NSW GOVERNMENT

Work Health and Safety Regulators

2018 REVIEW OF THE MODEL WORK HEALTH AND SAFETY LAWS

13 April 2018

LET'S TALK SAFETY

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EXECUTIVE SUMMARY

The NSW Work Health and Safety Regulators, SafeWork NSW and the Resources Regulator, aim to protect against work-related harm, reduce unnecessary compliance costs and secure safety standards. The Regulators conduct a range of initiatives aimed at making the lives of workers and business owners healthier, safer and more productive. The Regulators are committed to 'right touch' regulatory approaches through collaboration, innovation and expertise, with a view to protecting workers from harm while increasing the competitiveness and confidence of business.

The national work health and safety (WHS) model laws are a key tool used in achieving these objectives. Overall, the model laws have proven an effective framework for achieving continued reductions in workplace fatalities and major injuries. NSW has continued to see a reduction in the fatality incidence rates per 100,000 people since the introduction of the Model Laws (2012 to 2016). Serious injuries and illness incidence rates per 1,000 people have also continued to drop overall (2012 to 2014).

Participating jurisdictions have benefited from the national policy and standard-setting frameworks established to support the WHS model laws, which have brought greater cross-jurisdictional collaboration and delivered more nationally consistent policy and regulatory outcomes. The whole legislative framework is based on cooperation between jurisdictions, such as information sharing, licence recognition and cross border investigations.

While the WHS model laws are meeting their overall objectives, there are some areas in which the laws would benefit from clarification or improvement. The focus of this submission has been on identifying issues to be evaluated as part of the review. Our aim is to provide space to allow the issues to be investigated, rather than skipping straight to solutions.

There are a number of areas of the model WHS laws being considered under the 2018 review which are a priority for the regulators. These are summarised below:

1. Ensuring the model WHS laws keep pace with the changing nature of work so that regulators remain agile and can continue to work effectively to reduce harms as industries evolve with digital technology advancements and the increased use of the gig economy in the Australian community.
2. Including explicit provisions around psychological harm and risks in the workplace that will allow WHS regulators to ensure that psychological harms are viewed with the same importance as physical harms within the workplace.
3. Reviewing the provisions for consultation, participation and representation. These areas provide many challenges at an operational level both for the regulator and workplaces, including the format consultation may take in a workplace, Health and Safety Representative (HSR) training, the issue of provisional improvement notices (PINs) and what happens when an inspector confirms or varies a PIN, right of entry provisions and the way that the issue resolution components of the model WHS laws are working in practice.
4. Ensuring the main objects of the model WHS laws remain strong and are able to be effectively administered, including that a person with a health and safety duty cannot

transfer that duty to another person. The existence of insurance products covering a PCBU's costs associated with alleged contravention of the WHS laws, particularly where there has been a fatality or serious injury, is concerning.

5. Ensuring that 'officers' under section 27 can be held accountable through prosecution if they have failed in their due diligence requirements, including reckless conduct.
6. Ensuring regulators have the right tools to undertake compliance and enforcement activities, considering whether the model WHS laws have the mix of tools, understanding the purpose of penalty notices and when they are likely to be a deterrent and whether penalty notices are available for the 'right' offences. Also, investigating the use of agreed actions.
7. Ensuring regulators and inspectors have the right tools to undertake compliance and enforcement activities as well as complete timely investigations of workplace incidents. In particular, examining the efficacy of the current section 155 notice process which causes delays in investigations.
8. Clarifying the boundaries between WHS and public safety about the WHS regulators' responsibility for investigating incidents which are incidental to workplace activities (e.g. many recreational activities).
9. Learnings from enforceable undertakings (EUs), how each regulator implements EUs (e.g. cost recovery models) and ensuring the model WHS laws facilitate EUs that provide real benefits for the workplace, industry and community, while remaining robust enough for it to continue as a reasonable alternative to prosecution for an alleged contravention of the laws.
10. Ensuring the balance of responsibilities between all in the supply chain, including manufacturers, importers, suppliers and PCBUs remains balanced and gives the regulator appropriate ability to enforce the minimisation of harm through the higher-level hierarchy of controls across all aspects of the life cycle of plant, hazardous chemicals and dangerous goods.
11. Considering how digital technological advancements can be utilised by regulators to create more user friendly, multi-faceted and easily accessible and transportable tools, information and regulatory services across workplaces, such as codes of practice.
12. Ensuring regulation of high-risk work (HRW) licences remains robust, so regulators can effectively administer the licensing program, including consideration of disciplinary issues arising from mutual recognition of interstate licences (e.g. the inability to discipline interstate licence holders) and management of registered training organisations operating in the HRW industry.
13. For the jurisdictions that have adopted Schedule 1 to the NSW *Work Health and Safety Act 2011*, ensuring effective regulation of high risk plant and dangerous goods affecting public safety at non-workplaces where there is not a person conducting a business or undertaking (PBCU).

INTRODUCTION

Work Health and Safety in NSW

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

In NSW, WHS is overseen by two regulators:

- SafeWork NSW; and
- the Resources Regulator.

SafeWork NSW is responsible for regulating WHS at all workplaces except for mining workplaces. The Resources Regulator is the WHS Regulator for mines and petroleum sites.

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

The Regulators use a range of strategies when working with the people of NSW to prevent harm or recover from a work-related injury or illness. These include:

- Focusing on PREVENTION;
- RESPONDING to workplace incidents and requests for service where required;
- Promoting RECOVERY AT WORK;
- Securing COMPLIANCE with work health and safety legislation;
- Use EVIDENCE to make informed decisions; and
- FOCUSING OUR EFFORTS on those risks that have the potential of creating the greatest harm.

