you any comments on the provisions that support co-operation and use of regulator and inspector powers and functions across jurisdictions and their effectiveness in assisting with the compliance and enforcement objective of the model WHS legislation?

6.6. Incident notification

Section 35 defines the kinds of workplace incidents that must be notified to the regulator. A 'notifiable incident' is an incident involving the death of a person, 'serious injury or illness' of a person or a 'dangerous incident'.⁶⁸

The duty to report notifiable incidents under s 38 is linked to the duty under s 29 to preserve an incident site until an inspector arrives or otherwise directs so that evidence is not compromised.

Failure to notify or to preserve a site is an offence.

Question 30: Have you any comments on the incident notification provisions?

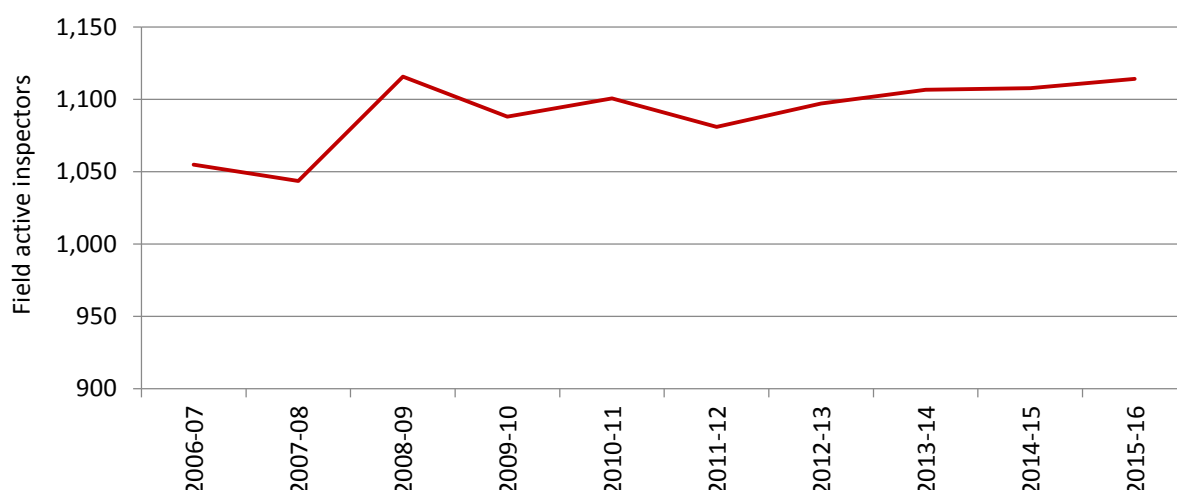
6.7. National compliance and enforcement data

WHS regulators encourage compliance with WHS laws using a variety of mechanisms ranging from education, advice and information through to prosecution. Inspectors appointed under the model WHS laws may visit workplaces for the purpose of providing information, presentations, training and advice, investigating incidents or dangerous occurrences and ensuring compliance with WHS legislation. Where breaches are detected, the inspector, based on risk, may issue notices or escalate the action to formal procedures that are addressed through the courts for serious contravention of the legislation.

Data compiled by Safe Work Australia for the Comparative Performance Monitoring program show that the number of field-active WHS inspectors employed around Australia has remained relatively stable at or around 1,100 since 2008-09, as shown in Figure 3 below.

⁶⁸ Model WHS Act s 36.

Figure 3: Number of field active WHS inspectors, Australia, 2006-07 to 2015-16

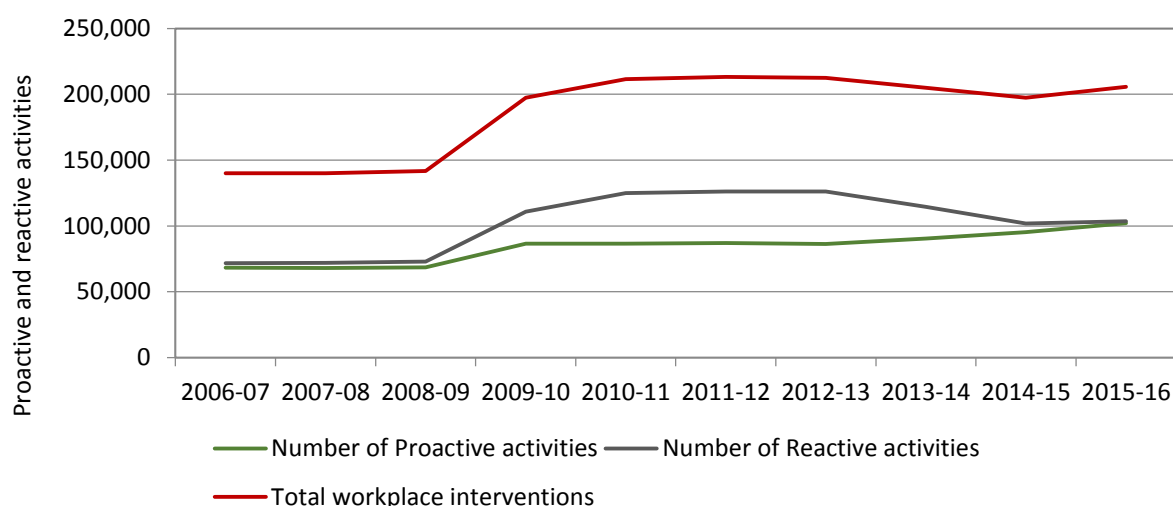


Source: Safe Work Australia, Comparative Performance Monitoring program

Each year regulators conduct thousands of workplace interventions to promote WHS compliance and respond to WHS incidents. In 2015–16, overall regulators undertook over 200,000 workplace interventions, of which almost 90,000 were proactive workplace visits (visits not related to an incident or complaint) and around 60,000 were reactive workplace visits (visits related to an incident or complaint). In addition, on the education front, regulators gave over 13,000 proactive workshops, presentations or seminars, and undertook over 40,000 other reactive activities such as desk based audits, meetings, telephone advice and written correspondence required to resolve an incident or complaint.

