



Customer
Service

Better Regulation Statement – Work Health and Safety Reforms

September 2019



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1. Executive Summary

A Better Regulation Statement (BRS) is required for significant new and amending regulatory proposals. The BRS must show that the regulatory proposal has been developed according to the Better Regulation principles set out in the NSW Government Guide to Better Regulation, and that the significant regulatory proposal is justified.

The Work Health and Safety (WHS) Reforms propose 12 amendments to the *Work Health and Safety Act 2011* (the Act) based on recommendations of the 2018 Review of the Model Work Health and Safety Laws (the 2018 Review), ahead of implementation of the recommendations in the national model Work Health and Safety Act.

Four of the 12 proposed amendments have been identified as significant regulatory proposals, and their impact is assessed in this BRS. Those proposals are:

- amending the Category 1 offence – which makes it an offence for a person owing a health and safety duty recklessly to engage in conduct which exposes an individual to whom that duty is owed to a risk of death or serious injury or illness – to include an alternative fault element of gross negligence;
- making it an offence to provide, enter into, or benefit from insurance or indemnity arrangements for work health and safety (WHS) penalties;
- providing that after an inspector has entered a workplace, they or another inspector can exercise the investigative powers in section 171 of the Act – being the powers to require a person to tell an inspector who has custody of documents, to require production of documents, and to require a person to attend to answer questions – for up to 30 days without having to re-enter the workplace; and
- clarifying that health and safety representatives (HSRs) are entitled to choose their course of training and that persons conducting a business or undertaking (PCBUs) and HSRs will need to consult as to the reasonable costs associated with training.

The impacts of the remaining eight proposals are not considered to be so significant as to require consideration in a BRS, although in putting forward those proposals, the Department of Customer Service has been mindful of the Better Regulation principles. Seven of those proposals have previously been assessed by Safe Work Australia in the Consultation Regulation Impact Statement on the 2018 Review as having minimal or no impact.

The BRS concludes that expediting the four proposals set out above in NSW is justified. The objectives of the proposals are to reduce work-related deaths and injuries, and minimise risks to health and safety in NSW workplaces. There is a clear need for government action to achieve these objectives, and the proposed measures will be effective and proportionate in meeting them. The proposals have been informed by extensive stakeholder consultation at a national level over many years.

2. Introduction

2.1 Background to the WHS Reforms

The Act commenced on 1 January 2012. It adopts the national model Work Health and Safety Act (the model Act). The model Act was developed through the National Review into Model Occupational Health and Safety Laws in 2008 (the 2008 Review) which undertook an extensive national consultation process, including analysis of existing WHS legislation in Australian jurisdictions, initial consultations with a wide range of stakeholders to inform the development of an issues paper, and consideration of 243 submissions received in response to the release of the issues paper.

NSW committed to implement the national model Act under the Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA) in 2008. The national model has since been adopted in all Australian jurisdictions other than Victoria and Western Australia.

In 2017, a review of the model WHS laws began. It was led by an independent reviewer, Ms Marie Boland, on behalf of Safe Work Australia. Ms Boland's Final Report was released in February 2019. Although the 2018 Review concluded that on the whole the model laws were operating well across jurisdictions, it identified a number of issues in the Act, particularly with respect to the prosecution and investigation of workplace injuries and deaths. Ms Boland's report contained 34 recommendations for improvements to the model WHS laws framework.

In June 2019, Safe Work Australia released a Consultation Regulation Impact Statement on the recommendations of the 2018 Review (Consultation RIS). The Consultation RIS was prepared in accordance with the Council of Australian Government Guide to Best Practice Regulation. It identified 12 of the 34 recommendations as involving an impact anticipated to be more than minor, complex implementation, a prominent issue requiring a policy change, or an alternative option which required further consideration or consultation. The Consultation RIS focused on those 12 recommendations. The remaining recommendations were assessed as having minor or no impact, or as requiring further review in order to assess their impact, and were not considered in detail in the Consultation RIS.

The national review process is not yet complete. A Decision Regulation Impact Statement on the recommendations is expected to be provided to WHS ministers for their consideration in late November 2019. Any subsequent amendments to the model WHS Act are not expected to be made before mid-2020.

2.2 The WHS Reforms

The WHS Reforms package which is the subject of this BRS proposes expedited implementation in NSW of 12 proposals based on recommendations of the 2018 Review. Four of the 12 proposals are based on recommendations which were examined in detail in the Consultation RIS. They are:

- amending the Category 1 offence to include an alternative fault element of gross negligence;
- making it an offence to insure against liability for WHS fines;
- expanding inspectors' powers; and
- clarifying that HSRs are entitled to choose their course of training.

These four proposals are the subject of analysis in this BRS.