RESPONSE TO THE DISCUSSION PAPER QUESTIONS

LEGISLATIVE FRAMEWORK

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

Submissions received during the NSW Statutory Review of the WHS Act demonstrated a general view that national harmonisation remains a valid object and accordingly the harmonised terms of the WHS model laws are securing that objective.

The three-tiered approach appears to achieve the object of the model WHS laws and the regulators support the continuation of the three-tiered approach at this time. However, the mode of delivering the content of the model WHS codes to workers and business requires consideration in light of the continuing digitisation of workplaces.

The Centre for WHS, a new unit within SafeWork NSW, is undertaking a research project to evaluate the regulatory approach for securing compliance with the law and looking at the effectiveness of existing enforcement tools and interventions. This research will be provided to the Safe Work Australia review team once completed.

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

Generally speaking, the model WHS regulations adequately support the object of the model WHS Act. There are a number of specific clauses that are either not working as well as intended, or the wording has created unintended consequences for both WHS regulators, PCBUs and the public. For example, there is confusion between labelling vs placarding requirements for hazardous chemicals. Further detail can be provided to the reviewer if required.

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

The model WHS Codes adequately supports the object of the model WHS Act. However, codes must be flexible to be updated easily for them to remain current, technically correct and relevant, to continue to be able to meet the object of the model WHS Act. It is also critical that information in codes align with the model WHS Act and Regulation.

Codes are traditionally paper based documents, which people often find challenging to use effectively. Traditionally they have been written for a particular group or industry, but have not been able to be universally applied from small through to large business. This review provides an opportunity to explore further channels of delivery for codes of practice, to keep pace with changes in technology and how businesses receive and review information and advice. This would enable them to be user friendly and multifaceted. For example, using innovative digital solutions/platforms, in addition to paper based documents, such as electronic media for example, Youtube, or phone apps to disseminate the information traditionally contained in codes.

There has been some concern that many codes initially agreed to be developed as model codes, have since been settled as guidance material. Concerns have also been raised about technical advice within the codes and guidance material, which appears to have been lost in translation, or 'watered down', in an effort to be less prescriptive.

It is also important to note that under section 275 of the Act, a Court may have regard to a code of practice to determine what is reasonably practicable in legal proceedings.

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?

The current framework currently strikes a balance between the model WHS Act, model WHS Regulation and model Codes to effectively deliver WHS outcomes. However, in relation to hazardous chemicals and dangerous goods, the balance needs to be reviewed. Where prescription is not contained in the model WHS Regulation, it is referred to the model Codes. If it is not in the Code, it sits in a standard. WHS outcomes have been impacted in the current framework because hazardous chemicals require prescription e.g. measurements, separations distances, compatibles, storage and transport restrictions, to name a few, that are in the Australian Dangerous Goods (ADG) code or the Globalised Harmonisation classification of labelling system (GHS). There is a danger that this area becomes confusing and, conflicting as requirements are found across all the model WHS laws documents as well as the ADG Code and the GHS.

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?

The definition of "health" in section 4 of the WHS Act includes psychological health. However other than that there is very little mention of psychological health in the model WHS laws, nor is it included in the list of notifiable incidents. The lack of reference to psychological injuries and illnesses means those using the model WHS laws could easily overlook or under-rate the importance of psychosocial hazards, failing to understand the nature of psychological injuries/illnesses and therefore failing to meet their duty of care.

From a regulators perspective, psychological health creates a range of challenges including the under-reporting of incidents within workplaces and to the regulator. To meet these challenges, a variety of business intelligence is used to better understand psychological health, including potential risk factors and treatments to improve the systematic management of potential harms in NSW workplaces. This is partly due to psychological injuries not being

required to be notified to the regulator. Notification of psychological injuries would increase the data and intelligence for use in the design of prevention initiatives. It would also enable the regulator to undertake further action in relation to individual cases and work directly with workplaces where psychosocial hazards are occurring.

During the NSW Statutory Review of the WHS Act, it was highlighted that the model laws could be improved to include possible expansion of definitions of psychological illness and psychological risks.

There is a range of research about the psychosocial hazards in the workplace that may be of assistance in the model WHS review, including from the International Labour Organisation. The International Labour Organisation research indicates there is a general trend to a decrease in the numbers of occupational accidents and diseases, reflecting a decrease in the "traditional" risks. The traditional hazard and risk prevention and control tools may be still effective. However, they need to be complemented by prevention strategies to anticipate, identify, evaluate and control hazards arising from the constantly evolving world of work. Hazardous psychological work and tasks need to be considered both in the light of actual risks occurring now and how the evolution of these risks may occur in future work. The review should consider whether the model laws provide the framework necessary to effectively manage risks to psychological health in the workplace as currently drafted.

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)?

The nature of work is changing rapidly and future workplaces may be quite different to the way they currently operate. The recent CSIRO report titled *Workplace Safety Futures* discusses increases in technology, (e.g. robotics, cranes and nanotechnology) along with the increase of the gig economy. These are starting to create challenges for workplace safety regulators as we try to fit these new business models into the model WHS laws. For example, the introduction of the National Disability Insurance Scheme (NDIS) has completely shifted how the disability industry operates. The introduction of platform based 'matching services' and the increase of informal supports (e.g. family of people with disability), 'self-managing' the NDIS plan and then either directly or indirectly employing support workers (thus potentially becoming a PCBU), along with the rise in the industry of people traditionally seen as 'workers', who are now being encouraged to obtain their own ABN and become 'independent workers'. There are also rising challenges about who is responsible for WHS costs in these scenarios.

Innovations like driverless vehicles are going to be reality in the not too distant future. The model WHS laws will need to be flexible to cope with the increased use of technology in the workplace. The model WHS laws were intended to be broad enough to encompass all types of current and future working arrangements. Further research and conversation into the changing future of work and the impact it will have on model WHS laws and WHS regulator activities is required.