As shown in Figure 4 below, the total number of workplace interventions has remained relatively stable over the last seven years, however, there has been a slight increase in the proportion of these interventions which are proactive in nature.

Figure 4: Number of workplace WHS regulator interventions, proactive and reactive, Australia, 2006-07 to 2015-16

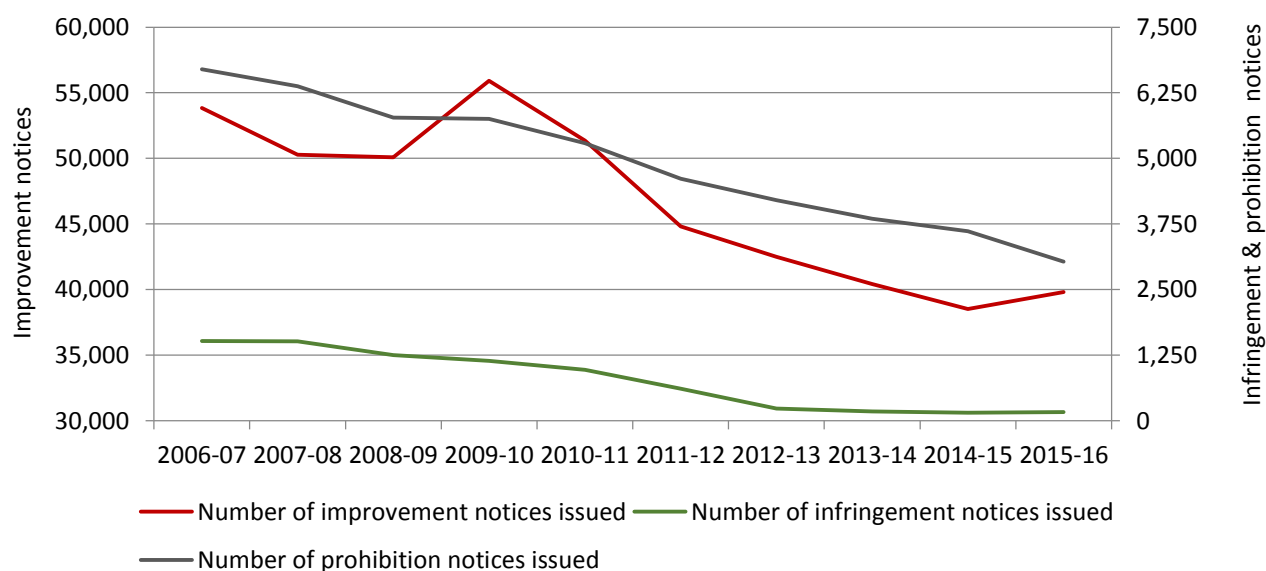


Source: Safe Work Australia, Comparative Performance Monitoring program

Where inspectors identify a breach under their WHS legislation a notice may be issued. In 2015-16, jurisdictional WHS authorities issued 43,025 notices, comprising 166 infringement notices, 3,032 prohibition notices and 39,827 improvement notices.

It is difficult to compare data on notices across jurisdictions as notices are issued differently in each. For example, in some instances a single notice may be issued for multiple breaches of the legislation, while in other instances separate notices are issued for each identified breach. At the national level, Figure 5 below shows that over the last 10 years there has been a general decline in the number of each type of notice issued.

Figure 5: Notices issued by type of notice, Australia, 2006-07 to 2015-16



Source: Safe Work Australia, Comparative Performance Monitoring program

7 NATIONAL COMPLIANCE AND ENFORCEMENT POLICY

The NCEP is a key element of the model WHS laws framework.⁶⁹ It is a ‘model policy’ that jurisdictions can refer to and/or adopt as their own.

Object of the model WHS Act: (see s 3(1)(h))	Maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.
Term of Reference:	The national compliance and enforcement policy adequately supports the object of the model WHS Act.

Prior to implementing the model WHS laws, regulators across jurisdictions had common approaches to enforcement and compliance but there were considerable inconsistencies in the level of penalties for breaching the laws and in enforcement and prosecution strategies. Compliance and enforcement policies were often not made public and so it was unclear to duty holders how a regulator would enforce occupational health and safety laws in different circumstances.

The IGA committed to the development of a NCEP as a means of ensuring a consistent regulatory approach to support the intention and efficacy of harmonisation.

The NCEP is a high-level document that sets out the principles that underpin how WHS Regulators should monitor and enforce compliance. It operates alongside other nationally agreed policies and procedures governing the use of specific regulatory tools and jurisdiction-specific approaches to criminal justice. The NCEP was endorsed by WHS ministers in August 2011.

The NCEP specifies nationally agreed:

- aims of compliance and enforcement
- key principles underpinning compliance and enforcement activities
- strategic enforcement priorities
- monitoring and compliance approaches
- compliance and enforcement tools, and
- information about guidance, enforcement, investigation and prosecution criteria.

7.1. Adoption of the NCEP

Regulators have taken two distinct approaches to the NCEP. The first is to adopt it in full. The second is to incorporate some elements into their jurisdiction’s operational policy framework for compliance and enforcement. The NCEP’s common approaches are, in broad terms, part of the architecture of WHS regulation, but there is by no means uniform adoption and application of it by the WHS regulators in the jurisdictions with harmonised WHS legislation. Despite this, the approach to compliance and enforcement across jurisdictions which have implemented the model WHS laws is relatively consistent. All jurisdictions continue to work co-operatively under the auspices of the Heads of Workplace Safety Authorities to develop frameworks, operational protocols and procedures to improve the consistency in the administration, inspection and enforcement of WHS legislation.