The remaining eight proposals are not regarded as having an impact which is more than minor, an analysis which is supported by the approach taken at a national level in the Consultation RIS. They include proposals to clarify the Act. Those proposals are:

- noting in the Act that work-related deaths can be prosecuted as manslaughter under the *Crimes Act 1900* (NSW);
- increasing the maximum penalties for offences in the Act to reflect increases in the Consumer Price Index (CPI) since 2011;
- extending the time within which a person can request that a WHS regulator commence a prosecution in relation to a workplace incident involving a risk of death or serious injury or illness from 12 to 18 months to ensure an effective review process;
- requiring regulators to provide updates on the progress of an investigation to a person who has made a request that the regulator bring a prosecution every three months from receiving the request until a decision is made as to whether a prosecution will be brought;
- clarifying that information can be shared between WHS regulators, including personal or health information, where it is relevant to a workplace incident under investigation in another State or Territory;
- amending the process for the issuing and service of notices under sections 155 and 171 of the Act to make these processes consistent with the processes for issuing and serving notices under section 209 of the Act;
- clarifying that a person can be both a worker of a PCBU and a PCBU themselves; and
- clarifying that Courts have the power to make a declaration that a person has engaged in discriminatory or coercive conduct within the meaning of Part 6 of the Act.

Although these proposals are not the subject of further impact analysis in this BRS, they have been developed with regard to the Better Regulation principles and are expected to contribute to the overall objectives of the WHS Reforms package of reducing work-related deaths and injuries and minimising risks to health and safety in NSW workplaces.

2.3 The Better Regulation principles

In assessing the impact of the four proposals identified as having significant impacts, the Department has been particularly mindful of the following Better Regulation principles:

- *Principle 1:* The need for government action should be established. Government action should only occur where it is in the public interest – that is, where the benefits outweigh the costs.
- *Principle 2:* The objective of government action should be clear.
- *Principle 3:* The impact of government action should be properly understood, by considering the costs and benefits (using all available data) of a range of options.
- *Principle 4:* Government action should be effective and proportional.
- *Principle 5:* Consultation with business and the community should inform regulatory development.

The following analysis demonstrates the application of these principles to the WHS Reforms.

3. Need for government action

The key objective of government regulation of WHS is to protect workers and others from harm to their health, safety and welfare by eliminating or minimising risks arising from work. In 2018, there were 47 workplace fatalities in NSW. In 2017, there were 62. The impact of these deaths on families, workplaces, and communities is devastating, as has been shown by the recent Senate Economic and Employment References Committee report *They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia* (the Senate report).

In addition to workplace fatalities, workplace injuries remain a serious issue in NSW. For 2016/17, there were 32,998 serious injury or illness claims accepted in NSW – that is, claims where the worker took one week or more off work due to injury or disease. The economic cost of work-related injury and illness in NSW in 2012/13 was estimated at \$17.3 billion or 3.7% of Gross State Product.

The NSW Government has already identified workplace fatalities and injuries as an issue it needs to address. It set out its vision for WHS in NSW in the *Work Health and Safety Roadmap for NSW 2022* (the Roadmap). The Roadmap's focus is on ensuring that workers have healthy, safe and productive working lives. By 2022, the Government is aiming for a 30% decline in worker fatalities due to injury, a 50% decline in the incidence rate of claims for serious injuries and illness, and a 50% decline in serious musculoskeletal injuries and illnesses.

Strong WHS regulation is vital to meeting those objectives. It provides the framework within which NSW workplaces can manage health and safety effectively. But within the last year, two national reviews which undertook extensive consultation and close analysis of the model WHS framework identified critical issues in that framework that can only be resolved through legislative reform.

The first of these reviews is the Senate report which was released in October 2018 following extensive consultation with affected families, regulators, governments, industry, unions, and academics. It examined the framework surrounding the prevention, investigation and prosecution of workplace deaths, and found that it fell short in a number of important respects. The Senate report made 34 recommendations to Safe Work Australia and Commonwealth, State and Territory Governments for improvements to that framework.

In February 2019, the Final Report of the 2018 Review was released. It echoed a number of the findings of the Senate report, and also identified other shortcomings in the model legislation with the potential to affect workers' safety.

The issues identified in the Senate report and the 2018 Review are currently affecting workplaces in NSW. Ongoing work-related fatalities and injuries in NSW demonstrate a need for government action to reduce the incidence of work-related deaths and injuries or illnesses. The Senate report and 2018 Review have highlighted the issues on which government action is now needed.

These issues include:

- challenges in prosecuting work-related deaths;

- insurance arrangements undermining the deterrent effect of the WHS laws;
- the length of investigations of workplace accidents; and
- disputes over HSR training courses.

3.1 Prosecuting work-related deaths

In 2017, 190 Australian workers were killed at work. Preliminary figures for 2018 suggest that 149 workers were killed at work that year, and in 2019, Safe Work Australia estimates that there have been 111 Australian workers killed at work as at 12 September.

It was a cause of concern in both the Senate Report and the 2018 Review that despite these deaths, the Category 1 offence in the model WHS Act – which carries the highest penalty – has been little used. The Category 1 offence is an offence of recklessly engaging in conduct exposing an individual to a risk of death or serious injury or illness. It carries a maximum penalty for an individual of \$300,000 and/or five years imprisonment, and for a corporation, \$3 million. The Category 1 offence was intended to be central to the Act's deterrent power.