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

It is common for PCBUs' head office to be located outside the state or territory where an incident occurs. This has impeded the Regulators ability to obtain critical evidence to meet the standards required to initiate prosecution for alleged contraventions of the WHS Act. It has also contributed to extended investigation timeframes in some of these matters.

The model WHS Act contains a jurisdictional note providing flexibility for jurisdictions to include extraterritoriality in their own legislation. This review provides an opportunity for extraterritoriality to be considered so it operates consistently across jurisdictions.

There are a number of other pieces of legislation in NSW which includes extraterritorial operation. During the 2017 Statutory Review of the NSW WHS Act, it was confirmed it would be appropriate to include a provision for extraterritoriality in NSW, specifically to obtain records and issue notices outside of NSW. NSW recently adopted a new section 155A, which came into effect on 21 March 2018, and explicitly provides for service of a s155 notice outside of NSW.

However, the ability of regulators to exercise other investigatory powers under the WHS laws interstate remains very unclear. Further refinement of the model laws to incorporate mutual recognition of investigatory powers and action, and disciplinary decisions, is required to reduce the risk to regulators contravening laws in other jurisdictions. Currently, the Regulators are heavily constrained in their ability to take disciplinary action (such as suspending a licence pending an investigation) if an interstate-licensed operator appears to have breached the NSW WHS Act.

Automatic recognition of interstate licensing and disciplinary decisions would improve worker and public safety, reduce regulatory duplication and enhance the consistent application of the model 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 that are connected to work?

The question of where WHS regulation ends and public safety regulation begins remains complex. Complexity also arises when an incident involves cross over with other agencies such as the Police or environmental protection agencies.

There are two main issues that arise around the sometimes-blurred boundaries between WHS and public safety. They are:

- The public's expectation that WHS regulators are responsible for regulating and investigating incidents which do not clearly fall within the scope of the WHS legislation. The flow on effects are reputational – where the public perceives that the WHS regulator is not doing its job because it is not fully investigating incidents which do not fall under WHS legislation but the public thinks it is the WHS regulators role.

- Resourcing – WHS regulators are being asked to investigate matters not directly related to a work activity, which can result in resources being allocated to matters not directly related to the object of the WHS Act.

Consideration should be given in this review to further defining the scope of the WHS legislation or at least to develop further tools to assist regulators and the public to understand that WHS legislation operates in a work context and there must be a connection to work, for WHS legislation to apply. Dependent on the outcomes of this review, consideration should also be given to the development of further information to help the public understand what that means.

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 5 refers to psychological health in the workplace, and question 6 talks about the changing nature of work. Further conversation about the issues and how the harms associated with them could be appropriately captured within the model WHS laws is required.

For example, Section 3(1)(c) of the model WHS Act encourages unions and employer organisations to take a constructive role in promoting improvements in WHS practices and to assist PCBU's and workers to achieve a healthier and safer working environment. However, many workplaces are small businesses and do not have representation from either group. The changing nature of work means that non-traditional workplaces are rapidly growing and are an emerging issue that needs to be considered.

Challenges have also been found with the way in which parent company structures have been established. A recent court decision, *Inspector Nash v Perilya [2018] NSWDC 29*, found that a parent company was not liable for work health and safety duties, despite the parent company having common officers and ultimate control of the PCBU.

DUTIES OF CARE

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?

There are emerging challenges with the rapidly changing nature of work due to technological advances and the rise of the gig economy. These changes will impact on the ability of the model WHS laws to continue to sufficiently capture PCBUs so that the primary duty of care sits with the appropriate person. For example, one of the items that regulators are investigating via the Heads of Workplace Safety Authorities (HWSA), is who has the primary duty of care and who is considered to be the PCBU across a range of scenarios, within the role out of the National Disability Insurance Scheme (NDIS).

The model WHS laws may need to be regularly reviewed and updated as technological advances continue and the gig economy grows across a range of industries, to ensure it continues to meet the needs of WHS regulators and the community. Ideally, however, there would be sufficient flexibility built into the terms of the WHS model laws to allow them to adapt to changing work practices and disruptive technology without constant amendment.

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

In relation to a PCBU's primary duty of care, there have been issues raised in legal proceedings in NSW regarding the application of section 19(2), including whether there needs to be a geographical connection to the workplace. The model laws are currently unclear in relation to:

- PCBUs duty of care in relation to procuring goods or services.
- While Schedule 1 to the WHS Act is optional for jurisdictions, for jurisdictions that have adopted it, there is a need to identify a duty holder for the application of Schedule 1 at non-workplaces where there is not a PCBU. For example, underground storage tanks located at premises that are no longer a workplace or under the control of a PCBU.

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

As the nature of work evolves, the approach to the meaning of 'reasonably practicable' will need to develop with it.

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

There have been some examples where the regulator has faced significant challenges in investigating an officer for the PCBU's failures, due to the burden of proof in establishing a lack of due diligence by the officer, and the corporate entity has subsequently folded or gone into liquidation. This is arguably contrary to the objects of the WHS legislation.

The burden of proof currently lies with the regulator to prove due diligence failures by officers of corporations which, in practice, presents greater difficulties with respect to larger corporate entities. The application of the officer duty may be seen as applying inconsistently, in that it is easier for a regulator to establish that a "hands on" officer of a smaller company has failed to exercise due diligence, whereas an officer of a large company, under whom a number of "competent" staff are operating, is further removed and thus it is harder to demonstrate a lack of due diligence on their part. This may be seen as disproportionate penalising of smaller businesses.

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?