7.2. The approach to compliance

All regulators use a triaging system similar to that identified in the NCEP and based on the principles of proportionality and responsiveness. Regulators use a mix of positive motivators (for example, provision of advice and support, engaging with stakeholders), compliance monitoring (for example

⁶⁹ Safe Work Australia, *National Compliance and Enforcement Policy* (2011).

audits and inspections) and deterrents (for example prosecutions and issuing of infringement notices), to encourage and secure the highest possible levels of compliance with WHS laws.⁷⁰

Regulators generally take a graduated approach to enforcement consistent with the hierarchy of enforcement measures identified in the pyramid and the criteria in the NCEP.⁷¹ When deciding on what action to take when faced with a breach of the model WHS legislation, regulators typically consider the seriousness of the breach, the culpability of the duty holder, the impact of enforcement on encouragement or deterrence and any mitigating circumstances.

The compliance tools available to the regulator are:

- Advice or guidance
- Improvement or prohibition notices
- Injunctions
- Infringement notices
- Civil proceedings – breaches of right of entry powers
- Enforceable undertakings
- Prosecutions
- Revoking, suspending or cancelling authorisations
- Publishing enforcement actions and outcomes.⁷²

In practice, the use of the pyramid does not necessarily lead to an unfolding process, with active escalation from the lower base to the top point. Rather, when a fatality or serious injury occurs, regulators generally move immediately to the top of the pyramid and conduct an investigation with a view to prosecution. Where a contravention is found but no injury occurs, enforcement action is generally confined to the lower levels of the pyramid.⁷³

Question 31: Have you any comments on the effectiveness of the National Compliance and Enforcement Policy in supporting the object of the model WHS Act?

Question 32: Have you any comments in relation to your experience of the exercise of inspector's powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?

⁷⁰ Consistent with Safe Work Australia, *National Compliance and Enforcement Policy* (2011) pp 2-4.

⁷¹ Safe Work Australia, *National Compliance and Enforcement Policy* (2011) p 6.

⁷² Ibid, pp 7-13.

⁷³ See the discussion of the approach to enforcement in R Johnstone, *From Fiction to Fact, Re-thinking OHS Enforcement* (Australian National University, 2003) p 17.

8 PROSECUTIONS AND LEGAL PROCEEDINGS

This chapter examines the penalty system underlying the model WHS laws, who can initiate legal action and the expansion of sentencing options.

Object of the model WHS Act: (see s 3(e))	Securing compliance with this Act through effective and appropriate compliance and enforcement measures.
Term of Reference:	Whether the compliance and enforcement provisions, such as penalties and enforceable undertakings, are effective and sufficient to deter non-compliance with the legislation.

8.1. Offences and penalties

A key policy intention behind the model WHS laws was to align penalties across jurisdictions for those who fail to meet their WHS obligations. This objective was achieved by introducing three categories of penalties based on the degree of culpability, risk and harm.⁷⁴

Category 1 offences relate to the most serious cases of non-compliance, involving recklessness in exposing an individual to whom a duty of care is owed to the risk of death, serious illness or injury. Category 2 offences relate to a person who fails to comply with their health and safety duty and in doing so exposes an individual to a risk of death or serious injury or illness. Category 3 offences relate to a person who fails to comply with their health and safety duty without the aggravating factors present in the first two categories.

The physical elements of these three offences are drafted consistently with strict liability, which means no proof of mental element is required and no defence of honest and reasonable mistake is allowed. However, it was left to jurisdictions to clarify where all or part of an offence attracts strict or absolute liability. The duties of care are also subject to the qualifiers of 'so far as is reasonably practicable', 'reasonable steps' and 'reasonable care' depending on the status of the duty holder (PCBU, officer and worker or other person at a workplace, respectively).

Importantly, the offences are focussed on the culpability of the offender and the level of risk and not merely the actual consequences/outcomes of the breach. This approach was considered by the 2008 National review to be more effective for deterrence. It was recommended that the most serious offences be indictable offences parallel with the most serious breaches of the criminal law; the intention being to maintain public confidence in the administration of justice in the worker safety area.⁷⁵ It was also intended that this approach would reinforce that offences against the model WHS laws are 'real offences' under the criminal law in order to strengthen their deterrent effect.

Under the model WHS laws the financial penalties for WHS offences increased for all jurisdictions, with the maximum penalty of \$3 million (for a Category 1 offence by a body corporate) almost double the highest previously available.

While the 2008 National review recommended that 'gross negligence' be included in the Category 1 offence, WHS ministers agreed to an alternative model on the basis that gross negligence offences should be dealt with outside the model WHS Act as they would otherwise cut across local criminal laws and manslaughter offences.⁷⁶

Since the 2008 National review and the introduction of the model WHS laws, there have been two further considerations of the offences in the model WHS laws, in South Australia and Queensland respectively.

⁷⁴ There are some exceptions for volunteer officers and unincorporated associations at model WHS Act s 34.

⁷⁵ Department of Education, Employment and Workplace Relations, *National Review into Model Occupational Health and Safety Laws, First Report* (2009) pp 234-5.

⁷⁶ Workplace Relations Ministers' Council, *Communiqué from Australian, State, Territory and New Zealand Workplace Relations Ministers' Council* (18 May 2009).

In May 2015, South Australian Greens MLC Tammy Franks introduced a private members Bill⁷⁷ which sought to introduce penalties of up to 20 years in prison for company officers who recklessly caused the death of a person. The Bill was referred to committee, which rather than support the introduction of a new industrial manslaughter offence, recommended that the Director of Public Prosecutions (DPP) and the Crown Solicitor develop a protocol for initiating work-related manslaughter prosecutions under the *Criminal Law Consolidation Act 1935* (SA) (CLCA).⁷⁸ The committee noted that the harmonised WHS laws represented a significant penalty improvement on the former SA Act and that a South Australian company owner had been successfully prosecuted under the CLCA in 2015, receiving a jail sentence of over 12 years for the manslaughter of an employee.

In 2017, Queensland passed the *Work Health and Safety and other Legislation Amendment Act 2017* which introduced an industrial manslaughter offence.

