

Review of the operation of the *Work Health and Safety Act 2012*

Issues Paper

Part One: Background

Introduction

1. South Australia's *Work Health and Safety Act 2012* (WHS Act), together with its accompanying regulations and codes of practice, took effect on 1 January 2013.¹ Under s.277², its operation must be reviewed as soon as practicable after the expiry of 1 year from its commencement.
2. The review, which is being undertaken by Mr Robin Stewart-Crompton³, commenced on 1 July 2014 for completion by November 2014.
3. The review is occurring against a background of South Australia's significant improvement in its work health and safety performance in the past decade. This is illustrated by South Australia's performance when compared with that of all other Australian jurisdictions. All Australian governments are parties to the *National Occupational Health and Safety Strategy 2002-12* and its successor, the *Australian Work Health and Safety Strategy 2012-22*. Each strategy has national improvement targets. The most recent national Comparative Performance Monitoring report⁴ recorded that only South Australia achieved an important 10-year target of a 40% reduction in the incidence of workplace injury 30 June 2012⁵

About the review

4. The Review is examining the WHS Act's impact in the South Australian context to ensure the continued effectiveness of the nationally harmonised WHS laws in this State.
5. Among other things, the review will examine the operation of provisions that were amended or inserted in the Parliamentary process, including:
 - a) those that were amended to clarify certain situations;

¹ The Act and the Work Health and Safety Regulations are referred to in this paper as 'the WHS legislation'.

² In the debate on the WHS bill, the provision for the reviews of the legislation was described by the Hon. J.A. Darley, who successfully moved for their inclusion as allowing an ... *opportunity for us to assess how the legislation and codes of practice are working, whether they need improving and whether indeed they have led to the sorts of issues that have been raised by those who oppose the bill*. The then Minister, the Hon. R.P. Wortley, stated that, *(t)he review of the act will allow the examination of the impacts of the laws in a South Australian context and ensure the continued effectiveness of nationally harmonised work health and safety laws within that context. This amendment is consistent with the Council of Australian Governments' request for a national review of the legislation under the auspices of Safe Work Australia by the end of 2014. The findings of the review of the South Australian work health and safety act may be used to inform the national review*. Hansard, Legislative Council, 1 November 2012, p.2589.

³ Robin Stewart-Crompton is the director of RSC Advising Pty Ltd, which was selected to undertake the review following a public tender process. Mr Stewart-Crompton has reviewed the operation of a range of Commonwealth and State safety laws and chaired the National Review into Model OHS Laws, which reported to a national Ministerial council in 2009 as part of the process for developing the nationally consistent WHS laws.

⁴ Safe Work Australia, *Comparative Performance Monitoring Report 15th Edition*, 2013.

⁵ South Australia recorded a 44% improvement.

- b) requirements relating to the approval of national Codes of Practice; and
- c) local consultation arrangements.

These are identified later.

- 6. The review will also include a specific report on the extent to which inspectors have attended at workplaces under the right of entry provisions (s.117) and an assessment of the operation and effectiveness of the policy established by the Executive Director under that section.⁶

Review process

- 7. The review has 4 stages, with the following timelines:
 - a) Stage 1 (1 -28 July 2014): commencement of review, with initial briefing by SWSA, contact with key stakeholders and preparation of a discussion paper;
 - b) Stage 2 (29 July – 29 August 2014): release of discussion paper with request for written submissions by 29 August 2014 and ongoing consultation with interested parties;
 - c) Stage 3 (29 August – end October 2014): analysis of responses and preparation of draft report, with targeted consultation over views expressed in submissions;
 - d) Stage 4 (1-21 November 2014): preparation and presentation of final report.

What is the purpose of this discussion paper?

- 8. The review will be greatly assisted by interested persons indicating what they consider to be the key issues in the WHS Act's operation. This will help the review to focus on important issues.

How is the review affected by the current COAG review of complying with WHS laws?

- 9. At its 2 May 2014 meeting, COAG agreed that all governments would:

... investigate ways in which model work health and safety laws could be improved to reduce red tape and make it easier for businesses and workers to comply with their work health and safety responsibilities.⁷

- 10. The COAG national review, which is now under way, is being co-ordinated by Safe Work Australia and its timing overlaps with the South Australian review of the operation of the WHS Act. Details are available on the SafeWork SA web site:

http://www.safework.sa.gov.au/show_page.jsp?id=113820#.U8hh72eKDIU

- 11. Responses to the COAG national review have been requested by 8 August 2014. A report is expected to be given to the Workplace Relations Ministers' national meeting in November 2014.

⁶ See discussion of securing compliance later in this paper.

⁷ <http://www.coag.gov.au/node/519>

12. Responses to the South Australian WHS Act review may address matters that are relevant to the national review. For interested persons who have not otherwise responded to the national review, their comments will be passed on to Safe Work Australia for consideration in the national review, unless they indicate that they do not want that to occur.

The structure of the issues paper

13. The paper broadly follows the structure of the WHS Act. Issues for your consideration are raised in relation to each of the Act's substantive Parts. The issues so identified are not meant to be exhaustive. You are welcome to raise other issues that are important to you or to other persons affected by the Act. In addition, you do not have to respond to all or any of the issues so raised. Please simply address any that you consider to be significant.

Part Two: Some information about the WHS Act

About the WHS Act

14. The WHS Act is based on a model *Work Health and Safety Act*, which was developed at the national level by Safe Work Australia, in consultation with the Commonwealth and all other States and Territories. By introducing the WHS Act, South Australia joined the other jurisdictions (other than Victoria and WA) in having nationally consistent WHS laws, with some local variations.⁸ The South Australian introduction of the Act (and accompanying regulations and codes of practice) is consistent with a 2008 national, inter-governmental agreement (IGA).⁹ Similarly, South Australia is party to nationally consistent compliance and enforcement policies.¹⁰
15. The IGA sets out the purpose of national harmonisation as follows (para 1.4).

Extract from inter-governmental agreement

(T)he fundamental objective of the reform ... is to produce the optimal model for a national approach to OHS regulation and operation which will:

- a) enable the development of uniform, equitable and effective safety standards and protections for all Australian workers;*
- b) address the compliance and regulatory burdens for employers with operations in more than one jurisdiction;*
- c) create efficiencies for governments in the provision of OHS regulatory and support services; and*
- d) achieve significant and continual reductions in the incidence of death, injury and disease in the workplace.*

⁸ The WHS Acts of the Commonwealth, NSW, Queensland and both Territories commenced on 1 January 2012. Tasmania's WHS Act commenced on 1 January 2013.

⁹ *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*

¹⁰ See discussion of securing compliance later in this paper.

16. The national review will provide insights into how well those aims are being achieved, but they are also relevant in assessing how well the WHS Act is operating within South Australia.
17. The WHS Act (like the counterpart laws in the six other jurisdictions that have adopted the model WHS legislation) includes in its object a purpose of: ... *maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction* (underlining added for emphasis).¹¹ Accordingly, as will be seen later in this paper, SafeWork SA has adopted and applies a number of nationally agreed principles and practices in its implementation of the WHS legislation.

Similarities and differences between the WHS Act and the previous OHSW Act

18. Many elements of the WHS Act substantially continue equivalent provisions of the OHSW Act. Some key ones are shown below.