There has been a single prosecution for the Category 1 offence in NSW since the Act was introduced in 2012. It was resolved through a guilty plea, and the offending company was fined \$900,000.

The 2018 Review identified the reason for the lack of Category 1 prosecutions as the difficulty of proving the offence's fault element, recklessness. An individual acts recklessly when they are consciously aware of the risk of death or serious injury or illness created by their behaviour, but choose to disregard it. This requires the prosecution to prove that the defendant had a particular state of mind.

The difficulty of prosecuting the Category 1 offence has two important consequences for the Act and the NSW Government's goal of reducing work-related deaths.

First, if the most serious offence under the Act – and the only one carrying a sentence of imprisonment – cannot be prosecuted, the deterrent power of the Act is lessened.

The Act relies on a graduated approach to enforcement. Under the National Compliance and Enforcement Policy, prosecution is reserved for the most serious breaches of WHS duties. But the availability of serious sanctions for breaches of WHS duties is crucial to the effectiveness of other compliance and enforcement mechanisms and to encouraging a climate of compliance. Prosecution for a Category 1 offence needs to constitute a real threat to ensure that WHS duty-holders take their responsibility to ensure workers' safety as seriously as the community expects they will.

Secondly, the difficulty of prosecuting Category 1 offences means that those responsible for work-related deaths are not being held to account to the full extent that they should be. The community expects that those who breach WHS duties and expose workers to a risk of death or serious injury will face substantial penalties. The penalties available for a Category 1 offence are substantially higher than those available for the lesser Category 2 offence.

The Category 1 offence needs to be easier for regulators to prosecute in order to strengthen the Act's deterrent power and to hold those responsible for serious breaches of WHS duties to account. This will focus attention in workplaces on ensuring compliance with WHS duties, including minimising risks to workers' safety.

Prosecuting work-related deaths: objective of government action

- Strengthen the deterrent power of the Act and hold those responsible for work-related deaths and serious breaches of WHS duties to account by making the Category 1 offence easier to prosecute.

3.2 Insurance for WHS penalties

Both the 2018 Review and the Senate Report were concerned by evidence of the availability of insurance policies which protect companies, their directors, principals, partners, and employees from liability for penalties for WHS offences. Both recommended prohibiting insurance for WHS penalties.

In both reports, these insurance policies and other indemnity arrangements were regarded as having the potential to seriously undermine the deterrent power of the offences in the model WHS Act. A strong incentive for compliance with WHS duties is removed if those who breach them can avoid the financial consequences of their actions.

The legal status of insurance and indemnity arrangements for WHS penalties is unclear. Section 272 of the Act already provides that any term of any agreement or contract that purports to exclude, limit or modify the operation of the Act is void. It is possible that insurance for WHS penalties would fall within that section.

However, this has not been tested, and is unlikely to be. Neither party to an insurance contract has any interest in exposing the practice to the scrutiny of a court during a WHS prosecution.

For similar reasons, evidence as to how common insurance or indemnity arrangements for WHS fines are is not readily obtainable. However, WHS regulators reported instances to the 2018 Review of WHS offenders having their fines paid through an insurance policy.

Regardless of how common such arrangements are, allowing insurance for a criminal fine where, for example, a person's gross negligence has led to the death of their employee is contrary to public policy.

Holding offenders, rather than their insurers, liable for WHS penalties is necessary for specific and general deterrence. WHS penalties also serve other purposes of criminal punishment, including retribution and rehabilitation.

There is therefore a need for government action to prevent insurance and indemnity arrangements providing coverage for WHS penalties. This will ensure both that WHS penalties serve the usual purposes of criminal sanction, and that the deterrent power of WHS offences is not undermined.

Objective of government action:

- Ensure that the deterrent effect of offences in the Act and the other purposes of sentencing are not undermined by the availability of insurance or indemnities for WHS penalties.

3.3 Issues in investigations

Inspectors appointed by the WHS Regulators (SafeWork NSW and the NSW Resources Regulator) are central to regulators' compliance and enforcement activities. Their powers are set out in Parts 8, 9 and 10 of the Act.

An inspector appointed by a regulator has the power to enter a workplace at any time. Section 171 of the Act sets out an inspector's powers upon entry to the workplace. They may:

- require a person to tell the inspector who has custody of, or access to, a document;
- require a person who has custody of, or access to, a document to produce that document;
- or
- require a person at the workplace to answer any questions put by the inspector.

In their submissions to the 2018 Review, regulators in other jurisdictions highlighted the impracticality of requiring an inspector to be physically present in a workplace in order to exercise these powers. In the course of investigations, a further need for documents or answers to questions will often arise after the inspector has left a workplace. The 2018 Review found that requiring an inspector to re-enter to request the documents or seek answers could impair the efficiency and effectiveness of inspectors' investigations, particularly in rural and remote areas.