There is an increase in the number of people traditionally captured under the 'worker' banner now being considered 'independent workers' under the gig economy. As industries become casualised, there is less union representation and therefore WHS Regulators need to find innovative ways to consult and communicate with workers ('independent' or otherwise) about their health and safety at work.

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

As mentioned earlier, as the nature of work evolves a worker's duty of care will need to develop with it.

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

As the nature of work evolves it means that 'other persons' are increasingly at workplaces and the duty of care relating to 'other persons' will need to evolve with it. For example, increasing numbers of persons with a disability (PwD) are being cared for by disability support workers in their residential homes rather than in the previous disability model.

The issue of scope creep also needs to be considered here too, where work health and safety, and public safety intersects. A recent example of this is the Supercars event held in Newcastle in November 2017. While SafeWork had jurisdiction in relation to noise exposure in workplaces, the matters raised by the public related to noise pollution resulting from a sporting event, which is generally outside SafeWork's scope. The Environmental Protection Authority and Local Council would ordinarily deal with these types of matters. However, under section 28 and 30 of the *Motor Racing (Sydney and Newcastle) Act 2008*, both agencies have restricted jurisdiction relating to noise for this event. Although this legislation does not specifically state SafeWork has a role, it did cause an influx of complaints being lodged with SafeWork relating to potential public health/safety concerns.

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

The principles that apply to health and safety duties are critical to the intent of the model WHS laws. The continued importance of the principle that a duty cannot be transferred to another person should remain.

CONSULTATION, REPRESENTATION AND PARTICIPATION

Consultation, representation and participation are critical components of the model WHS laws and as such consideration of how Part 5 of the model WHS Act is working in practice is essential as part of this review. In addition to answering the discussion questions below, the following information has been provided to contextualise the answers to the discussion paper questions.

SafeWork undertook a comprehensive review of workplace consultation in 2016. The intention of the review was to gain a better understanding of the barriers to effective consultation and identify strategies and solutions which are customer focussed to help businesses improve their capability to consult.

The principal objective was to develop a Consultation@Work (C@W) Strategy to support and assist workplaces in building their capability to consult, in order to better facilitate the resolution of WHS issues. Generally, the findings of the review outlined that stakeholders reported multiple barriers to workplace consultation, as well as a lack of understanding of the legal requirements regarding health and safety representatives (HSRs).

The key themes identified by stakeholders included:

- Time and perceived cost;
- Work culture – changing the culture, especially in small business, is a challenge;
- HSR training is too long and it is not compulsory;
- A lack of worker or management interest in consultation;
- Accessibility of information does not suit a lot of workers (e.g. construction workers) on sites without access to computers, so they struggle to access the Regulators website;
- Language and literacy of workers – the literacy levels of some workers is not always taken into consideration; and
- Lack of support to HSRs.

General response to the discussion paper questions

The practical problems with the model WHS Act appear to be symptomatic of the fact it is requiring a collaborative approach, while the industrial environment continues to be adversarial. The underlying reality is the model WHS Act effectively changes the nature of the relationship between the workplace parties and many years of education will be needed to build their understanding of how it is to work in practice.

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?

Stable functioning of HSRs and Committees is a challenge on construction sites where contractors come and go.

Anecdotal evidence shows that horizontal consultation (s46) is not undertaken well, or at all. This is most clearly seen when incidents occur and the subsequent investigation identifies a complete lack of consultation (one causal factor). This issue is most often seen in supply chains, joint ventures and construction environments.

Multi-business complexes are another area of industry where problems may occur, for example, in relation to lack of consultation on traffic management. Consultation requirements could include a written signed agreement and plan as to how consultation should take place between supply chain entities, such as in the construction industry where the principal contractor is identified and has responsibilities.

A survey undertaken at the SafeWork Consultation@Work conference in 2017, indicated there was a need for ‘more horizontal engagement between overlapping duty holders, as the fundamental actions required to consult, co-ordinate and co-operate with other duty holders is not currently occurring, or such activity is not well understood.’

The 2018 Review is encouraged to consider how the model WHS laws could provide greater clarity on consultation requirements and encourage more effective strategies for meaningful consultation with workers.

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?

The WHS Regulators have found there is a general lack of understanding about the obligation to consult affected workers, regardless of whether a safety representative has been consulted.

Work groups and HSRs are a relatively recent arrangement in NSW.

The current HSR arrangements are challenging for small business given their more limited resources.

Some of the issues raised by stakeholders during the development of the Consultation@Work Strategy include:

- requests for determinations where employers have ignored a section 50 request for negotiations to commence on work groups and HSRs;
- problems with elections of an HSR;
- organising HSR training;
- allowing HSR the time and resources to perform the function;
- provisional improvement notice reviews;
- which training course to attend;
- entry permit holder and refusal of entry (Part 7);
- when entry is given when consulting or advising workers; and
- discrimination (s104-106) for a prohibited reason.

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?

Workers without secure employment may be reluctant to share their opinions. They need security or at least a mechanism of anonymity before they feel confident raising issues with the WHS regulator. Many workers are now engaged in less secure employment arrangements. Several years ago, the number of businesses in NSW was anecdotally reported as approximately 350,000. Using ABN data, we see that number has quickly increased to over 700,000 in recent times. This increase has been attributed to a significant increase in workers becoming independent contractors (with an ABN).

Classes of workers that maybe affected by ineffective consultation could include:

- Casuals
- Independent contractors
- Section 457 visa workers
- Labour hire employees
- Unpaid interns
- Volunteers

- Culturally and linguistically diverse workers
- Gig economy workers
- 24 x 7 workers
- Split shift workers
- Zero-hour contract workers
- Transitory workers

It is suggested the review considers how the model WHS laws can provide stronger protection for workers around discrimination (104-106), particularly for the types of workers listed above.

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?