Figure 1: Aspects of the WHS Act that are strongly similar to previous OHSW Act

Significant approaches that were in the previous law and are in the WHS Act are as follows:

- a) duties of care for health and safety are placed on entities and persons involved in work (including government and local government);
- b) *workplace* is defined broadly;
- c) provision is made for worker representation, health and safety representatives and committees, consultation;
- d) workers are protected against discrimination on grounds related to their rights and functions under the Act;
- e) HSRs are able to issue reviewable provisional improvement notices (previously, default notices);
- f) processes are included for resolving disputes over health and safety matters;
- g) there are defined roles, powers and functions for SWSA as the regulator and for inspectors;
- h) legal proceedings may be taken for contraventions;
- i) imprisonment may be imposed on individuals who recklessly expose another person to whom a duty of care is owed to a risk of death or serious injury or illness;
- j) the SWSA Advisory Committee continues as a Council;
- k) provision is made for regulations and codes of practice (but see below for important changes).

19. There are important new concepts and provisions, including those described in the following box.

¹¹ Object, s.3(1)(h)

Figure 2: New concepts and provisions in the WHS Act

Significant new features of the WHS Act are:

- a) its broader application to primary duty holders (now *Persons conducting a business or undertaking* rather than *employers*);
- b) positive duties of care for *officers* (to a standard of *due diligence*), replacing the *responsible officer* provisions;
- c) statutory principles that apply to all duties and statutory explanations of how risks must be managed and of what is *reasonably practicable* in relation to meeting a duty to ensure health and safety;
- d) rights of entry to workplaces for WHS entry permit holders;
- e) internal review by SWSA of various decisions under the Act by inspectors or by SWSA (external review is also available);
- f) a different (lower) evidential status for codes of practice;
- g) enforceable written undertakings that may be given by a person without an admission of guilt and accepted by SWSA in respect of a breach or alleged breach of the Act in lieu of other proceedings for the breach or alleged breach;
- h) clearer classification of offences, particularly for breaches of duties;
- i) increased maximum fines;
- j) the availability of civil penalties for certain offences;
- k) a wider range of sentencing options.

Changes to the model WHS Bill

20. In passing the WHS Act, the South Australian Parliament varied the model WHS Act in some notable respects. These changes are in addition to the local provisions that were expected to be included in each jurisdiction's version of the model bill to allow for local policies and practices. The additional changes, which do not appear in the WHS Acts of other jurisdictions that have implemented the model law, are summarised below.¹²

¹² It was also decided to change the meaning of 'high risk construction work' in regulation 291 of the WHS Regulations to mean *construction work that involves a risk of a person falling more than 3 metres*. The previous definition was *more than 2 metres*. This relates to when a safe work method statement must be prepared.

Figure 3: Key amendments to the model WHS bill included in the South Australian WHS Act

Amendments to the bill made by the Legislative Council included:

- a) a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable, *to the extent to which the person has the capacity to influence and control the matter*¹³ - s.17(2) [italicized words added in the Council];
- b) volunteer officers in mixed residential/commercial strata/community titles corporations are not liable for a breach of officer duties under the WHS Act - s.34;
- c) clarification about the types of persons who may assist a Health and Safety Representative (HSR) - ss.68(3) and (6);
- d) more training days for HSRs, up from the model WHS regulations' total of 7 days in 3 years (5 in the first year, 1 in the second and 1 in the third – reg.21) to 10 days [5 in the first year, 3 in the second and 2 in the third - s.72(9)];
- e) adding certain policies and procedures relating to when a WHS entry permit holder seeks to exercise a right of entry to enquire into suspected contraventions of the WHS Act – s.117;
- f) adding an inspector's power to issue directions to a WHS entry permit holder who requires copies of documents - s.120(6);
- g) an increased maximum penalty for contravening a condition imposed on a WHS entry permit (\$20,000 rather than \$10,000) – s.123;
- h) reinstating a right to silence as protection against self-incrimination – s.172;
- i) requiring the Small Business Commissioner to be consulted before a Code of Practice is submitted to the Minister – s.274(3);
- j) requiring Ministerial approval of a Codes of Practice made under the WHS Act be subject to a recommendation by the SWSA Advisory Council – s.274(2);
- k) providing for Codes of Practice to be subject to disallowance by Parliament – s.274(8); and
- l) requiring a review of the WHS Act to be undertaken as soon as practicable after 1 January 2014, including a review of right of entry under s.117, and a second review of the Act to be undertaken as soon as practicable after 1 January 2016 – s.277.

21. In making your comments about aspects of the bill, you are invited to express your views on the operation of these provisions.

Part Three: Issues on which you may wish to comment

¹³ A similar qualification applies under s.16(3)(b) of the model WHS bill in relation to persons who concurrently hold the same duty of care (this is contained in the corresponding provision of the WHS Act).

Overall effectiveness of the WHS Act

22. The aims of the WHS Act are set out in its principal object (s.3), which appears below.

3 - Object

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

23. The Act's provisions are designed to give effect to these objects. A question arises of how well they are being achieved. Some issues that you may wish to consider appear below. You may comment on any of them, or on other broad issues of concern to you or those persons that you represent.

Issues to consider in relation to the overall effectiveness of the WHS Act

- A. Is the WHS Act operating effectively?

- B. Are there any aspects of the Act that do not satisfactorily achieve its overall goals , particularly:
- a) good work health, safety and welfare;
 - b) fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety;
 - c) securing compliance;
 - d) appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under the Act and regulations.
- C. Have there been particular situations or events where the Act has helped or impeded you in achieving good WHS outcomes?
- D. If you conduct your business or undertaking in another jurisdiction as well as South Australia, do you consider that the harmonised laws facilitate your compliance with the work, health and safety requirements in this State and in the other jurisdiction(s) and assist in achieving better outcomes?

Scope and application of the WHS Act

24. The WHS Act applies to specified classes of individuals and entities, including the Crown, and sets out their rights and obligations. Some issues relating to these persons and bodies are specifically raised later in this paper.
25. The Act is in addition to and *not in derogation from* any other legislation that applies to those individuals or entities (e.g., South Australian dangerous substances laws and transport safety laws and the Fair Work Act). In other words, those other laws operate concurrently with the WHS Act.

Issues to consider in relation to the WHS Act's application

- E. Is it clear how and when the Act applies?
- F. Do you consider that it is clear who is covered by the WHS Act and what their rights and obligations are? [Note: definitions are the subject of the next part of this paper]
- G. Have you experienced any operational difficulties through the application of the WHS Act and the concurrent application of other safety-related laws?

Are the definitions working effectively?

26. The WHS Act defines key terms in ss.4-8 and, for *reasonably practicable*, in s.18, and *due diligence* (which relates to the duty of an officer), in s.27. As mentioned, some new terms have been introduced under the harmonised laws, including in the South Australian Act. These include *Person conducting a business or undertaking* (s.5), and new definitions of *officer* (s.4), *worker* (s.7) and *workplace* (s.8). The definition of worker is broad, accommodating the changing nature of work relationships and ensuring health and safety protection is given to all types of workers.

Issues to consider in relation to the operation of the definitions

- H. Are the definitions in the WHS Act clear to you? If they are not, has that presented any problems for you?
- I. Is there sufficient guidance available to explain how the WHS Act applies to you?
- J. Are any other definitions required?

Health and safety duties

- 27. These duties are at the heart of the WHS Act and modern regulation of work related safety and health generally. The WHS Act provides in Part 2 (ss.13-29) for the range of persons with health and safety duties of care under the legislation, particularly, person conducting a business or undertaking (PCBU), officers, workers and other persons who are at a workplace. The legislation is intended to secure the observance of these duties. Particular provision is made for volunteers.¹⁴
- 28. Sections 13-17 set out principles that apply to all duties under the Act (other duties are discussed later). These make clear that duties cannot be transferred and that a person can concurrently have more than one duty under the Act, as well as that more than one person can hold the same duty and be responsible for discharging it subject to certain qualifications.
- 29. As noted earlier, s.17, dealing with the elimination or minimisation of risks as far as practicable, was amended to add sub-section 17(2):

A person must comply with subsection (1) to the extent to which the person has the capacity to influence and control the matter or would have that capacity but for an agreement or arrangement purporting to limit or remove that capacity.