Investigations serve a number of purposes. They enable regulators to identify breaches of WHS duties and hold duty-holders responsible for those breaches; they enable regulators to identify the risks that give rise to fatalities and illnesses or injuries in workplaces; and their results inform educational and other regulatory activities.

The Senate inquiry heard evidence that protracted investigations add considerably to the trauma experienced by the families, friends, and worker colleagues of victims of workplace accidents.

For these reasons, investigations of workplace incidents need to be as effective and efficient as possible. The obstacle created by the current wording of section 171 is affecting investigations in NSW now, particularly in rural and regional areas. Government action to streamline investigations is therefore needed now.

Objective of government action:

- Ensure that investigations of workplace incidents in NSW are not delayed by impractical limits on inspectors' investigative powers.

3.4 HSR training

HSRs are elected by their co-workers to represent them on health and safety matters in their workplace. They play an important role in gathering information about health and safety issues in their work group, and in resolving those issues in consultation with PCBUs, managers and supervisors. Their functions include the investigation of WHS complaints and the investigation of risks to the health and safety of the workers in their work group. In carrying out their functions, HSRs are authorised to inspect the workplace or a part of a workplace where a worker in their group works, to accompany inspectors during an inspection, to attend interviews on WHS matters between a worker in their group and an inspector or the PCBU, to request the establishment of a health and safety committee, and seek assistance from any person (see generally, sections 68 and 69).

The Act gives HSRs the authority to direct a worker in their group to cease work if they have a reasonable concern that to carry out the work would expose the worker to a serious WHS risk, emanating from an immediate or imminent exposure to a hazard (section 85). When they believe that a person is contravening a provision of the Act, or has contravened the Act in circumstances that make it likely that the contravention will continue or be repeated, an HSR has the power to issue a provisional improvement notice (PIN) (section 90).

To carry out their functions and exercise their powers, an HSR requires training. The key objective of HSR training is to ensure that an HSR has the knowledge and confidence to raise WHS issues with their managers and employers in the right way, when they need to.

Section 72 of the Act makes provision for the training of HSRs. A PCBU must, if requested by an HSR, allow the HSR to attend an approved course of WHS training. The PCBU is obliged to allow the HSR to attend the course as soon as is practicable within 3 months of receiving a request, and to pay the course fees and any other reasonable costs associated with attendance at the training.

The Act provides that the training course is to be chosen by the HSR, in consultation with the PCBU (section 72(1)(c)). If agreement cannot be reached between the PCBU and the HSR within three months, either party may ask the regulator to appoint an inspector to decide the matter.

The 2018 Review found that section 72(1)(c) has the potential to lead to stalemate in the workplace when the HSR and PCBU cannot agree on the choice of training course. The Review noted that disagreements over HSR training can cause unnecessary delays which affect an HSR's ability to fulfil their role and exercise their powers under the model Act. It therefore recommended amending the Act to remove the requirement that an HSR consult with the PCBU about their choice of training course.

Problems with the operation of section 72(1)(c) are affecting workplaces in NSW. *Sydney Trains v SafeWork NSW* [2017] NSWIRComm 1009 (*Sydney Trains*) was a long-running dispute between Sydney Trains and a number of its HSRs, who wished to attend a course of training of their choice. The Industrial Relations Commission ordered that the HSRs be allowed to attend the training of their choice, but noted that section 72(1)(c) was extremely unclear.

SafeWork NSW inspectors are called in to resolve disputes between PCBUs and HSRs in NSW as to the choice of training course. There are currently 145 approved training providers in NSW, and in 2018/19 525 HSR training courses were run here.

The lack of clarity in the legislation and its potential to delay HSR training needs to be addressed for two reasons. First, as individuals on the ground in the workplace with the training and authority to identify and address WHS issues, HSRs are an important part of the regulatory framework which protects workers from exposure to risk. Delays to HSR training impair an HSR's ability to fulfil their role. Secondly, ensuring that HSRs understand their role and the circumstances in which they can use their authority to issue PINs or cease work orders minimises disruption to business and the number of disputes which require the intervention of an inspector.

These issues are currently affecting workers' safety and business efficiency in NSW and can only be addressed by amending the WHS Act.

Objective of government action:

- Avoid disputes between PCBUs and HSRs over HSRs' choice of training providers.
- Ensure that HSRs receive their training promptly and are able to carry out their role effectively.
- Ensure that HSRs have the knowledge and confidence to be an independent voice on WHS issues on behalf of their work groups.

4. Consideration of options

4.1 Harmonisation

In considering options to address the objectives identified in the previous section, the Department of Customer Service has been conscious of another, overarching objective. That is, that any proposed legislative amendments expedited in NSW should conform as closely as possible to amendments that are likely to be made to the model WHS laws in due course. This minimises the risk to harmonisation of WHS laws in Australia, which continues to be strongly supported by stakeholders. In assessing the likely course of amendments to the model WHS laws, the Department has been mindful of the overall context of WHS regulation in Australia, the recommendations of the 2018 Review, the treatment of those recommendations in the Consultation RIS, and stakeholder views. It considers that the preferred options identified below strike an appropriate balance between what is needed to address WHS issues in NSW now and what is likely to be agreed nationally.