HSRs are not always safety professionals; they are simply workers playing a conduit role. They have full time work to undertake and their role is not well understood, particularly by supervisors. Some are being told they need to undertake the role in their own time.

HSRs are elected to represent their work group, but are often not available to their work groups as shifts are changed, roles are revised, they are made redundant or moved. The work environment is fluid and the role is not keeping up with these changing circumstances.

THE ROLE OF AN HSR / DEPUTY HSR

Workers need convenient access to an HSR so they can express any concerns regarding their health and safety, and so can readily be consulted by the HSR about health and safety matters in the workplace. This could mean consulting directly or indirectly (for example, consultation via email or phone). However, it is desirable there be as much opportunity for face-to-face contact as possible.

The philosophy underpinning work groups under the model WHS laws is that work groups be established to enable the workers' WHS interests be represented and safeguarded. Each worker should have ready access to an available HSR /deputy who understands the work and its associated risks. In turn, the PCBU should be able to identify the person representing the workers involved in respect to which consultation is required, or issues that require resolution.

The role of a HSR is important and representative workers should not be deterred from performing and properly exercising rights and powers provided by the model WHS Act, through fear of incurring intimidation and discrimination. The Act provides protection to an HSR from incurring civil liability for any act or omission, in the course of the performance of the role, or exercise of any power or right of an HSR.

Deputy HSRs can fulfil the role when the HSR is unable to, due to absence or any other reason. The provisions of the model laws relating to election, term of office, training, immunity, disqualification and ceasing to be an HSR also apply to deputy HSRs.

In some industries, unions are including issues related to HSRs into enterprise agreements to strengthen clarity on their role and place in the workplace. Some are specific about on-site consultative arrangements. This review should consider whether the consultation provisions around HSRs can be clarified.

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

The issue resolution procedures in the model laws identify the parties to an issue and articulates the consultation requirements and processes for issue resolution at a workplace. They appear to be working effectively.

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?

As discussed in question 20, the issue of being discriminated against for taking on a representative role under the model WHS laws remains. Workers must initiate the process for work groups and HSRs. This may be difficult, as workers may be fearful of repercussion and it is often difficult for the WHS regulator to prove that actions taken are discriminatory, as they may be explained as worker performance issues.

As a legitimate and valuable role, HSRs need to be supported and resourced and clear mechanisms need to be put in place to assist them to effectively undertake their role and functions. The statutory functions and training provided to HSRs and deputy HSRs equips them with an autonomy of role and an independence of mind to be able to stand up for health and safety when required. The real value in an engaged and effective HSR is they can examine WHS issues and maintain a mindset that, while collaborative, is not simply an instrument of the employer. As such, the regulator is particularly obliged to protect the role as the HSR, to provide a voice to all employees within the work group.

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

Some stakeholders have raised issues about how regulators are responding to disputes about union right of entry and the potential of legal proceedings relating to right of entry breaches and discrimination provisions.

In regard to the effectiveness of the provisions, anecdotal evidence from SafeWork NSW indicates that each month there potentially might be dozens of instances in which the right of entry to a workplace is exercised. The data below shows the regulator receives a relatively modest number of enquires and requests for service each year. Many of the enquiries which are not escalated for a regulatory intervention are about training and qualification requirements or were checks on the validity of permits.

As outlined in Table 1, records indicate there were 78 requests for service from 2012-2017 concerning entry permit holder/s that required an inspector response.

Table 1

Date Received by Year	Count of Requests for Service
2012	5
2013	6
2014	14
2015	17
2016	19
2017	17
TOTAL	**78**

The requests for service were as follows:

- 70 entry permit holder dispute resolution requests (s141 requests for service); and
- 8 issue resolution requests (section 82 request for service relating to an entry permit holder dispute).

Table 2 shows that since 2012, SafeWork NSW has dealt with 311 customer enquiries regarding entry permit holders. Around 40 per cent of queries related to training and qualification requirements to become an Entry Permit Holder, with the remainder queries about the rights and obligations of Entry Permit Holders or the validity of specific permits.

Table 2

Question	2012	2013	2014	2015	2016	2017	TOTAL
How does a person become an entry permit holder under WHS legislation?	32	17	16	12	6	13	96
Must entry permit holders undertake training under WHS legislation?	11	3	6	2	10	5	37
When does an entry permit holder need to give notice to enter a workplace?	6	7	6	7	8	5	39
What documents can a WHS entry permit holder inspect or copy under WHS legislation?	11	4	2	2			19
If a workplace has no employee representative body members, do officials still have the right to enter the workplace with a WHS entry permit under the WHS legislation				1	1		2
Must a WHS entry permit holder have and produce their permit under WHS legislation?					1	1	2
If a PCBU is concerned about a WHS entry permit site visit, what can they do under WHS legislation	2	5	10	3	2	4	26
When a WHS entry permit holder is at a workplace, can they warn any person of a potential risk to their health and safety under WHS legislation	1	2	1	2	1		7
Can a WHS entry permit be revoked under WHS legislation?	3	4			2		9

Question	2012	2013	2014	2015	2016	2017	TOTAL
What other remedies can be obtained for breaches of provisions relating to WHS entry permit holders under WHS legislation	4	1		3	1		9
How can a PCBU check if a WHS entry permit is valid under WHS legislation?	3	7	14	8	7	6	45
Can a WHS entry permit holder enter any part of a workplace that is used only for residential purposes under WHS legislation?							
WHS Entry Permit right of entry dispute		1	3	3	5	4	16
What are the three types of entry which may be exercise by an entry permit holder?			1	1	2		4
Renewal process for EPH training providers							
TOTAL	**73**	**51**	**59**	**44**	**46**	**38**	**311**

COMPLIANCE AND ENFORCEMENT

Compliance and enforcement is a critical component of the model WHS laws. How WHS regulators approach compliance and enforcement varies for a range of reasons, which the Discussion Paper highlights. The WHS Regulators undertake a wide range of advisory, compliance monitoring and enforcement activities to purposefully build PCBU capability to embed the safety landscape in NSW workplaces while securing compliance with the legislation where necessary. It is recognised that every business faces different health and safety risks and has varied capabilities and willingness to comply with their WHS obligations. The application of the graduated approach to compliance and enforcement takes the level of risk, public interest and due diligence effort into consideration. The provision of advice in every interaction with NSW workplaces builds the confidence, capability and willingness to comply.