This provision, which is not included in other jurisdictions' versions of the model WHS law, is yet to be considered by a Court, so it is not yet settled how it will be interpreted in the context of s.17.
- 30. Each duty placed by Part 2 on a duty holder is subject to a qualification. For a PCBU, the duty is to ensure *as far as reasonably practicable* the health and safety of certain types of workers and other persons (s.19) in specified circumstances. There are particular duties of care for various identified types of PCBUs (including designers, manufacturers, suppliers, importers of plant, substances or structures), which require ensuring the health and safety of specified persons who may be affected by the business or undertaking of that type of duty holder. The standard is again *as far as reasonably practicable* (ss.20-26).
- 31. Officers have a positive duty to exercise *due diligence* (see also the discussion of definitions above). They must be proactive and have an ongoing duty to ensure compliance with duties and obligations under the Act. A non-exhaustive list of actions necessary for due diligence is set out in s.27(5).

¹⁴ See the SafeWork SA fact sheet relating to volunteers at https://www.safework.sa.gov.au/uploaded_files/007-2011_Volunteers.pdf

32. Workers must, while at work, take *reasonable care* for their own health and safety and take reasonable care so that their acts or omissions do not harm the health and safety of other people (s.28). A similar duty is placed on other persons at a workplace (s.29).

33. Part 2 also includes the offences for non-compliance with the Part 2 health and safety duties (ss.30-34). There are 3 categories of offence and the penalties for each depend on whether the offender is an individual, an officer or a body corporate. There are limited exceptions (s.34). The following provides an outline of the offences and maximum penalties. These are the same under other versions of the model Act in other jurisdictions.

Outline of offences and maximum penalties under the WHS Act

<i>Type of breach of health and safety duty</i>	<i>Provision of WHS Act</i>	<i>Type of duty holder</i>	<i>Maximum penalty</i>
Category 1 – Reckless conduct	Section 31	a. Body corporate b. Individual who is a PCBU or an officer of a PCBU c. Other individual	a. \$3m. b. \$0.6m or 5 years imprisonment or both c. \$0.3m or 5 years imprisonment or both
Category 2 – Failure to comply with a health and safety duty that exposes an individual to a risk of death or serious injury or illness.	Section 32	a. Body corporate b. Individual who is a PCBU or an officer of a PCBU c. Other individual	a. \$1.5m. b. \$0.3m c. \$0.15m
Category 3 – Failure to comply with a health and safety duty	Section 33	a. Body corporate b. Individual who is a PCBU or an officer of a PCBU c. Other individual	a. \$0.5m b. \$0.1m c. \$0.05m

34. You are invited to comment on any matter relating to the operation of the health and safety duties that appears relevant to you. Some issues that you may consider appear below.

Issues to consider in relation to health and safety duties

- K. Is complying with the health and safety duties under the WHS Act practically different from complying with those under the previous Act? If so, in what way?
- L. Do you or persons you represent have any issues with the operation of the health and safety duties in the WHS Act? Can you give examples?
- M. Do you consider that other duty holders understand their responsibilities when they are engaged in activities that affect your work?
- N. Has s.17(2) assisted you in understanding and meeting your duty under the Act to eliminate or minimise risks to health and safety, as far as reasonably practicable?
- O. Are the provisions relating to the duties of volunteers operating effectively?
- P. Is there sufficient guidance available to explain how the WHS Act applies to you?
- Q. Are the penalties an effective deterrent to poor health and safety practices?

Incident notification

- 35. Part 3 of the Act specifies the types of serious work-related incidents that must be notified to SafeWork SA. These provisions are similar to those in the previous legislation.¹⁵ SafeWork SA now deals with notified incidents in accordance with its *Framework for a common approach to work health and safety SafeWork SA event triaging*.¹⁶
- 36. There have been some changes in the numbers of matters notified to SafeWork SA under the WHS legislation compared with the previous OHSW legislation. In the last complete financial year under the OHSW legislation, 2011-12, there were 1699 notifications. In the first complete financial year under the WHS legislation, 2013-14, there were 1263 notifications. It does not appear possible to explain the variation on one year's figures.

Issues to consider in relation to incident notification

- R. Are the incident notification provisions working effectively?
- S. If there are any difficulties, are they owing to the law or to how it is understood and administered?

Authorisations

- 37. Part 4 of the WHS Act deals with *authorisations*. These relate to licences, permits, registration or other authority (however described) required by the regulations. They relate to the authorisation of workplaces, plant or substances, work or classes of work and requirements for prescribed

¹⁵ They are complemented by regulations 699 and 699A of the WHS Regulations 2012

¹⁶ Public availability of the Framework document is under consideration.

qualifications or experience in situations considered to involve high risks. The national review is considering options to reduce the regulatory burden in some circumstances (see the national Issues Paper and Consultation Regulation Impact Statement).

38. South Australia has not yet fully implemented the national regulations in this area. Doing so may facilitate mutual recognition of the relevant authorisations.
39. A number of licences, registrations and other forms of authorisation are provided for under the OHSW Act and the *Occupational Health, Safety and Welfare Regulations 2010* (the Regulations). The WHS Act recognises a number of these authorisations for a period of time, so that, in general, holders of a licence or authorisation do not need to reapply under the WHS Act.
40. The recognition of these authorisations will be provided for in the South Australian *Work Health and Safety Regulations 2012* (SA). Once the WHS Regulations are approved at national level, it is understood that SafeWork SA will draft provisions to ensure the appropriate recognition of current authorisations. Further information will be provided by SafeWork SA once this has been completed.

Issues to consider in relation to authorisations

T. Do you expect to see benefits in South Australia participating in a nationally consistent system of authorisations? If so, what are they?
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Consultation, representation and participation

41. Part 5 of the Act¹⁷ underpins the statutory object of securing the health and safety of workers and workplaces by 'providing for fair and effective consultation, representation, participation and issue resolution in relation to work health and safety' [s.3(1)(b)].
42. This is achieved by:
 - a) requiring, so far as is reasonably practicable:
 - i. in s.46, duty holders to consult, co-operate and co-ordinate activities with all other persons who have a WHS duty in relation to the same matter¹⁸ - penalties of \$20,000 (individuals) and \$100,000 (corporations) apply for non-compliance;
 - ii. in s.47, PCBUs to consult workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety - penalties of \$20,000 (individuals) and \$100,000 (corporations) apply for non-compliance
 - b) providing for elected Health and Safety Representatives (HSRs), with certain statutory functions and powers [including that of issuing provisional improvement notices (PINs)] and for their training, which is paid for by the PCBU and for their disqualification in certain circumstances (ss.50, 60-74 and 90-96);
 - c) providing for work groups and Health and Safety Committees (HSCs);

¹⁷ See also Part 2 of the WHS regulations.

¹⁸ The principles applying to duties in ss.13-16 apply to this duty.

- d) establishing an issue¹⁹ resolution process, which may lead to the involvement of an inspector to assist in resolving the issue (ss.81,82);
- e) subject to certain safeguards and procedural requirements²⁰, a statutory right for :
 - i. a worker to cease or refuse to carry out work if the worker has a reasonable concern that the work would expose the worker to a serious risk to the worker's health or safety, 'emanating from an immediate or imminent exposure to a hazard' (s.84);
 - ii. a trained HSR to direct a worker who is in the work group represented by the HSR to cease work if the HSR has that reasonable concern (s.85) and consultation or issue resolution has not addressed the matter, unless the risk is so serious and immediate or imminent that it is not reasonable to consult before giving the direction (s.86).