4.2 Consultation

The proposals discussed below have been the subject of extensive stakeholder consultation at a national level. The views of stakeholders on these issues are well known.

Stakeholder views on WHS offences were canvassed extensively during the 2008 Review, which underpins the current model laws framework. Stakeholder views on these issues do not appear to have changed over time. For example, unions continue to support industrial manslaughter laws, while a number of industry groups are opposed to the introduction of an outcome-based offence.

Consultation on the 2018 Review itself was extensive. It began with the publication of a Discussion Paper which called for written submissions. 136 written submissions were received, and 127 comments were posted in a series of online discussion forums conducted by Ms Boland. Unless the contributor specifically requested otherwise, these submissions are publicly available on the Safe Work Australia website.

Ms Boland also held in-person consultations in every capital city and in regional centres (including Tamworth in NSW), where she met with safety regulators, businesses, workers, unions, industry organisations, HSRs, health and safety and legal practitioners, academics, and community organisations. 387 people attended 81 face-to-face consultations.

Consultation on the Senate inquiry into industrial deaths was also thorough. The Senate Economic and Employment References Committee received 69 submissions. The submissions covered a broad range of perspectives on the issues, and included input from affected families, industry associations, PCBUs, academics, unions, State and Territory Governments and the Commonwealth. The inquiry held eight public hearings around Australia, including one in Sydney.

In developing the options below, the Department has taken into account the contributions of stakeholders to the 2018 Review and the Senate Report, and to the Statutory Review of the Work Health and Safety Act 2011 which was conducted in NSW in 2017. In identifying a preferred option,

the Department has been mindful of the views which continue to be expressed by stakeholders in a range of forums.

The views of stakeholders are incorporated into the discussion below.

4.3 Prosecuting work-related deaths

4.3.1 Status quo

This option would leave the Category 1 offence unamended, and prosecutors would continue to be required to prove recklessness in order to prosecute the offence.

Prosecutions following work-related deaths may then be more likely to be brought as Category 2 prosecutions. The Category 2 offence does not require proof of recklessness. But it does not carry any sentence of imprisonment, and the maximum fine which may be imposed for a Category 2 offence is half the fine which may be imposed for a Category 1 offence.

Work-related deaths can also be prosecuted as manslaughter under the *Crimes Act 1900* (NSW). However, challenges can arise in prosecuting companies for manslaughter, due to difficulties in attributing the conduct of officers and employees to the company.

This will not address the deterrence gap which is created by the difficulty of prosecuting the Category 1 offence. Nor will it ensure that those responsible for work-related deaths are held to account.

The status quo is supported by some industry and employer groups. It is opposed by unions and a number of families affected by a workplace fatality.

NSW could await the outcome of the national review process before amending its Act. However, any reforms at the national level are not anticipated to be agreed until 2020, and would take longer to be enacted in NSW. In the meantime, work-related deaths remain an ongoing issue in NSW.

4.3.2 Industrial manslaughter

The 2018 Review and the Senate Report both recommended that the model Act be amended to include an industrial manslaughter offence. Industrial manslaughter has been an offence in the ACT's criminal legislation since 2004, and was introduced to the *Work Health and Safety Act 2011* (Qld) in 2017. The Northern Territory has introduced a Bill to amend its *Work Health and Safety (National Uniform Legislation) Act 2011* to provide for an industrial manslaughter offence. The offences in the ACT and Queensland differ substantially.

To date, there have been no prosecutions for industrial manslaughter in the ACT or Queensland.

As noted above, work-related deaths can already be prosecuted as manslaughter under the Crimes Act which carries a maximum penalty of 25 years' imprisonment. Work-related deaths have previously been prosecuted as manslaughter in NSW. Including industrial manslaughter in the WHS Act may cut across or duplicate the manslaughter offence in the Crimes Act.

That a workplace death can be prosecuted as manslaughter in NSW already is not well understood in the community. The WHS Reforms include a proposal to add a note to the Act to make this clear.

The main difference between an industrial manslaughter offence and existing offences in the Act is that whereas the Act currently penalises the creation of a risk of death or serious injury or illness, whether or not the risk eventuates, industrial manslaughter requires a death.

Penalising the creation of risk is consistent with the risk-based approach of the Act as a whole. The risk-based approach focuses on the culpability of the offender, rather than the physical consequences of their breach. The creation of a risk of death to a worker is regarded as meriting the strongest possible sanction, whether or not the worker dies as a result of exposure to the risk. This focus on risk is crucial to the preventative ethos of the Act. Industrial manslaughter is not consistent with the risk-based approach of the Act.