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

To consider the functions and powers of the Regulators, to ensure compliance with the model WHS laws are generally appropriate and allow them to conduct its regulatory functions without major restriction.

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?

The ability of the Regulator to undertake timely and comprehensive investigations is limited by a number of factors, including:

- s171(6) - reasonable excuse as witnesses are refusing to answer questions until they have legal representation even though the witness is afforded protection from self-incrimination after receiving a caution/warning. Clarification required whether this is a reasonable excuse.

- There are instances where witnesses at incident scenes are refusing to answer questions based on legal advice from PCBU solicitors (Section 171(6)). Clarification is required about whether this is reasonable.

However, the major issue across both Regulators is section 155, which has created many issues and unintended consequences. The current staged approach for seeking information under s155 is time consuming, cumbersome and impedes the ability to monitor and enforce compliance with the WHS Act.

s155 requirement for information in writing

Restricting the regulator from requiring a person to appear until one or more attempts have been made to obtain the information in writing creates unnecessary delays in investigation timeframes, increases costs and creates legal arguments about the Regulator's powers. The legal requirement to always seek a written response to questions creates the following situations and impedes the Regulator's ability to conduct comprehensive and timely investigations.

Prohibition and improvement notices

SafeWork NSW continues to undertake quality reviews of operational practice including the review of the application and use of prohibition and improvement notices. The WHS Regulators adopted the model notice templates developed as part of the Regulator Harmonisation Program in 2012, and have since identified limitations to the effectiveness of their use arising from the design of the template. Programs implemented in NSW have indicated that greater voluntary compliance can be achieved when due consideration is given to behavioural insights when designing compliance tool templates. An example is when behavioural insights were used in the redesign of the penalty notice reminder and enforcement orders by Revenue NSW.

This will be further considered as part of the current review of notices.

The Resources Regulator has a specific issue regarding verifying compliance with improvement and prohibition notices due to requirements under their legislation for mines and petroleum sites in NSW. As a result, directions in these notices often need to detail matters to be considered in assessing the risks or information in any safety management plans, procedures. It is prudent for inspectors to include a request for the operator to provide a revised copy of these documents to effectively determine compliance. While the notice could be followed up with a visit or a section 155 notice (under the WHS Act), this is not very efficient or clear for either the Resources Regulator or duty holder. This is particularly important in regard to improvement notices, where a targeted and detailed assessment may identify multiple issues.

SafeWork NSW has also experienced this same issue in relation to the provision of statutory documents resulting from improvement and prohibition notices, for example the provision or revision of safe work method statements, WHS management plans, asbestos registers and asbestos removal control plans. The WHS Act could provide more clarity regarding what information can be requested in these notices as evidence of compliance, such as the provision of certain WHS documents and relevant materials to the Regulator.

Infringement Notices or Penalty notices

The National Compliance and Enforcement Policy (NCEP), Section 11. Penalty Notices states:

"Penalty notices are a mechanism for regulators and inspectors to impose an immediate form of punishment for certain types of breaches, sending a clear and timely message that there are consequences for non-compliance.

Penalty notices will generally be issued where there is some punishment warranted for the breach but the nature of the breach is not serious enough to warrant prosecution."

Penalty Notices are intended to be used to impose an immediate higher-level sanction for certain contraventions and send a clear and timely message that there are consequences for non-compliance with WHS requirements and exposing persons to risk of harm. They should be issued where a sanction is warranted for the contravention but the nature of the contravention does not warrant prosecution or a prosecution will not be initiated.

The NCEP compliance pyramid depicts penalty notices as higher-level sanctions. However, in reality, they are only made available for minor offences or administrative based offences e.g. failure to keep records. In NSW's experience, the reality of the nationally agreed position, following the implementation of the model Act has had unintended consequences and contradicts and limits the effective application of the NCEP.

It has been identified that the regulator is restricted in applying the NCEP to maximise its effectiveness due to these unintended consequences. This negatively impacts on compliance and enforcement efforts and ability. Key issues identified contribute to the negative impacts which include:

1. The reduction in available scheduled penalty notice offences;
2. The scheduled offences are predominantly administrative based, e.g. record-keeping; and
3. Penalties are generally limited to offences that are not qualified by 'so far as reasonably practicable.'

There are limitations imposed by the current situation as higher-level deterrence options for offences are generally limited to prosecution. In some cases, this is not the appropriate enforcement option. Specifically, there is an identified compliance and enforcement gap between applying compliance tools such as improvement and prohibition notices and the high-level court sanctions. Penalty notices were intended to bridge this gap.

This has unintended and negative consequences where the tools for compliance and enforcement action are not as flexible as they could be. Broadening the penalty notice offences would correct this unintended consequence.

Consideration should be given to expanding the list of penalty notice offences to include additional offences, especially where the Regulations provide for specific controls to be implemented. For example, NSW has recently implemented penalty notices for the Falls clause (Regulations 78-80) as these clauses, although qualified by so far as reasonably practicable, outline definitions and required controls.