There are a number of other offences under the model WHS Act that relate to specific requirements and carry their own individual penalties. These include offences in relation to:

- incident notification (for example, failure to notify the regulator of a notifiable incident)
- authorisations (for example, using unauthorised plant equipment or substances at a workplace)
- consultation (for example, failing to consult other duty holders or workers about WHS matters)
- the establishment of workgroups (for example, failing to negotiate with workers or their representative regarding the formation of workgroups)
- HSRs (for example, failing to consult with HSRs on WHS matters)
- HSCs (for example, failing to establish an HSC following a request)
- discriminatory, coercive or misleading conduct (for example, knowingly or recklessly making a false or misleading representation to another person regarding the rights, obligations or abilities under the model WHS act), and
- the regulator and inspectors (for example, impersonating an inspector).

The model WHS laws also provides scope for jurisdictions to legislate for infringement notices (in effect 'on the spot' fines)⁷⁹ which inspectors can use as an alternative to prosecution in prescribed circumstances.

Question 33: Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices?

8.2. Legal proceedings

Proceedings for an offence against the model WHS Act may be brought by a WHS regulator or an inspector acting with the written authorisation of the regulator as well as the DPP.⁸⁰ Allowing only these parties to prosecute was seen as a means of improving the consistency of enforcement procedures and facilitating the process of graduated enforcement. There is, however, provision for a person to request that the DPP consider a matter if the regulator has decided not to prosecute (s 231 of the model WHS Act refers).

⁷⁷ The Work Health and Safety (Industrial Manslaughter) Amendment Bill 2015 (SA).

⁷⁸ The Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation, *Response to the Parliamentary Committee's Report – Work Health and Safety (Industrial Manslaughter) Amendment Bill 2015* (August 2017).

⁷⁹ It is noted that NSW introduced new on the spot fines in 2017 relating to the management of the risk of falls and fall-related emergency procedures and carrying out high-risk work without a licence.

⁸⁰ Noting that in NSW the secretary of an industrial organisation of employees can bring proceedings for Category 1 or Category 2 offences if the regulator has declined to follow the advice of the Director of Public Prosecutions to bring proceedings; *Work Health and Safety Act 2011* (NSW) s 231(3).

Prior to the implementation of the model WHS laws only New South Wales and Queensland provided for a reverse onus of proof for offences relating to duties of care. In these two jurisdictions, in a prosecution a defendant was required to show that they had done everything reasonably practicable to ensure safety. In all other jurisdictions, the burden of proof for duty of care offences was placed entirely on the prosecution. The 2008 National review recommended that in the model WHS Act the prosecution should bear the criminal standard of proof for all elements of a WHS offence.

Those who support the onus of proof being placed on the defendant suggest that, in this field of regulatory offences, employers are in the best position to determine what was done in each situation, and whether what they did was reasonably practicable. In other words, employers and other duty holders know what steps they have taken with respect to risks and hazards and so forth, and accordingly the onus should be placed on them to prove, on a balance of probabilities, that they did all that was reasonably practicable. This approach is intended to achieve the right balance between regulatory authorities on the one hand and employers and other duty holders on the other.⁸¹

The approach taken in the model WHS Act reflects the view that all duty of care offences are criminal offences and therefore it was considered appropriate that the burden of proof rest with the prosecutors, particularly given the substantial increase in the size and range of penalties for WHS offences, including imprisonment.⁸²

The Queensland review considered that:

*...there is a not-insignificant case for the restoration of the reverse onus of proof as an aid to compliance and enforcement and to ensure the positive obligations of persons conducting a business or undertaking to maintain a safe system of work. However, given the issue of onus of proof is a core part of the model work health and safety laws, a change to this requirement is problematic if pursued in Queensland alone and it is appropriate that the matter be considered further as part of the national review of the model work health and safety laws being undertaken in 2018’.*⁸³

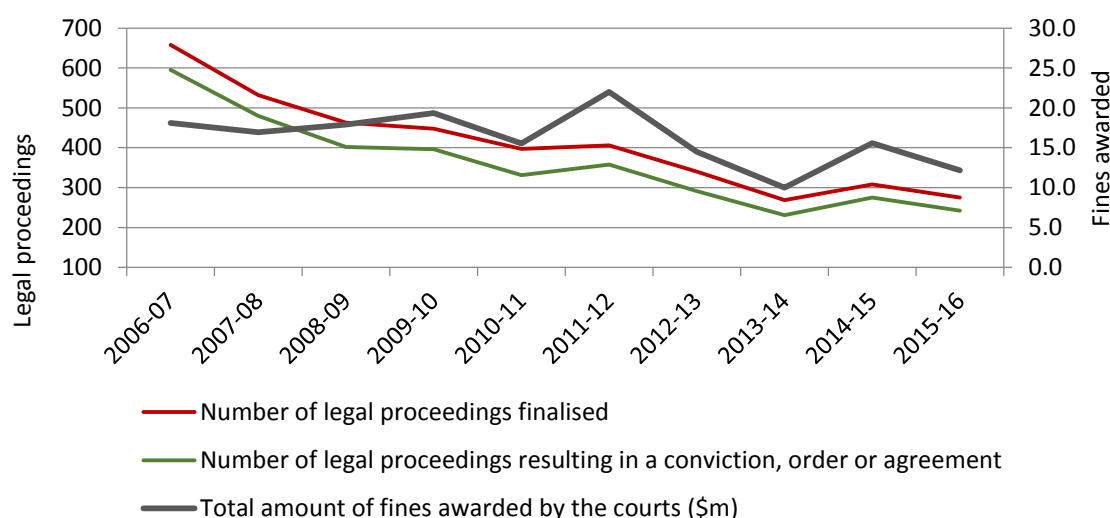
In relation to WHS prosecutions and the resulting fines, Figure 6 shows that nationally over the last 10 years there has been an overall decline in the number of legal proceedings, as well as the total amount of fines issued.