The Consultation RIS anticipated that any industrial manslaughter offence would involve a fault element of gross negligence. This may create an anomaly in the Act in which a higher penalty is imposed for an offence involving gross negligence than for an offence involving recklessness (Category 1), which is usually regarded as the higher level of culpability.

Stakeholders have diverse views on the introduction of an industrial manslaughter offence. In general, it is supported by unions and opposed by industry. Some family members who have lost relatives in workplace fatalities support the introduction of industrial manslaughter; others would like to see more prosecutions of work-related deaths and higher penalties imposed on those responsible achieved through some means, but not necessarily through an industrial manslaughter offence.

4.3.3 Enhancing Category 1 offence

The 2018 Review recommended that the existing Category 1 offence be amended to include a fault element of gross negligence in addition to recklessness. This was considered in addition to and as an alternative to introducing an industrial manslaughter offence in the Consultation RIS.

An individual is grossly negligent when their behaviour falls so far short of the standard of care that is expected of a reasonable person and involves such a high risk of death or serious injury that it deserves criminal punishment. The prosecution may be able to prove the offence by comparing the conduct of the defendant with the conduct expected of a reasonable person. It does not require the prosecution to prove matters relating to the subjective state of mind of the defendant.

For this reason, it is anticipated that a Category 1 offence including gross negligence as a fault element would be easier for regulators to prosecute than the existing Category 1 offence.

This enhancement of the Category 1 offence is consistent with the risk-based framework of the Act.

It would also have the benefit of section 244 of the Act, which covers imputing conduct to bodies corporate. It provides that any conduct engaged in on behalf of a corporation by an employee, agent or officer of the corporation acting within the actual or apparent scope of their employment,

or within their actual or apparent authority, is conduct also engaged in by the corporation. This may make it easier to bring a Category 1 prosecution against a company than a manslaughter prosecution under the existing *Crimes Act*.

The 2008 Review originally recommended that the Category 1 offence include both recklessness and gross negligence, as it regarded breaches of duties involving those fault elements and a serious risk of harm as the most serious breaches. This recommendation was not implemented in the model Act.

4.3.4 Preferred option

The Department has identified enhancing the Category 1 offence to include gross negligence as a fault element (as an alternative to recklessness) as the preferred option.

This will meet the two objectives of strengthening the Act's deterrent power and enabling regulators to hold those responsible for work-related deaths to account without undermining the risk-based framework of the Act or duplicating existing criminal offences.

In identifying this as the preferred option, the Department has been mindful of risks to harmonisation.

However, harmonisation in this area has already been undermined by the unilateral reforms introduced by Queensland and announced by the Northern Territory, as well as the existence of the ACT industrial manslaughter offence, which pre-dates the model Act. If industrial manslaughter is adopted in the model Act, it is difficult to say exactly what form it would take, given the different models already in operation in Australia.

The amendment of Category 1 to include gross negligence as a fault element is a straightforward amendment, whose form, if adopted in the model Act, is relatively easy to anticipate.

The Department has also been mindful of stakeholder views on this issue. Although it notes that unions and families in some instances strongly support industrial manslaughter, it recommends enhancing the Category 1 offence because the key need in NSW is for an offence carrying the highest penalty which regulators can prosecute. It is concerned by the absence of any industrial manslaughter prosecutions in jurisdictions which have enacted that offence.

The Department notes the opposition of some industry stakeholders to any amendment of WHS offences, but it considers that the amendment is justified by the need to strongly deter non-compliance with WHS duties and prevent work-related deaths in NSW. Only PCBUs who are grossly negligent in observing their WHS duties will become liable for the offence. The amendment will not impose additional obligations on PCBUs. It is intended to give PCBUs and other duty-holders a stronger incentive to comply with the duties they already owe to workers and the public under Part 2 of the Act.

4.4 Insurance for WHS penalties

4.4.1 Status quo

The WHS Act does not at present expressly prohibit insurance or indemnity arrangements to cover WHS monetary penalties.

It is possible that if an insurance or indemnity arrangement for payment of a WHS fine were subjected to the scrutiny of the courts, it would be found to be void due to section 272 of the Act (the 'no contracting out' provision). However, it is difficult to envisage circumstances in which either party to an insurance or an indemnity arrangement would be likely to bring it to the attention of a court.

In the meantime, these arrangements continue to operate. This may leave some businesses paying for insurance products which have no value.

The status quo will not address the need to ensure that insurance and indemnity arrangements do not undermine the deterrent effect of WHS offences or detract from the other purposes of sentencing.

4.4.2 Providing that insurance contracts for WHS penalties are void

This may be the effect of the existing section 272 of the Act. However, according to WHS regulators, section 272 has not prevented WHS offenders from taking advantage of insurance or indemnity arrangements to cover monetary WHS penalties. Any provision providing that insurance contracts for WHS penalties are void is likely to face the same enforcement challenges as the status quo, since neither party to the contract has an interest in bringing it to the attention of the regulator or a court.