43. As noted earlier, the power for HSRs to issue PINs is new under the SA legislation, although similar to the previous power to issue default notices.²¹ Up to 1 July 2014, SafeWork SA has been requested to be involved in relation to 13 PINs.²² The outcomes were that two PINs were upheld, three were withdrawn, three were cancelled, one was complied with without an inspector's decision, one matter was about a different issue and three are ongoing.

Issues to consider in relation to consultation, representation and participation

- U. Have the duties to consult, co-operate and co-ordinate activities worked effectively?
- V. How well are the provisions working in relation to work groups?
- W. Are the provisions relating to Health and Safety Committees working satisfactorily?
- X. Are the provisions relating to HSRs working satisfactorily?
- Y. Have you found the provisions relating to issue resolution effective?
- Z. Have you experienced any instances where a worker has exercised the right to cease work on grounds of a reasonable concern about exposure to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard, and, if so, did the statutory processes and safeguards work satisfactorily (this issue is relevant for PCBUs and workers);
- AA. Have you experienced any instances where an HSR has directed a worker to cease work on grounds of a reasonable concern about exposure to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard, and, if so, did the statutory processes and safeguards work satisfactorily (this issue is relevant for PCBUs, HSRs and workers);
- BB. If you have sought to involve SafeWork SA in relation to any of these matters, did you find the engagement effective?

¹⁹ Under the Act, if a matter which arises about WHS at a workplace or in relation to the conduct of a business or undertaking cannot be resolved by discussion between the parties, the matter becomes an *issue* for the purposes of the statutory resolution process.

²⁰ SWSA has no records of directions to cease work being given that required any SWSA involvement.

²¹ *Occupational Health, Safety and Welfare Act 1986*, s.35

²² See ss.100-102 of the WHS Act.

Discriminatory, coercive and misleading conduct

44. Part 6 prohibits such conduct where it relates to a person's engaging in work health and safety activities and the exercise of rights, roles and responsibilities under the legislation. Contraventions are subject to fines of up to \$0.5m in the case of corporate bodies and \$0.1m in the case of individuals. A court may also make various remedial orders, including compensation and re-employment or re-engagement. Proceedings may be for a criminal offence or a civil proceeding (injunctions are available in the latter). There is a 12 month period in which to bring an action.²³
45. The provisions operate alongside and not in place of other anti-discrimination laws, including those in the Fair Work Act, but actions cannot be brought under the WHS Act provisions if a proceeding has commenced under another law or an application or complaint under another law is under way.
46. Section 109 makes it an offence to deliberately or recklessly misrepresent a person's rights and obligations under the WHS Act or regulations or ability to initiate or be involved in a process or proceedings under the legislation or to make a complaint or inquiry to any person (e.g., an HSR) or body (e.g., SafeWork SA) who can seek compliance with the legislation.²⁴ There are so far no recorded instances of a prosecution for the offence.

Issues to consider in relation to discriminatory, coercive or misleading conduct

- CC. Do you have any experience with using the WHS Act's provisions in relation to discriminatory, coercive or misleading conduct, and, if so, was their operation effective?
- DD. In a case of conduct that was in contravention of Part 6, would you seek to rely on that provision or on other laws (such as the Fair Work Act) to deal with the contravention? If so, why?

Workplace entry by WHS entry permit holders

47. Under Part 7, a person who holds an office in or is an employee of a union and who is a WHS entry permit²⁵ holder may enter workplaces and exercise certain powers while there. Statutory requirements apply to WHS entry permit holders who are exercising or proposing to exercise a right of entry. Certain specified conduct by WHS entry permit holders or other persons at a workplace in relation to them is prohibited.²⁶
48. The body responsible for the issue, revocation and oversight of WHS entry permits is the SA Industrial Relations Commission. As at 16 July 2014, there were 119 WHS entry permit holders in South Australia.²⁷

²³ Under the Fair Work Act, there is a 6 year limitation period for making applications to a Federal court alleging a breach of the general protections provisions in respect of adverse action, other than a dismissal, for which there is a 21 day period in which to make an application.

²⁴ The provision does not apply if the person to whom the misrepresentation was made would not be expected to rely on it.

²⁵ *WHS entry permit* is defined in s.4 to mean a permit issued under Part 7 or the equivalent part of a corresponding WHS law, as defined in s.4.

²⁶ A useful guide is provided by the SafeWork SA Right of Entry Fact Sheet available at: https://www.safework.sa.gov.au/uploaded_files/WHS_014-Entry_Permit_Holders_Guide.pdf

²⁷ See list on the Industrial Court web site at: <http://www.industrialcourt.sa.gov.au/index.cfm?objectID=835A5E52-9EC3-2015-9C56156E1A17DA9A>

49. There are statutory procedures for dealing with disputes that arises about the exercise or purported exercise of a right of entry. Penalties under this Part are civil only.
50. A permit holder may enter a workplace to:
- a) enquire into a suspected contravention of the Act that relates to or affects a relevant worker;
 - b) inspect employee records or other documents that are directly relevant to the suspected contravention;
 - c) consult and advise *relevant workers*²⁸ on WHS matters.
51. The WHS Act places limits on when entry may be sought and provides for the notice required, where a permit holder may go on exercising the right of entry and how the permit holder must behave. There are also obligations placed on other persons in relation to their conduct in respect of the permit holder's exercise of the right of entry.
52. Under s.117, a WHS Entry Permit holder must give consideration as to whether it is *reasonably practicable* to give notice to the Executive Director of SafeWork SA about the proposed entry before exercising the power in order to inquire into a suspected contravention of the laws.²⁹ This is in order to provide an opportunity for an inspector to attend at the workplace at the time of entry.
53. In addition, as required by s.117(4), the Executive Director has established and maintains a policy that relates to the circumstances when inspectors will attend at workplaces when notified of the proposed entry of WHS entry permit holders under the section.³⁰
54. SafeWork SA received 175 notifications of a proposed entry under these provisions between 1 January 2013 and 30 June 2014. WHS inspectors have attended 52 workplaces after notification and, where necessary, appropriate action was taken to address safety concerns that were raised.
55. If a permit holder exercises a power of entry under Part 7 in relation to a suspected contravention of the Act without being accompanied by an inspector:
- (a) the permit holder must furnish a report on the outcome of his or her inquiries at the workplace to the Executive Director in accordance with the regulations; and
 - (b) on the receipt of such a report, the Executive Director must give consideration to what action (if any) should be taken on account of any suspected contravention outlined in the report.
56. The reports received by SafeWork SA are published on its web site³¹.
57. SafeWork SA has been notified of 6 situations where the right of entry provision has been disputed.

²⁸ A *relevant worker* is one who (a) is, or is entitled to be, a member of the union that the permit holder represents; (b) has industrial interests that the union is entitled to represent; and (c) works at the workplace concerned - s.116.

²⁹ Reg.28 sets out how notice is to be given (by telephone) and the information to be provided.

³⁰ See: http://www.safework.sa.gov.au/show_page.jsp?id=112112#2

³¹ http://www.safework.sa.gov.au/show_page.jsp?id=112112. Published reports may be redacted.

Issues to consider in relation to entry to workplaces by WHS entry permit holders

- EE. Are the provisions for the entry to workplaces by WHS entry permit holders working appropriately?
- FF. In cases where there are difficulties with the exercise of the powers, are there effective means of resolving them?
- GG. Are the requirements of s.117 of the WHS Act relating to the giving of notice to the regulator of proposed entry on premises resulting in effective interventions by the regulator?
- HH. Do you consider the published reports of entry by permit holders to be useful?
- II. If you consider any changes are needed, what do you consider needs to be changed, how and why?