⁸¹ See, for example, R McCallum, T Schofield & s Jamieson, *Public Submission No 42* (Submissions to Issues Paper, National Review into Occupational Health and Safety Laws 2008); N Foster, *Public Submission No 30*, (Submissions to Issues Paper, National Review into Occupational Health and Safety Laws 2008).

⁸² See the discussion of the onus of proof at Department of Education, Employment and Workplace Relations, *National Review into Model Occupational Health and Safety Laws, First Report* (2009) p 123.

⁸³ Lyons T, *Best Practice Review of Workplace Health and Safety Queensland: Final Report* (2017) WorkSafe Queensland p 24.

Figure 6: WHS prosecutions – number of legal proceedings and fines issued, Australia, 2006-07 to 2015-16



Source: Safe Work Australia, Comparative Performance Monitoring program

Question 34: Have you any comments on the processes and procedures relating to legal proceedings for offences under the model WHS laws?

8.3. Sentencing

The model WHS laws increased the range of sentencing options available in all jurisdictions. In addition to imposing a fine, courts may impose alternative remedies including:

- adverse publicity orders
- restoration orders
- work health and safety project orders
- court ordered work health and safety undertakings
- injunctions, and
- training orders.

Safe Work Australia has commissioned research into the sentencing of WHS offenders. The limited numbers of prosecutions at the time the research was undertaken and the differences in approaches across jurisdictions made it difficult to draw significant conclusions.

With these caveats, the report found that most prosecutions were for Category 2 offences for breaches of the primary duty of care, with the focus generally on 'safety incidents' rather than 'health issues'. Difficulty in establishing 'recklessness' for Category 1 offences, and a lack of clarity around whether a Category 2 offence can be prosecuted in the alternative to Category 1, were common factors across jurisdictions.

Queensland differed from other jurisdictions in that rehabilitation was a more significant sentencing factor. In the vast majority of Queensland cases penalties were applied without conviction, with fines and other non-pecuniary penalties, such as training orders, being applied in the alternative.

The research also identified that there were difficulties in prosecuting PCBU's who went into liquidation after WHS proceedings commenced; discounts for early guilty pleas and other mitigating factors varied greatly; and there was a limited role for victim impact statements in sentencing.

These differences ultimately arose from the interaction of the WHS laws with local criminal law frameworks.⁸⁴

The 2008 National review recommended that subject to wider criminal justice policy considerations, the model WHS Act should provide for the promulgation of sentencing guidelines or, where there are applicable sentencing guidelines, they should be reviewed for national consistency and compatibility with the OHS regulatory regime.⁸⁵ WHS ministers agreed in principle with this recommendation but suggested that this issue should be dealt with outside the model WHS laws on the basis that the provisions for sentencing guidelines differ between jurisdictions and are generally dealt with in the general sentencing law or criminal procedure legislation.⁸⁶

Within this context, in *Williamson v VH & MG Imports Pty Ltd*, the Court found that a Queensland employer's fatality-related fine should have been nearly three times higher than the one imposed, after examining cases from other harmonised jurisdictions. The District Court accepted Workplace Health and Safety Queensland's submission that the Qld Act permitted sentencing courts to have regard to decisions from other harmonised states and territories, given that the main object of the Act in s 3 was to provide for a balanced and nationally consistent framework for work safety.⁸⁷

The Queensland review has recommended the development of nationally consistent sentencing guidelines following the British model.⁸⁸

Question 35: Have you any comments on the value of implementing sentencing guidelines for work health and safety offenders?

8.4. Enforceable undertakings

A key change for many jurisdictions which enacted the model WHS laws was the ability of the regulator to accept written, legally binding, enforceable undertakings to take specified action to rectify a breach or to improve performance, as an alternative to prosecution.

The use of enforceable undertakings has considerably increased since the adoption of the model WHS laws, with 35 enforceable undertakings accepted by regulators in 2015–16, compared to 23 in 2014–15 and 10 in 2011–12.⁸⁹

Whether an enforceable undertaking is the appropriate enforcement tool is dependent on how and when they are used.⁹⁰ Under the model WHS Act, an enforceable undertaking cannot be made in relation to a Category 1 offence.⁹¹ Regulator guidelines in New South Wales, South Australia and Queensland require exceptional circumstances before an enforceable undertaking will be made if an

⁸⁴ National Research Centre for Occupational Health and Safety Regulation, Safe Work Australia, *Project 2: Sentencing of Work Health and Safety Offenders: Report to Safe Work Australia* [unpublished report] (July 2017).

⁸⁵ Department of Education, Employment and Workplace Relations, *National Review into Model Occupational Health and Safety Laws, First Report* (2009) p 164.

⁸⁶ Workplace Relations Ministers' Council, *Communiqué from Australian, State, Territory and New Zealand Workplace Relations Ministers' Council* (18 May 2009).

⁸⁷ *Williamson v VH & MG Imports Pty Ltd* [2017] QDC 56.

⁸⁸ Under Britain's 2016 sentencing guidelines, a court applies a formula to set the penalty, first taking account of the defendant's culpability, then the likelihood and magnitude of potential harm. The harm rating and culpability assessment are then applied to a series of tables with the amount of fines calculated for organisations based on different levels of annual turnover. The number of people affected is also considered and judicial discretion is available.

⁸⁹ Safe Work Australia, *Comparative performance monitoring report 19th edition, Part 2 – Work health and safety compliance and enforcement activities*, p 14.

⁹⁰ Department of Education, Employment and Workplace Relations, *National Review into Model Occupational Health and Safety Laws, Second Report* (2009) pp 257–263.

⁹¹ Model WHS Act s 216(2).

incident has involved a fatality or very serious injury.⁹² In comparison, Victoria, which has not implemented the model WHS laws, goes further and requires exceptional circumstances where: the contravention was reckless; the contravention involved a fatality; there was a recent prior conviction relating to a work-related fatality; or where there were more than two prior convictions from separate investigations.⁹³

The Queensland review raised particular concerns around enforceable undertakings being used for Category 2 offences where there has been a fatality, and recommended amending the Qld Act to expressly prohibit enforceable undertakings in these circumstances.⁹⁴

Question 36: Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?