Inspectors report the penalty notice offences available under the current legislative framework are not suitable and do not provide a satisfactory system of enforcement. One such example is there is a penalty notice available for unauthorised/unlicensed work, but there is no penalty notice available for unsafe work/operation by a licensed operator.

Penalty notices have been identified as an area of opportunity as there have been recent changes in their use. SafeWork NSW has revised its penalty notice decision-making framework to align with the graduated approach to compliance contained within SafeWork NSW *Our Approach to WHS Regulation*. The penalty notice decision-making framework provides guidance to ensure a consistent and proportionate inspector response to the particular circumstances of a workplace intervention. The primary aim is to achieve the best workplace health and safety outcomes from every interaction. It provides guidance to ensure penalty notices are used as a higher-level sanction and discrete influencing mechanism to enable behavioral change of a PCBU or individual. This is to assist in embedding a health and safety landscape in NSW's workplaces. The policy position in NSW is to enable behavioural change in an organisation for the identified contravention, a penalty notice also is accompanied by an improvement or prohibition notice requiring remedial action, and information and advice on what compliance looks like.

Examples include:

1. Clause 308, which includes a penalty notice to the value of $2160 for failing to display a Principal Contractor sign on a fence. However, no penalty is available to be issued for a higher-level offence that would not warrant prosecution e.g. clause 298, failing to isolate a construction site by installing a fence.
2. A penalty exists for a high-risk work (HRW) licence holder failing to produce a HRWL for inspection, but there is no penalty for conducting unlicensed work. The only option is to prosecute. SafeWork NSW has recently introduced penalties for s43 that address this gap.
3. A penalty exists for failing to prepare a Safe Work Method Statement for High Risk Construction work e.g. when working at heights, but there is no fine for placing the workers at risk of falls from height. SafeWork has recently introduced penalties that address this gap.

The use of agreed actions

Agreed actions were developed under a model operating procedure as part of the Regulator Harmonisation Program prior to the implementation of the model laws. Agreed actions are used by a number of WHS Regulators. However, there is no legislative basis for their existence. Its application and use is a policy decision arising from the advice and guidance section of the NCEP. Under the current approach, there is a risk that agreed actions are not consistently applied and are not being effectively monitored and reported on at a state or national level. This results in data not being available to verify a PCBU or individual's compliance history with ineffective use potentially creating complications in court proceedings.

Practical issue with provisional improvement notice reviews

Section 101 of the WHS Act requires the inspector appointed to undertake a review of a provisional improvement notice to attend the workplace as soon as practicable after a request for review is made.

The Regulators have a number of examples where attendance at the workplace was not required to review the provisional improvement notice. The Review should consider that inspector attendance on site is not a requirement in all cases, and therefore should be optional depending on the circumstances.

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?

Section 226 states that a decision must be made within 14 days of the receipt of a request for an internal review and that if a reviewable decision is not varied or set aside within this time the decision is taken to have been confirmed by the internal reviewer. This may disadvantage the applicant. SafeWork uses 14 **calendar** days. In effect, this only gives the reviewer 10 working days to complete the review or less, if there are public holidays within the review period. For example, a PCBU applies for an internal review of a notice. If the regulator is unable to complete the review in time for whatever reason, the original decision is taken to have been confirmed, with the only further redress being an external review.

Although there is a jurisdictional note that allows the timeframes for internal review to be changed at clause 680 of the WHS Regulation, consideration of the interaction between section 226 and clause 680 should be given as part of this review to ensure there is no confusion around whether working days or calendar days are meant in the WHS Act and Regulation.

Section 227 states that as soon as practicable after reviewing the decision, the internal reviewer must give the applicant, in writing, the decision on the internal review, and the reasons for the decision. There have been times where other affected persons have wanted a copy of the decision but the section does not allow for that. This review should aim to clarify this issue so regulators and affected persons understand their rights under this provision.

An emerging trend has been identified, whereby PCBUs are seeking reviews of notices that have been complied with, in an attempt to have them set aside and keep a notice free record, because many construction contracts impose financial penalties if a notice has been issued. Frivolous requests can attract valuable resources away from other critical investigations and harm prevention activities.

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?

Overall, the provisions for exemptions are generally appropriate and work effectively except for the following situation - Part 11.2 Exemptions. The section allows the regulator to exempt a person or class of person from compliance with any part of the WHS Regulation. However, it does not allow the regulator to exempt a thing from compliance with any part of the WHS Regulation This has created challenges, for example, a specific item of plant cannot be exempt from item registration because the requirement for registration is placed on the plant, not the person.

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?

The NSW Regulators have developed and maintain strong relationships with other WHS regulators. In particular from an operational perspective, with offices near borders with Queensland and Victoria, cross-border activities are regularly undertaken with these regulators. The regulators also work effectively and collaboratively with Comcare in responding to event requests that occur involving NSW workers on Comcare sites (e.g. Department of Defence sites). The Heads of Workplace Safety Authorities (HWSA) provides an opportunity for regulators to examine challenges and opportunities associated with the practical application of WHS legislation across the country.

However, the ability of regulators to exercise other investigatory powers under the WHS laws interstate remains very unclear. Further refinement of the model laws to incorporate mutual recognition of investigatory powers and action, and disciplinary decisions, is required to reduce the risk to regulators contravening laws in other jurisdictions. Automatic recognition of disciplinary decisions would also increase public safety and reduce regulatory duplication.

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

SafeWork receives approximately 6000 incident notifications per year and triages them for regulator response according to the *'Framework for the common approach to work health and safety regulator event triaging,'* which was designed as a tool to assist the incident notification provisions.

Incident notification is a critical provision that must stay at least in its current form or be strengthened through the model WHS laws review. Incident notification enables the Regulators to respond to incidents and investigate their cause. This is used to gather information to inform the community about risks that may exist in specific types of workplaces and how to minimise these risks. Incident notification also enables the regulator to gather evidence that assists to determine the most appropriate and effective compliance and enforcement activities.