The regulator

58. SafeWork SA is not established under the WHS Act. It is a business unit of the Attorney-General's Department. Although SafeWork SA undertakes regulatory functions under the WHS Act, the regulator, for the purposes of the Act, is SafeWork SA's Executive Director.³² Both terms are used throughout the Act when identifying the regulator's role.
59. The principal functions of the regulator are enumerated in s.152, with general powers provided in s.153. Numerous other specific functions, powers and obligations are specified in the legislation. The main functions and powers relating to the performance of functions and the exercise of powers under the Act are discussed later in this issues paper.
60. Safe Work SA is responsible for the administration of the State industrial relations legislation as well the WHS and certain other safety legislation.³³ It is resourced to have up to 216 staff. There are 89 WHS inspectors, of whom the majority are based in the metropolitan area.
61. Important accountability mechanisms under the Act include giving written reasons for a decision:
- a) about accepting or rejecting a proposed WHS enforceable undertaking (see discussion of Part 11 of the WHS Act later);
 - b) on the internal review of a reviewable decision (see later discussion of Part 12 of the WHS Act);
 - c) not to bring a prosecution (s.231) where the regulator has been requested to do so by someone under s.231 (see later discussion of Part 13 of the WHS Act);
 - d) not to accept the advice of the DPP under s.231 about bringing a prosecution.
62. The SafeWork SA Advisory Council (see later discussion) keeps the administration and enforcement of the WHS legislation, and other legislation relevant to occupational health, safety and welfare, under review, and may recommend changes as it thinks fit [Schedule 2, Part 1, cl.8(1)(a)].

³² The terms *regulator* and *Executive Director* are defined in s.4 of the WHS Act.

³³ SafeWork SA administers the *Dangerous Substances Act 1979* and the *Explosives Act 1936*

63. An important regulatory power in Part 8 is that under s.155, authorising the regulator to require in writing a person to give evidence and produce documents. This applies where the regulator has reasonable grounds for believing that a person is capable of giving information, providing documents or giving evidence in relation to a possible contravention of the legislation or that will assist the regulator to monitor or enforce compliance with it.

Issues to consider in relation to SWSA's operations under the WHS Act

JJ. Is the WHS Act providing a basis for SafeWork SA and its officers to perform their functions and exercise their powers more effectively?

Securing compliance

64. Under section 3 of the WHS Act, the main object of the Act and regulations is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by (among other means) *securing compliance with this Act through effective and appropriate compliance and enforcement measures* [s.3(1)(e)]. Part 9 of the Act, *Securing compliance*, supports this objective by the appointment of inspectors and for their functions and powers.³⁴ Certain offences in relation to inspectors are included.

65. SafeWork SA has adopted the *National Compliance and Enforcement Policy* as endorsed by the former Workplace Relations Ministers' Council.³⁵ The policy sets out seven key principles that underpin all WHS compliance and enforcement activities. It also makes clear that to ensure consistency, responsiveness and the efficient use of resources, WHS regulators in the various Australian jurisdictions work collaboratively, including by setting and addressing national priorities.

66. The *National Compliance and Enforcement Policy* is outlined in *SafeWork SA's Framework for a common approach to work health and safety SafeWork SA event triaging*. An extract follows.

Extract from *SafeWork SA's Framework for a common approach to work health and safety SafeWork SA event triaging*

SafeWork SA's role and principles for compliance and enforcement

SafeWork SA is committed to the prevention of deaths, injuries and illness arising from work activities. WHS laws provide regulators with a range of functions such as monitoring and securing compliance with WHS laws, providing advice and information to duty holders and the community, fostering co-operative, consultative relationships between duty holders, the persons to whom they owe duties and their representatives, sharing information with other regulators and conducting and defending proceedings under WHS laws.

The *National Work Health and Safety Compliance and Enforcement Policy* sets out the principles that are to be applied to all compliance and enforcement actions. Work health and safety regulators have agreed to an approach for triaging incident notifications and requests for a regulator response to work health and safety issues that apply the principles in the following way:

³⁴ The WHS regulations also authorise an inspector to give expiation notices for alleged offences (reg. 703).

³⁵ The policy is available at: https://www.safework.sa.gov.au/uploaded_files/enforcement_policy.pdf

- consistency – provide sufficient detail to enable similar approaches to be taken in similar circumstances;
- constructiveness – build capability of complainants and duty holders to address issues in the workplace before they are escalated to the regulator;
- transparency – public accessibility to the factors used to determine the triaging responses;
- accountability – triaging decision-making criteria available in the event of a challenge to the Regulator on triaging actions taken;
- proportionality – criteria is balanced to ensure the triaging response is proportionate to the potential seriousness of the alleged conduct;
- responsiveness – triaging responses take account of the known circumstances of the duty holder or workplace; and
- targeted – a triaging response, in terms of the investment of resources, is focused on the areas of perceived highest risk or on published strategic enforcement priorities.

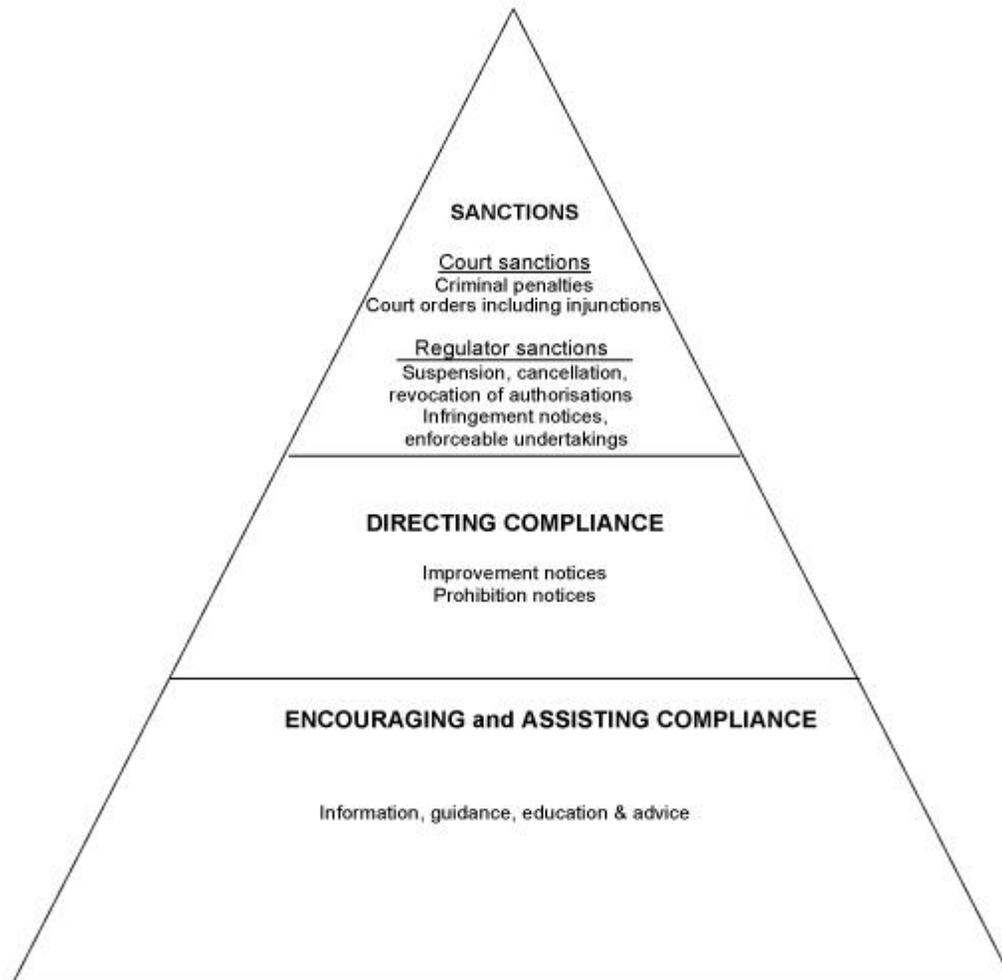
67. Under the *National Compliance and Enforcement Policy*, in determining which complaints or reports of incidents, injury or disease to investigate and in deciding the level of resources to be deployed, the regulators are committed to taking account of the following factors:

- the severity and scale of potential or actual harm;
- the seriousness of any potential breach of the law;
- the duty holder’s compliance history, including such matters as prior convictions and notices issued;
- whether the duty holder was licensed or authorised to undertake certain types work;
- strategic enforcement priorities;
- the practicality of achieving results, and
- the wider relevance of the event, including matters of significant community concern.