8.5. Insurance against fines and penalties

Key to the model WHS legislative framework is the principle that anyone who can influence a WHS outcome should use that influence and should not be able to transfer their duty of care to others. The ability to 'contract out' WHS obligations is specifically prohibited at s 272 of the model WHS Act.

Since 2013, this section has been discussed in the context of the availability of insurance products which indemnify directors of companies against fines and penalties arising from breaches of work health and safety legislation.

The availability of insurance to cover OHS fines and penalties was highlighted by His Honour, Industrial Magistrate Lieschke, in his decision in *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor*.⁹⁵ In this matter, a worker was killed on a construction site and his employer (Ferro Con) was found to have breached the *Occupational Health, Safety and Welfare Act 1986* (SA). The employer's sole director was found to have failed to take reasonable steps to ensure compliance by the employer with its obligations under the Act, in circumstances where the director's failings contributed to the commission of the offence by the employer. The employer had a general insurance policy which included an indemnification of its director for fines imposed for criminal conduct. The effect of this was that the director paid a relatively small proportion of the fine imposed by the Court with the insurance company paying the rest.

Although this was a decision made under the repealed *Occupational Health, Safety and Welfare Act 1986* (SA), Industrial Magistrate Lieschke, raised questions relevant to the operation of s 272 of the model WHS Act. He said:

The Occupational Health, Safety and Welfare Act does not prohibit such insurance, but some other laws do. New Zealand's corresponding OHS laws prohibit insurance... Section 272 of the new Work Health and Safety Act 2012 states that any term of a contract which seeks to modify the operation of the Act is void, but it does not specifically prohibit insurance of penalties, and it does not make it an offence for an insurer to provide an indemnity. Whilst the full scope of s 272 is unclear, it will still be possible for an insurer to sell such policies and to grant indemnity for perceived commercial benefit.

His Honour suggested that the availability of insurance cover for WHS penalties undermined the Court's sentencing powers by negating the principles of both specific and general deterrence.

⁹² Lyons T, *Best Practice Review of Workplace Health and Safety Queensland: Final Report* (2017) WorkSafe Queensland pp 75-76.

⁹³ Victorian WorkCover Authority, *Policy on Enforceable Undertakings pursuant to section 16 of the Occupational Health and Safety Act 2004* (October 2014) p 3.

⁹⁴ Lyons T, *Best Practice Review of Workplace Health and Safety Queensland: Final Report* (2017) WorkSafe Queensland p 79.

⁹⁵ *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor* [2013] SAIRC 22.

A related decision examining a court's power to, in effect, prevent an employer from indemnifying an employee against penalties was recently made by the High Court in *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union*. The decision confirmed that a penalty order made against an individual under the *Fair Work Act 2009* can include a requirement for the individual to pay the penalty personally. Justices Keane, Nettle and Gordon noted that "[u]ltimately, if a penalty is devoid of sting or burden, it may not have much, if any, specific or general deterrent effect, and so it will be unlikely, or at least less likely, to achieve the specific and general deterrent effects that are the *raison d'être* of its imposition."⁹⁶

Both the 2014 South Australian review and the Queensland review included recommendations that the model WHS Act be amended to expressly prohibit insurance contracts being entered into which cover the cost of WHS penalties and fines.

Question 37: Have you any comments on the availability of insurance products which cover the cost of work health and safety penalties?

⁹⁶ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2018] HCA 3 at [116].

9 SUMMARY OF QUESTIONS

- Question 1: What are your views on the effectiveness of the three-tiered approach - model WHS Act supported by model WHS Regulations and model WHS Codes - to achieve the object of the model WHS laws?
- Question 2: Have you any comments on whether the model WHS Regulations adequately support the object of the model WHS Act?
- Question 3: Have you any comments on whether the model WHS Codes adequately support the object of the model WHS Act?
- Question 4: Have you any comments on whether the current framework strikes the right balance between the model WHS Act, model WHS Regulations and model Codes to ensure that they work together effectively to deliver WHS outcomes?
- Question 5: Have you any comments on the effectiveness of the model WHS laws in supporting the management of risks to psychological health in the workplace?
- Question 6: Have you any comments on the relationship between the model WHS laws and industry specific and hazard specific safety legislation (particularly where safety provisions are included in legislation which has other purposes)?
- Question 7: Have you any comments on the extraterritorial operation of the WHS laws?
- Question 8: Have you any comments on the effectiveness of the model WHS laws in providing an appropriate and clear boundary between general public health and safety protections and specific health and safety protections that are connected to work?
- Question 9: Are there any remaining, emerging or re-emerging work health and safety hazards or risks that are not effectively covered by the model WHS legislation?
- Question 10: Have you any comments on the sufficiency of the definition of PCBU to ensure that the primary duty of care continues to be responsive to changes in the nature of work and work relationships?
- Question 11: Have you any comments relating to a PCBU's primary duty of care under the model WHS Act?
- Question 12: Have you any comments on the approach to the meaning of 'reasonably practicable'?
- Question 13: Have you any comments relating to an officer's duty of care under the model WHS Act?
- Question 14: Have you any comments on whether the definition of 'worker' is broad enough to ensure that the duties of care continue to be responsive to changes in the nature of work and work relationships?
- Question 15: Have you any comments relating to a worker's duty of care under the model WHS Act?
- Question 16: Have you any comments relating to the 'other person at a workplace' duty of care under the model WHS Act?
- Question 17: Have you any comments relating to the principles that apply to health and safety duties?
- Question 18: Have you any comments on the practical application of the WHS consultation duties where there are multiple duty holders operating as part of a supply chain or network?
- Question 19: Have you any comments on the role of the consultation, representation and participation provisions in supporting the objective of the model WHS laws to ensure fair and effective consultation with workers in relation to work health and safety?
- Question 20: Are there classes of workers for whom current consultation requirements are not effective and if so how could consultation requirements for these workers be made more effective?