Workplaces tend to either over notify, by notifying every incident, or may not always report notifiable incidents, due to the information in sections 36 and 37 of the model WHS Act being open to interpretation. Questions have been raised by PCBUs since the introduction of the model legislation and the regulators have attempted to clarify ambiguity through the introduction of supporting fact sheets.

However, NSW has a number of large PCBUs who notify all incidents as per their legal advice, as they have determined that relying on supporting documentation can leave them open to prosecution for non-notification. This has an impact on Regulator and PCBU resources. Consideration on clarifying the ambiguity of the incident notification provisions would be welcomed.

Two areas which should be considered for inclusion in the incident notification provisions are:

- Psychological injury and illness (refer to question 5); and
- 'near misses' at Major Hazard Facilities (MHFs).

Currently 'near misses' at MHFs are not required to be reported to the regulator as a dangerous incident. In the industry, 'near misses' are seen as lead indicators for major incidents but are not highlighted to the Regulator. This means the Regulator has less ability to work with MHFs to prevent larger incidents. A national forum with MHFs was recently held where this theme was highlighted as being beneficial for the prevention of future incidents and for the education of other stakeholders.

A related issue is the definition of 'serious injury or illness' in section 4, which is stated to apply to Part 3 (incident notification). The same term 'serious injury or illness' is used in Division 5 of Part 2 (health and safety duties), though it is not clear whether the section 4 definition applies.

NATIONAL COMPLIANCE AND ENFORCEMENT POLICY

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?

SafeWork adopted the NCEP at the same time as the model legislation. The NCEP as a philosophy underpins all activities, not just those related directly to compliance and enforcement. To support the regulators in the consistent implementation of the NCEP, a number of documents have been created to provide further guidance around how the principles of the NCEP apply across a range of scenarios, including:

- Our approach to work health and safety regulation, and
- SafeWork and Resources Regulator Prosecution Guidelines

It is imperative the NCEP is regularly reviewed and updated, particularly in light of the rapidly changing nature of work, such as the gig economy. This will ensure it continues to be an effective graduated approach to compliance and enforcement activities. Additional comments relating to the effectiveness of the NCEP have also been included in the response to Question 26.

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?

The NCEP assists the WHS Regulators to communicate their approach to PCBUs, workers and other persons relevant to an activity. For example, in response to an incident notification, people generally respond well to the idea that a graduated approach will be applied, appropriate to the individual scenario. Having such a document that explains the compliance and enforcement approach is not all about prosecuting, helps to explain the regulator's approach so that the inspector and PCBU can work together positively to resolve workplace health and safety issues and create positive outcomes for everyone involved.

PROSECUTION AND LEGAL PROCEEDINGS

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?

Penalties should be high enough to act as a deterrent to poor health and safety practices. However, the NSW experience is that the maximum penalty is never applied by the courts. While the size of penalties applied may act as a deterrent for small to medium businesses (if they are aware that penalties have been applied), it is not known whether the size of penalties applied act as a deterrent for large businesses to preventing 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?

As mentioned in question five, Section 4 defines health as "physical and psychological health". It is difficult to prosecute for psychological harm under s31-32, as those sections require prosecution to establish that a 'failure exposes an individual to a risk of death or serious injury or illness'.

The Resources Regulator has had issues regarding the application of section 31 to officers. Although section 30 says that in this division health and safety duty means a duty imposed under Division 2, 3 or 4 of this Part, and this would therefore capture officers, workers and others in the workplace as well as PCBU. This does not align with the wording in section 31, which is not consistent with an officer breaching that provision.

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

Any item that facilitates consistency of implementation of the model WHS laws across the country should be considered as part of this review.

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?

SafeWork commenced negotiating enforceable undertakings (EUs) early in the journey of the model WHS laws. Much experience has been gained in that time, with 32 EUs accepted since the commencement of the model WHS laws. There are many positives to an EU in lieu of a prosecution. However, there are refinements that should be considered across a number of areas to develop consistency between regulators, such as on the factors surrounding acceptance of an EU and the types of activities which might be considered suitable for an EU, among other. For example:

- Costs provisions associated with the investigation of matters and negotiation and verification of EUs. Some WHS regulators seek to recoup costs with respect to EUs, whilst others do not. There is inconsistency between the states on how these types of matters are managed. However, there is no specific provision in the statute on this issue.

- Acceptance of EUs for category 2 offences where there has been a fatality – regulators are taking different approaches to this aspect of EUs.
- EUs may be accepted for all alleged contraventions of the Act excluding category 1 offences. The SafeWork NSW EU Guidelines state that SafeWork will consider interest in an EU after charges have been laid and proceedings have been commenced against the person in respect of an alleged contravention.
- Companies that liquidate or sell to another company while undertaking an accepted EU. Should there be a conversation around the PCBU paying a bond or other type of surety to protect against companies selling the part of their company that holds the EU or liquidating before completing the terms of the EU.

This situation occurred recently in NSW and the EU was closed without completion of the agreed terms as there was no avenue for recourse available. Legal proceedings for failing to comply with an EU term were unable to be commenced as the company no longer existed.

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

The availability of insurance products to cover the cost of WHS penalties significantly undermines the principles of the model WHS laws and would result in corporations and/or individuals suffering no financial penalty as any penalty imposed would be covered by the insurance company. It may also encourage unsafe behaviour and increase the occurrence of incidents. Companies and officers should not be able to indemnify themselves against incurring a penalty, it may promote a lack of due diligence on the part of officer's due to the absence of any real financial penalty and limit the ability of the court's sentencing powers by removing any deterrence factors.