68. Against that background, the following circumstances or allegations are priority areas for investigations:

- work-related fatalities and serious injuries or where there is a risk of such outcomes;
- non-compliance with inspectors’ notices or directions;
- offences against inspectors;
- offences against health and safety representatives and matters relating to entry permit holders;
- discrimination against workers on the basis of their work health and safety activities, and
- failure to notify incidents.

69. The policy also commits SafeWork SA to the well-known compliance pyramid.



70. Under s.160, inspectors have the following functions:

- (a) to provide information and advice about compliance with the WHS legislation;
- (b) to assist in the resolution of—
 - (i) work health and safety issues at workplaces;
 - (ii) issues related to access to a workplace by an HSR's assistant;
 - (iii) issues related to the exercise, or purported exercise, of a right of entry under Part 7;
- (c) to review disputed PINs;
- (d) to require compliance with the WHS legislation through the issuing of notices;
- (e) to investigate contraventions of the WHS legislation and assist in the prosecution of offences;
- (f) other functions or powers conferred by the regulations.

71. Under the WHS Act, inspectors have continued to visit workplaces either in response to a complaint or an incident (reactive visits) or to ensure that WHS duty holders are complying with their obligations (proactive visits). In the 2013-14 financial year, inspectors undertook 7469 reactive visits and 8386 proactive visits (SafeWork SA data).
72. Inspectors are given significant powers under Part 9 of the WHS Act. They have the right to enter workplaces with, or without, the consent of the person with management or control of the workplace and may enter any place if authorised by a search warrant. There are certain notice requirements (s.164). Inspectors have wide inspection powers. These include powers to obtain information by questioning and the production of documents (s.171).
73. The WHS Act differs from the model WHS bill (and other WHS legislation implementing the model bill³⁶) by providing in s.172 for an individual's right to refuse to answer a question or to provide a document on the ground of self-incrimination, i.e., that the answer to the question, or the information or document, may tend to incriminate that individual or expose that individual to a penalty. This is only available to a natural person, not a corporate entity. Section 269 also applies, under which legal professional privilege applies to protect documents and information.
74. A complementary power is available to the regulator (the Executive Director of SafeWork SA or delegate) under s.155 to require, by written notice, a person to provide information, documents and to give evidence about a possible contravention of the Act. The regulator must have reasonable grounds for believing that the person can give the information or evidence or produce the documents. The notice must contain a statement about the effect of ss.172 and 269 and state that the person may attend with a legal practitioner.
75. Inspectors are also given powers to seize evidence and dangerous workplaces and things and, in specified circumstances, to require a person to give the person's name and residential address.

Issues to consider in relation to compliance

- KK. How effective is SafeWork SA's approach to securing compliance under the WHS legislation?
- LL. Does the WHS Act facilitate SafeWork SA and inspectors applying the principles of graduated compliance and enforcement effectively?
- MM. Does the WHS legislation facilitate compliance with the statutory obligations that are imposed on duty holders? If not, what do you perceive as obstacles to securing compliance?
- NN. If you have experienced how SafeWork SA 'triages' matters, did you find that, from your perspective, the system worked effectively and consistently with the objects of the WHS Act?

³⁶ In the other six jurisdictions that have implemented the model bill, s.172 abrogates the privilege against self-incrimination. In other words, a person may not refuse to answer a question or produce a document on the ground of self-incrimination. Any such answer or document is not admissible as evidence against an individual in civil or criminal proceedings, other than for proceedings where the answer, information or document concerned is alleged to be false or misleading.

Enforcement measures

76. Part 10 of the WHS Act, *Enforcement measures*, also supports the statutory aim of *securing compliance with this Act through effective and appropriate compliance and enforcement measures* [s.3(1)(e)]. The Part provides for various enforcement measures that are available to the regulator and inspectors. These are improvement notices, prohibition notices, non-disturbance notices, each of which may be enforced by injunction. Inspectors are also able to issue infringement notices for various instances of non-compliance (particularly with the regulations).³⁷ The requirements relating to notices are also stipulated and the regulator is empowered to take remedial action in cases of non-compliance with a prohibition notice.
77. The *National Compliance and Enforcement Policy*, adopted by SafeWork SA, contains criteria to guide enforcement decision-making. These are set out in the following extract from the policy.

Extract from the *National Compliance and Enforcement Policy*

In deciding on the most appropriate action to take, the regulators are guided by the following considerations:

- the adverse effect, that is the extent of the risk, the seriousness of the breach and the actual or potential consequences;
- the culpability of the duty holder, that is, how far below acceptable standards the conduct falls and the extent to which the duty holder contributed to the risk;
- the compliance history and attitude of the duty holder;
- if it is a repeat offence or there is a likelihood of the offence being repeated;
- whether the duty holder was authorised to undertake certain types of work;
- impact of enforcement on encouragement or deterrence;
- any mitigating or aggravating circumstances, including efforts undertaken by the duty holder to control risks;
- whether the risk to health and safety is imminent or immediate; and
- whether the safety issue can be rectified in the presence of an inspector or the inspector is satisfied with a plan to remedy the breach.

78. The most common measures taken to enforce the legislation involve the exercise by inspectors of their powers under the WHS Act. Typically, these involve the use of Part 10 notices. The following compares the numbers of notices issued by inspectors in 2013-14, which was the first complete

³⁷ See SafeWork SA Fact Sheet on infringement notices at:
https://www.safework.sa.gov.au/uploaded_files/Fact_Sheet-Infringement_Notices.pdf

financial year under the WHS legislation, with the numbers issues in 2011-12, which was the last complete financial year under the Occupational Health, Safety and Welfare (OHSW) legislation.

Figure 4: comparison of numbers of notices under the WHS legislation and the OHSW legislation

Type of notice	2013-14 (WHS legislation)	2011-12 (OHSW legislation)
Expiation	2	1
Improvement	1347	2295
Prohibition	629	857

79. There have been a number of applications for internal review of notices. This is discussed later.

Issues to consider in relation to enforcement

OO. Are notices for securing compliance with the Act used effectively?

PP. Does the *National Compliance and Enforcement Policy* operate consistently with the WHS Act?

QQ. Are inspectors giving appropriate information about an individual's rights when making inquiries under the WHS legislation?

Note: Issues relating to the internal review of decisions are dealt with later

Enforceable undertakings

80. Under Part 11 of the WHS Act, SafeWork SA may accept a written, *enforceable undertaking* (a WHS undertaking) from a person in connection with a matter related to a contravention or an alleged contravention of the Act, as an alternative to proceeding to prosecution. This is not available for the most serious (Category 1) offences.³⁸

81. A WHS undertaking is a legally binding agreement under which a person or organisation agrees to carry out specific activities to rectify a contravention or alleged contravention of the WHS Act or to improve worker health and safety performance. Giving a WHS undertaking is voluntary and is not an admission of guilt. The person concerned may, by agreement with SafeWork SA, withdraw or vary an undertaking. SafeWork SA has published guidelines on the (discretionary) acceptance of such undertakings.³⁹

82. Non-compliance with the undertaking is an offence and may also expose the person concerned to prosecution for the original alleged offence.