- Question 21: Have you any comments on the continuing effectiveness of the functions and powers of HSRs in the context of the changing nature of work?
- Question 22: Have you any comments on the effectiveness of the issue resolution procedures in the model WHS laws?
- Question 23: Have you any comments on the effectiveness of the provisions relating to discriminatory, coercive and misleading conduct in protecting those workers who take on a representative role under the model WHS Act, for example as an HSR or member of a HSC, or who raise WHS issues in their workplace?
- Question 24: Have you any comments on the effectiveness of the provisions for WHS entry by WHS entry permit holders to support the object of the model WHS laws?
- Question 25: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers of the regulator (ss 152 and 153) to ensure compliance with the model WHS laws?
- Question 26: Have you any comments on the effectiveness, sufficiency and appropriateness of the functions and powers provided to inspectors in the model WHS Act to ensure compliance with the model WHS legislation?
- Question 27: Have you experience of an internal or external review process under the model WHS laws? Do you consider that the provisions for review are appropriate and working effectively?
- Question 28: Have you experience of an exemption application under the model WHS Regulations? Do you consider that the provisions for exemptions are appropriate and working effectively?
- Question 29: Have you any comments on the provisions that support co-operation and use of regulator and inspector powers and functions across jurisdictions and their effectiveness in assisting with the compliance and enforcement objective of the model WHS legislation?
- Question 30: Have you any comments on the incident notification provisions?
- Question 31: Have you any comments on the effectiveness of the National Compliance and Enforcement Policy in supporting the object of the model WHS Act?
- Question 32: Have you any comments in relation to your experience of the exercise of inspector's powers since the introduction of the model WHS laws within the context of applying the graduated compliance and enforcement principle?
- Question 33: Have you any comments on the effectiveness of the penalties in the model WHS Act as a deterrent to poor health and safety practices?
- Question 34: Have you any comments on the processes and procedures relating to legal proceedings for offences under the model WHS laws?
- Question 35: Have you any comments on the value of implementing sentencing guidelines for work health and safety offenders?
- Question 36: Have you any comments on the effectiveness of the provisions relating to enforceable undertakings in supporting the objectives of the model WHS laws?
- Question 37: Have you any comments on the availability of insurance products which cover the cost of work health and safety penalties?

APPENDIX A TERMS OF REFERENCE

Background

1. In February 2008, the then Workplace Relations Ministers Council agreed that model legislation was the most effective way to achieve harmonisation of Work Health and Safety (WHS) laws.
2. Safe Work Australia (SWA) was established by the Safe Work Australia Act 2008 with primary responsibility to lead the development of policy to improve WHS and workers' compensation arrangements across Australia. One of SWA's statutory functions is to prepare, and if necessary revise, model WHS laws for approval by ministers with responsibility for WHS (WHS ministers), and for adoption as laws of the Commonwealth, each of the States and each of the Territories.
3. The model laws comprise the model WHS Act, model WHS Regulations and model Codes of Practice. These elements are supported by the National compliance and enforcement policy which sets out principles of how WHS regulators monitor and enforce compliance with WHS laws.
4. Seven of the nine jurisdictions have implemented the model WHS laws. The Commonwealth, Australian Capital Territory, New South Wales, Northern Territory and Queensland implemented the model WHS laws on 1 January 2012; South Australia and Tasmania implemented the laws on 1 January 2013. Western Australia and Victoria have not implemented the model WHS laws in their jurisdictions.

Scope of the review

5. As agreed by WHS ministers, SWA is asked to examine and report on the content and operation of the model WHS laws.
6. The review will be evidenced-based and propose actions that may be taken by WHS ministers to improve the model WHS laws, or identify areas of the model WHS laws that require further assessment and analysis following the review.
7. In undertaking the review, SWA will have regard to the object of the model WHS Act (section 3).
8. The review will consider whether:
 - a. the model WHS laws are operating as intended
 - b. any areas of the model WHS laws have resulted in unintended consequences
 - c. the framework of duties is effective at protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships
 - d. the compliance and enforcement provisions, such as penalties and enforceable undertakings, are effective and sufficient to deter non-compliance with the legislation
 - e. the consultation, representation and issue resolution provisions are effective and used by duty holders; and workers are protected where they participate in these processes, and
 - f. the model WHS Regulations, model Codes of Practice and National compliance and enforcement policy adequately support the object of the model WHS Act.
9. The review will be finalised by the end of 2018.
10. SWA will provide a written report for the consideration of WHS ministers.

APPENDIX B SECTION 3 OBJECT OF THE MODEL WORK HEALTH AND SAFETY ACT

Model Work Health and Safety (WHS) Act

Division 2 – Object

3 Object

- (1) *The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by:*
- (a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work [or from specified types of substances or plant]; and*
 - (b) providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety; and*
 - (c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and*
 - (d) promoting the provision of advice, information, education and training in relation to work health and safety; and*
 - (e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and*
 - (f) ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act; and*
 - (g) providing a framework for continuous improvement and progressively higher standards of work health and safety; and*
 - (h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.*
- (2) *In furthering subsection (1)(a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work [or from specified types of substances or plant] as is reasonably practicable.*