4.4.3 Making it an offence to provide, enter into or take the benefit of insurance or an indemnity for a WHS penalty

Both the Senate Report and the 2018 Review recommended prohibiting insurance for WHS penalties. The Consultation RIS sought stakeholder views on amending the model Act to make it an offence to:

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

Creating these offences is likely to put an end to the availability of insurance and indemnities for WHS penalties, and address the objective of ensuring that their availability does not undermine the deterrent power of the Act. This would ensure that WHS duty-holders have a strong financial incentive to take their WHS duties seriously, and help create a culture of compliance with WHS regulations in NSW workplaces.

The 2018 Review found that there was strong stakeholder support for prohibiting insurance and indemnities for WHS penalties. This was also the view of the Senate Report.

Some industry stakeholders were opposed to prohibiting insurance on the basis that it might create difficulties for PCBU's in attracting and retaining directors and officers. However, given the dubious legal status of such insurance at present, the Department is of the view that any impact on the recruitment of officers is likely to be minimal.

Introducing the new offence would have a resource impact on NSW WHS Regulators. They will need to give consideration to how they will investigate and prosecute the new offences, which may require them to inquire into matters which they do not currently investigate.

Consideration has been given to how existing insurance and indemnity arrangements would be affected if this option were pursued. It is not proposed that the law apply retrospectively to entry into existing insurance or indemnity arrangements. It is expected that the law would apply to the roll-over or renewal of existing arrangements. The law would apply to any person who sought to take the benefit of insurance or an indemnity in respect of a WHS penalty imposed for an offence which occurred after the commencement of the provision.

The Department notes that it is not proposed to prohibit insurance for the costs of legal proceedings as part of this option.

4.4.4 Preferred option

The Department has identified making it an offence to enter into, provide, or take the benefit of an insurance or indemnity arrangement for liability for a monetary WHS penalty as the preferred option.

This option is the only one which will address the Government's objectives of ensuring that the availability of insurance and indemnity arrangements for WHS penalties does not undermine the deterrent power of the Act or the general purposes of sentencing. The option has the additional benefit of clarifying an existing legal grey area.

Given the strong support for this proposal at a national level, and the detail of the proposal set out in the Consultation RIS, the Department is of the view that the risks of departing from the harmonised framework in expediting this reform are minimal, and are in any event justified by the need to strengthen the deterrent power of the Act as soon as possible.

4.5 Investigative powers

4.5.1 Status quo

Under this option, inspectors would retain their powers upon entry in the existing section 171, but be required to re-enter in order to exercise them.

In some circumstances inspectors may be able to rely on the regulator's power to obtain information under section 155 of the Act. However, that section requires the regulator to form a reasonable belief that a person is capable of providing information, documents or evidence in

relation to a contravention of the Act, or that will assist the regulator to monitor or enforce compliance. The regulator may not hold sufficient material to form that view, particularly at an early stage of an investigation.

These limits on investigators' powers will continue to have the potential to limit the effectiveness and efficiency of investigations. The full extent of alleged contraventions may not be clear to inspectors when they first enter the workplace, and they will be required to re-enter to obtain further information. This may draw out investigations, particularly of incidents in remote and rural areas, when the inspector may not have the capacity to travel to the workplace immediately. Protracted investigations can be distressing for those affected by a workplace fatality or injury. They can also delay prosecutions, and prevent regulators from using the lessons learned from the investigation to educate other PCBUs and workers as soon as they might.

The existing re-entry requirements impose a burden on the regulator, but may also affect the business operations of the PCBU. It can be disruptive to a PCBU for an inspector to enter and re-enter the workplace, potentially requiring the PCBU to stop some part or all of its operations.

This option will not address the Government objective of ensuring that investigations of workplace incidents in NSW are not delayed by impractical limits on inspectors' investigative powers.

4.5.2 Amending the Act to enhance investigators' powers

In order to make investigations more efficient and effective, the 2018 Review recommended amending the Act to provide that inspectors can exercise the powers in section 171(1) in relation to a workplace for up to 30 days after they, or another inspector, have entered the workplace.

This would remove the requirement that an inspector re-enter a workplace in order to require production of documents or answers to questions. It is likely to reduce the number of times an inspector attends a workplace as part of an investigation. It may increase requests for documents or answers to questions.

This is expected to streamline investigations, particularly in regional or remote workplaces, as the inspector will be able to progress their investigation without further travel. It will also allow for different personnel to work on an investigation, which will give WHS regulators greater flexibility in responding to an incident.

It may also impose an additional burden on the PCBU by requiring them to travel to the inspector rather than the inspector to travel to them, or to provide more documents or respond to further questions. However, it may be less disruptive for the PCBU to have the opportunity to answer questions or provide documents in response to a request received without re-entry than to face multiple visits by the inspector to the workplace.

4.5.3 Preferred option

Amending the Act to allow inspectors to exercise their powers upon entry in section 171 of the Act in relation to a workplace up to 30 days after they or another inspector has entered the workplace has been identified as the preferred option.