83. South Australia has not yet had any enforceable undertakings entered into with the regulator or imposed by a Court under the WHS Act. By contrast, Queensland has had over thirty voluntary undertakings under the *Work Health and Safety Act 2011* (Qld), which is that State's version of the model WHS law, and another twenty-five under equivalent provisions under its previous WHS law.

³⁸ Section 216(2)

³⁹ https://www.safework.sa.gov.au/uploaded_files/011-2011_Enforceable_Undertakings.pdf

Issues to consider in relation to enforceable undertakings

- RR. Are you aware of the availability of enforceable undertakings as an alternative to prosecution for a breach of the WHS Act?
- SS. Do you consider voluntary enforceable undertakings to be a useful option in the event of a contravention or alleged contravention of the Act?
- TT. Do you have any concerns about how they may operate?

Review of decisions

84. Part 12 introduces the right to seek the review by a delegate of (or body appointed by) the Executive Director of certain regulatory decisions under the WHS legislation. The relevant provisions under which the reviewable decisions were made and by whom a review may be sought are specified in s.223. Applications must be made within a prescribed time (usually 14 days – see s.224). Stays of operation take effect for most reviewable decisions (s.228), but are subject to a time limit.⁴⁰ There may be a practical difficulty for the operation of a stay if the internal review takes longer than 14 days [e.g., if the internal reviewer seeks further information from the applicant, the 14 day review decision making period ceases until the information is provided - s.226(3) - but the stay may expire in that time].
85. Since the introduction of the WHS Act, there have been 13 requests for internal review in relation to a total of 15 improvement or prohibition notices. Nine notices were set aside after review, two were varied, and three were confirmed. One could not be reviewed internally and one has subsequently gone to external review and the matter is still proceeding.

Issues to consider in relation to the review of decisions

- UU. Do you consider that the provisions for the internal review of decisions by SWSA or inspectors provisions are appropriate and working effectively?

Legal proceedings

86. Part 13, *Legal proceedings*, provides for prosecutions for offences, sentencing options⁴¹, infringement notices (see discussion earlier), offences by bodies corporate, the Crown and public authorities, civil penalties and how the Act affects civil liability.
87. As at 7 July 2014, there were:
- a) 13 prosecutions before the court under the OHSW Act;

⁴⁰ The time limit under s.228(6) for a stay of operation is 14 days (the prescribed period for applying for external review – reg. 701) or when an application for external review is made, whichever is the earlier.

⁴¹ Under ss.234-241, a Court may make various orders (which may be concurrent), namely, adverse publicity orders, restoration orders, WHS project orders, orders for enforceable WHS undertakings (“Court-ordered WHS undertakings”), injunctions and training orders.

- b) no prosecutions before the court under the WHS Act, although an information is expected to be laid in relation to the first such matter soon;
- c) 1 prosecution before the court under the WHS Regulations.

88. Against that background, it is too soon to assess the extent to which the Courts are likely to use the sentencing options available under the Act in addition to fines.

89. An issue which has arisen relates to the availability of insurance for fines under the WHS Act. This is a public policy issue, which was highlighted in the decision in *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor* [2013] SAIRC 22.⁴² The issues were summed up by His Honour, Lieschke IM, in his judgment. A relevant extract appears below.

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

[Lieschke IM]

83 The *Occupational Health, Safety and Welfare Act* does not prohibit such insurance, but some other laws do. New Zealand's corresponding OHS laws prohibit insurance.⁴³ Section 174K of the *SA Road Traffic Act 1961* prohibits any insurance of penalties imposed by a court in relation to far less serious driving offences and makes it an offence to provide an indemnity. Section 272 of the new *Work Health and Safety Act 2012* states that any term of a contract which seeks to modify the operation of the Act is void, but it does not specifically prohibit insurance of penalties, and it does not make it an offence for an insurer to provide an indemnity. Whilst the full scope of s 272 is unclear, it will still be possible for an insurer to sell such policies and to grant indemnity for perceived commercial benefit. Whether such indemnities should be outlawed under the current Act and under the new Act are policy considerations for Parliament. I make these observations to explain the legal significance of these surprising arrangements.

90. Another useful discussion of the issues appears in a 2013 address given by the Chief Justice of NSW, the Hon JT Bathurst: *Insurance law – a view from the bench*.⁴⁴ Among other things, the Chief Justice observed that while section 272 of the *Work Health and Safety Act* provides that any term of a contract that seeks to modify the operation of while section 272 of the *Work Health and Safety Act* provides that any term of a contract that seeks to modify the operation of the Act is void, but does not specifically prohibit insurance for criminal liability.⁴⁵

91. Views are invited on how this issue might be dealt with.

Issues to consider in relation to legal proceedings

VV. Do you consider that there any issues with how the WHS Act operates in relation to prosecutions?

WW. In your experience, how do prosecutions affect compliance more generally?

XX. Should duty holders be able to be insured against fines for breaches of WHS laws?

⁴² The decision is available at: <http://www.industrialcourt.sa.gov.au/index.cfm?objectid=843CCDAA-A7F0-FDA2-0B7B6400CCB58EC6>

⁴³ His Honour is referring to s.56l of New Zealand's *Health and Safety in Employment Act 1992*.

⁴⁴ Available at:

http://www.supremecourt.lawlink.nsw.gov.au/agdbasev7wr/assets/supremecourt/m6700011771004/bathurst_2013.09.19.pdf

⁴⁵ *Ibid*, pp.17,18.

General

92. Some important general provisions are included in Part 14 of the WHS Act, *General*. They include provisions relating to codes of practice and the making of regulations. Each is discussed below. Part 14 also provides for the exemption from producing a document, if so requested under the Act, which would disclose information, or otherwise provide information, that is the subject of legal professional privilege (s.269). This qualifies any exercise of other powers under s.155 or s.171 to require the production of a document.
93. Section 272 makes void any attempt in an agreement or contract to exclude, limit or modify the operation of the WHS legislation or any duty under it or to transfer such a duty to another person. As noted, this may not exclude indemnifying someone by insurance against a fine under the Act.

Codes of practice

94. Under s.274 of the WHS Act, the Minister may make a code of practice. A code is not an enforceable instrument in the way that regulations are. Instead, a code is admissible in a proceeding as evidence of whether the Act or regulations have been complied with (s.275). In other words, a person who is alleged to have not complied may be found to have been in compliance by acting in accordance with the code. This does not preclude a person from complying by other reasonably practicable means and the person may introduce evidence to that effect.
95. An 8-stage process for developing and implementing a code of practice must be followed under the WHS Act before the code is effective. The process is set out below.

Stage one: national development

[In line with process agreed in the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*]

Step one

Safe Work Australia (SWA) develops proposed model code of practice, with input from national public consultation, and in accordance with COAG principles

[All governments and peak national industry bodies and the ACTU are represented on SWA]

Step two

If proposed model code is agreed, SWA recommends the model code of practice to a national meeting of Workplace Relations Ministers (replacing the COAG Select Council on Workplace Relations).

Step three

If Ministers agree to proposed model code, each jurisdiction participating in national harmonisation is committed to implementing the model code.