APPENDIX C KEY TERMS

2008 National review	<i>National Review into Model Occupational Health and Safety Laws.</i> First Report released in October 2008; Second Report released in January 2009.
2014 COAG review	<i>Review of the model Work Health and Safety laws: Improving the model WHS laws (2014).</i>
ABS	Australian Bureau of Statistics.
ACT	Australian Capital Territory.
ACT Act	<i>Work Health and Safety Act 2011 (ACT).</i>
COAG	Council of Australian Governments.
Codes	Codes of practice, which are practical guides to achieving the standards of health, safety and welfare required under the WHS Act and the WHS Regulations in a jurisdiction. Under the model WHS Act, courts may regard a Code of Practice as evidence of what is known about a hazard or risk, risk assessment or risk control (see s 275(3)(a)), and may rely on the Code in determining what is reasonably practicable in the circumstances to which the Code relates (see s 275(3)(b)).
Cth	Commonwealth.
DPP	Director of Public Prosecutions.
Duty holder	A duty holder refers to any person who has a WHS duty under the model WHS Act including a PCBU, designer, manufacturer, importer, supplier, installer of products or plant used at work (upstream duty holders), an officer and workers.
Frequency rate	The number of claims expressed as a rate per hour worked.
Hazard	A situation or thing that has the potential to harm a person.
HSC	Health and Safety Committee, which is a consultative body established under the model WHS Act. The committee's functions include facilitating co-operation between workers and the person conducting a business or undertaking to ensure worker's health and safety at work, and assisting to develop work health and safety standards, rules and procedures for the workplace (HSC functions are outlined in s 77 of the model WHS Act).
HSR	Health and safety representative, which is a worker who has been elected by a work group under the model WHS Act to represent them on health and safety issues.
IGA	<i>Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety.</i>
Model WHS Act	The model WHS Act refers to the <i>Model Work Health and Safety Bill 2016</i> . It forms the basis of the WHS Acts that have been implemented in most jurisdictions across Australia.
Model WHS laws	Model Work Health and Safety laws. Comprised of the model WHS Act, model WHS Regulations, model Codes of Practice and the <i>National compliance and enforcement policy</i> .

Model WHS Regulations	<i>Model Work Health and Safety Regulations 2016.</i> The model WHS Regulations set out detailed requirements to support the duties in the model WHS Act.
Model Codes	Model Codes of Practice (also see 'Codes').
National Codes	National Codes of Practice, which preceded harmonisation of WHS laws.
National Standards	National occupational health and safety standards which preceded harmonisation of WHS laws.
Notifiable incident	An incident that is required, under the model WHS Act, to be notified to regulators. Includes incidents involving the death of a person, 'serious injury or illness' (defined at s 36 of the model WHS Act) of a person or a 'dangerous incident' (defined at s 36 of the model WHS Act).
NCEP	National compliance and enforcement policy.
NSW	New South Wales.
NSW Act	<i>Work Health and Safety Act 2011 (NSW).</i>
New South Wales review	Work Health and Safety Act 2011 Statutory Review.
NT	Northern Territory.
NT Act	<i>Work Health and Safety (National Uniform Legislation) Act 2011 (NT).</i>
Officer	An officer within the meaning of section 9 of the <i>Corporations Act 2001</i> (Cth) is a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the organisation's activities (defined at s 4 of the model WHS Act)
OHS	Occupational health and safety.
PCBU	Person conducting a business or undertaking. A PCBU can be a: company; unincorporated body or association; sole trader or self-employed person. Individuals who are in a partnership that is conducting a business will individually and collectively be a PCBU (defined at s 5 of the model WHS Act).
PIN	Provisional improvement notice.
Plant	Includes any machinery, equipment, appliance, container, implement or tool, and any component or anything fitted or connected to these things (defined at s 4 of the model WHS Act).
Qld	Queensland.
Qld Act	<i>Work Health and Safety Act 2011 (Qld).</i>
Queensland review	Best Practice Review of Workplace Health and Safety Queensland (2017).
Review	Review of the model WHS laws.
Regulator	The relevant WHS regulator for each jurisdiction. The regulator manages compliance and enforcement of WHS laws and has enforcement and arbitration powers. The regulators are: Comcare

	(Cth), WorkSafe ACT, SafeWork NSW, NT WorkSafe, Workplace Health and Safety Queensland, SafeWork SA, WorkSafe Tasmania, WorkSafe Victoria and WorkSafe WA.
Relevant worker	A relevant worker is one who is entitled to be or is a member of the union that the permit holder represents, has industrial interests that the union is entitled to represent and works at the workplace concerned with the entry (defined at s 116 of the model WHS Act).
Risk	The possibility that harm (death, injury or illness) might occur when exposed to a hazard.
Robens model	Lord Robens' Report of the Committee on Safety and Health at Work, HSMO, London, 1972.
SA	South Australia.
SA Act	<i>Work Health and Safety Act 2012 (SA).</i>
2014 South Australian review	Review of the Operation of the <i>Work Health and Safety Act 2012</i> (2014).
2016 South Australian review	Review of the <i>Work Health and Safety Act 2012</i> (2016).
Serious claims	An accepted workers' compensation claim for an incapacity that results in a total absence from work for one working week or more. It includes claims that receive common-law payments. Claims that arise from a journey to or from work, or during a recess period, are not compensable in all jurisdictions and are excluded, as are compensated fatalities.
Tas	Tasmania.
Tas Act	<i>Work Health and Safety Act 2012 (Tas).</i>
Vic	Victoria.
Vic Act	<i>Occupational Health and Safety Act 2004 (Vic).</i>
Vic Review	Independent Review of Occupational Health and Safety Compliance and Enforcement in Victoria (2016).
Volunteer	A person who acts on a voluntary basis regardless of whether they receive out of pocket expenses (defined at s 4 of the model WHS Act).
WA	Western Australia.
WA Act	<i>Occupational Safety and Health Act 1984 (WA).</i>
WHS	Work health and safety.
WHS ministers	Commonwealth, state and territory ministers with responsibility for WHS.
Work group	A group of workers represented by an HSR who in many cases share similar work conditions, for example all the electricians in a factory, all people on night shift, all people who work in the loading bay of a retail storage facility (defined at s 4 of the model WHS Act).

Worker	Any person who carries out work for a PCBU, including work as an employee, contractor, subcontractor, self-employed person, outworker, apprentice or trainee, work experience student, employee of a labour hire company placed with a 'host employer' and volunteers (defined at s 7 of the model WHS Act).
Workplace	Any place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work. This may include offices, factories, shops, construction sites, vehicles, ships, aircraft or other mobile structures on land or water (defined at s 8 of the model WHS Act).