This will remove a barrier to effective and efficient investigations of workplace incidents without imposing any undue burden on PCBUs and workers.

The Consultation RIS proposed making these amendments consistent with those already made in Queensland. This means that the intention and wording of the proposed option is relatively clear, and minimises the risk that an amendment expedited in NSW will differ from any amendment ultimately made to the model Act.

For these reasons, this option is expected to meet the government objective of ensuring that investigations of workplace incidents in NSW are not delayed by impractical limits on inspectors' investigative powers in a proportionate way.

4.6 HSR choice of training provider

4.6.1 Status quo

The Act's current provisions on HSRs' choice of training provider are unclear and, without amendment, are likely to result in further disputes. This in turn is likely to result in delays to HSR training which prevent an HSR from playing their role in the WHS framework in NSW workplaces, which may leave workers exposed to risks that a well-trained HSR would be in a position to identify and resolve.

Ongoing disputes will also result in costs to PCBUs, courts, and the regulator.

The task of resolving disputes between PCBUs and HSRs as to the choice of training provider can be burdensome for the regulator. The *Sydney Trains* case showed that the matters to be taken into account in resolving such a dispute are extensive, and may require inspectors to inquire into the particular business needs and operations of a PCBU, to examine records of training provided to previous HSRs, and in the case of publicly employed HSRs, to consider NSW Government procurement policies.

These costs to business and the regulator and the risks to those workers who are not represented by a well-trained HSR may be disproportionate. All HSR training providers and the content of the HSR training course are already approved by SafeWork NSW, so that any approved training course should meet the appropriate standards.

4.6.2 Amending to clarify that the HSR may choose their course of training

The 2018 Review recommended that the Act be amended to make it clear that the HSR is entitled to choose their course of training, and that if the PCBU and HSR cannot reach agreement on time off for attendance, payment of fees or the reasonable costs of the training course chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter.

This may reduce the number of disputes between the PCBU and HSR over HSR training and ensure that HSRs receive their training within a reasonable time after requesting it. This in turn will ensure that HSRs are equipped to play their important role in addressing WHS risks for their work group.

Permitting the HSR to choose the choice of training may ensure that HSRs are trained by a course provider with whom they are comfortable, and who will equip them to be an independent voice on WHS issues in their workplace.

This option may reduce the costs to business, courts and the regulator of those disputes. It may leave the regulator to resolve the smaller number of disputes which relate to time off for attendance and the costs of training.

This option was strongly supported by union submissions to the 2018 Review.

4.6.3 Amending to permit the PCBU to choose the course of training

This would involve amending the Act to provide that rather than being chosen by the HSR in consultation with the PCBU, an HSR's training course is chosen by the PCBU.

This would largely remove the possibility of disputes between the PCBU and HSR over HSR training.

This is not an option under consideration at the national level. If NSW were to amend its Act to provide that a PCBU may choose the course of training for their HSR, there is a considerable risk that NSW will be departing from the amendments likely to be made to the model Act.

This option may also be inconsistent with the underlying purpose of HSR training, which is to ensure that the HSR is an independent voice on WHS issues in their workplace on behalf of their co-workers. An HSR may be less likely to gain the confidence they need to be an independent voice in a training course chosen by their employer, particularly if the employer conducts its own in-house training course.

4.6.4 Preferred option

Amending the Act to make it clear that the HSR is entitled to choose their course of training, and that if the PCBU and HSR cannot reach agreement on time off for attendance, payment of fees or the reasonable costs of the training course chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter has been identified as the preferred option.

This minimises the risk that amendments to the NSW Act will ultimately differ from amendments made to the model Act.

It reflects a compromise between the need for HSR training to encourage independence in HSRs and the need to take a business's resources and operations into account in allowing time off to attend training and agreeing the costs of training.

If this amendment proceeds, NSW WHS Regulators should consult widely with stakeholders in developing guidance as to the meaning of 'reasonable costs' in relation to HSR training.

5. Evaluation and review

There will be an opportunity to evaluate the expedited WHS Reforms, and in particular to consider the extent to which they differ from any amendments made to the model Act, when amendments are made to the model Act. That is not expected to be earlier than mid-2020, and may be later.

At that stage, NSW will have the opportunity to consider whether the wording of any model amendments or the policy intention (where it differs from the NSW policy) should be reflected in the Act. That will include an evaluation of how well the WHS Reforms have contributed to the overall objective of reducing workplace fatalities and injuries.

In the ordinary course of things, the Act is next due for review five years from the date of the last review in 2017. A review would therefore occur in 2022. This coincides with the end of the current Roadmap, and will provide an excellent opportunity to evaluate the effectiveness of the reforms in the light of the Roadmap's objectives.

In the meantime, NSW WHS Regulators will continue to contribute to the national review process.

Department of Customer Service

Address: McKell Building, 2-24 Rawson Place, Sydney NSW 2000

www.customerservice.nsw.gov.au