Stage two: South Australian implementation

[In accordance with s.274 of the WHS Act]

Step four A Code must have involved consultation between Australian governments, unions and employer organisations (the Stage One process qualifies): s.274(2)	Step four B SWSA Advisory Council must recommend the approval of the code by the Minister: s.274(2)	Step four C Small Business Commissioner (SBC) must assess whether the code would affect small business if implemented and provide any comments or advice the SBC considers appropriate: s.274(3)
Step five A Minister may approve the code, including with a variation recommended by the SBC: s.274(1) and (3)	Step five B Minister may decide not to approve the code.	
Step six Code effective on notice's publication in Gazette and must be published in a State newspaper: s.274(6)		
Step seven Code must be laid before each house of Parliament within 6 sitting days of Gazette notice: s.274(9)		
Step eight Parliament may disallow the code: s.274(8) and (10)		

96. There is some repetition of steps in the above process, particularly in relation to consultation, and a tension between prior national agreement to implement a code and the possible variation or disallowance of a code at the State level.

97. Currently twenty nationally developed codes of practice in place in South Australia under the WHS Act. They are set out in figure 5.⁴⁶ Another three nationally developed codes have been disallowed in South Australia, namely:

- Construction work
- Prevention of falls in the housing construction
- Safe design of structures

98. For ease of access, each South Australian code of practice has been summarised by SafeWork SA in a relatively short accompanying fact sheet (among other things, the fact sheets identify the location of more detailed information in the relevant code). They are all available on SafeWork SA's web site.⁴⁷

⁴⁶ Under the WHS Act's transitional provisions (s.23 of Schedule 6 of Part 9 and r.739 of the WHS Regulations), 15 codes made under the previous legislation were 'prescribed codes' which remain in place until varied or revoked under s.274. Some have been replaced by national codes. The code on working hours is currently before the Small Business Commissioner (this is proposed to be revoked as national guidance is being developed).

Figure 5: Nationally agreed codes of practice given effect under the WHS Act

1. Abrasive Blasting
2. Confined Spaces
3. Demolition Work
4. Excavation Work
5. First Aid in the Workplace
6. Hazardous Manual Tasks
7. How to Manage Work Health and Safety Risks
8. How to Manage and Control Asbestos in the Workplace
9. How to Safely Remove Asbestos
10. Labelling of Workplace Hazardous Chemicals
11. Managing Noise and Preventing Hearing Loss at Work
12. Managing the Risks of Plant in the Workplace
13. Managing Risks of Hazardous Chemicals in the Workplace
14. Managing Electrical Risks in the Workplace
15. Managing the Risks of Falls at Workplaces
16. Managing the Work Environment and Facilities
17. Preparation of Safety Data Sheets for Hazardous Chemicals
18. Spray Painting and Powder Coating
19. Welding Processes
20. Work Health and Safety Consultation Cooperation and Coordination

99. In the other six jurisdictions that have adopted the model WHS legislation, it appears that four (Commonwealth, NSW, Tasmania, ACT) have adopted all twenty-three codes. Queensland has adopted most of them and one has been implemented under electrical safety legislation. The NT has not yet implemented all codes.

100. It should be noted that the twenty-three nationally agreed Work Health and Safety Codes of Practice (see above) were not subject to the requirements under the WHS Act for the recommendation of SafeWork SA Advisory Council and consultation with the Small Business Commissioner. This is because consultation had already occurred and the codes were approved before those provisions were included in Work Health and Safety Bill.

101. Recently, Safe Work Australia consulted nationally on a draft model code, *Preventing and Managing Fatigue in the Workplace*. After considering responses, Safe Work Australia agreed to change the draft code to national guidance - *Guide for managing the risk of fatigue at work*.

⁴⁷ http://www.safework.sa.gov.au/show_page.jsp?id=5892#.U8dzzmeKDIv

102. Consequently, the SafeWork SA Advisory Council considered whether South Australia should remove the existing South Australian code and instead adopt the national guidance material. In order to maintain national harmonisation, the Advisory Council has so recommended.

103. Further possible codes have been considered in the national development process. Of the twelve so considered, nine are now model guidance material. No national agreement was reached on the remaining three. South Australia has not made a decision about their use.

Figure 6: Decisions by Safe Work Australia about possible codes

<i>Possible codes recently considered by Safe Work Australia</i>	<i>Outcome of consideration</i>
Amusement devices	To be guidance material
Cash-in-transit	To be guidance material
Cranes	Not agreed
Forestry operations	To be guidance material
Formwork and falsework	To be guidance material
Industrial lift trucks	To be guidance material
Rural plant	Not agreed
Safe design, manufacture, import and supply of plant	To be guidance material
Scaffolding work	To be guidance material
Traffic management in workplaces	To be guidance material
Tree trimming and removal work - crane access method	Not agreed
Working in the vicinity of overhead and underground electric lines	To be guidance material

Issues for consideration and response relating to codes of practice

104. Against that background, interested persons and entities are invited to comment on any matters that relate to the operation of the Act in providing for codes of practice. Without limiting the matters that you may wish to raise, you may wish to consider and comment on some or all of the following issues. You do not have to address any of them and you might wish to raise other matters or to make no comment at all.

Issues to consider in relation to codes of practice

<p>YY. Do you or persons you represent use the codes of practice?</p> <p>ZZ. Do the codes provide useful guidance?</p> <p>AAA. Have the codes presented any difficulties?</p> <p>BBB. How do the codes under the WHS Act compare with those under the previous legislation in terms of relevance and user friendliness?</p> <p>CCC. Have you referred to the SWSA fact sheet summaries of the codes, and, if so, are they useful to</p>

you or to persons you represent?

DDD. Do you require other guidance on the matters covered by the codes?

EEE. Do you use the disallowed codes of practice for guidance (noting that they are operative in other jurisdictions)?

FFF. Are there ways in which the development of and decisions about codes could be made simpler or speedier?

Regulations

105. Section 276 allows for the making of regulations under the WHS Act. They may be wide in scope and provide for any matter relating to work health and safety and anything required or permitted by the Act, or necessary or convenient to give effect to it. The *Work Health and Safety Regulations 2012* are consistent with the model Work Health and Safety regulations prepared at the national level and adopted in line with the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*.

106. Consideration is currently being given to amending the WHS Regulations to adopt the most recent nationally agreed technical changes and to make consequential changes arising from the end of transitional arrangements. The opportunity may also be taken to correct some typographical errors in the Regulations and clarify local operational jurisdictional issues.

107. The operation of the regulations is not directly under consideration in this review, except to the extent that the regulations affect the operation of the Act. The national review is examining whether red tape in the harmonised WHS legislation can be reduced. If you have concerns of that kind, you may raise them directly in a submission to the national review or, if they are part of your comments to this review, they will be drawn to the attention of the national review (unless you indicate that you do not wish that to be done).

Issues to consider in relation to regulation making powers under the WHS Act

GGG. How effective are the regulations in supporting the achievement of the objects of the WHS Act?

Note: The national review is examining whether red tape in the harmonised WHS legislation can be reduced. If you have concerns of that kind, you may raise them directly in a submission to the national review or, if they are part of your comments to this review, they will be drawn to the attention of the national review (unless you indicate that you do not wish that to be done).

The SafeWork SA Advisory Council

108. The 11 member SafeWork SA Advisory Council is provided for in Schedule 2, *Local tripartite consultation arrangements*. Its functions and powers include certain matters that are relevant to the operation of the WHS Act. These include ongoing review of the administration and enforcement of the WHS legislation and, as noted, recommending codes of practice to the Minister.

Issues to consider in relation to the SWSA Advisory Council

HHH. Has the SWSA Advisory Council been able to achieve its purpose successfully?

III. Are there other functions or powers that you consider the Council should be given?

Part Four: How to make a submission to the review

109. Please provide your comments in writing on any matters relevant to the review electronically at the following website:

<http://www.safework.sa.gov.au/whsreview/>

Unless you request otherwise, your submission will be published on SafeWork SA's website.