

## EXPLANATORY MEMORANDUM – MODEL WORK HEALTH AND SAFETY BILL

### OUTLINE

The Model Work Health and Safety Bill (the Bill) has been developed under the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (IGA) to underpin the new harmonised work health and safety (WHS) framework in Australia.

The harmonisation of work health and safety laws is part of the Council of Australian Governments' National Reform Agenda aiming to reduce regulatory burdens and create a seamless national economy.

The objects of harmonising work health safety laws through a model framework are:

- to protect the health and safety of workers
- to improve safety outcomes in workplaces
- to reduce compliance costs for business, and
- to improve efficiency for regulator agencies.

The Bill includes the following key elements:

- a primary duty of care requiring persons conducting a business or undertaking (PCBUs) to, so far as is reasonably practicable, ensure the health and safety of workers and others who may be affected by the carrying out of work
- duties of care for persons who influence the way work is carried out, as well as the integrity of products used for work
- a requirement that 'officers' exercise 'due diligence' to ensure compliance
- reporting requirements for 'notifiable incidents' such as the serious illness, injury or death of persons and dangerous incidents arising out of the conduct of a business or undertaking
- a framework to establish a general scheme for authorisations such as licences, permits and registrations (e.g. for persons engaged in high risk work or users of certain plant or substances)
- provision for consultation on work health and safety matters, participation and representation provisions
- provision for the resolution of work health and safety issues
- protection against discrimination for those who exercise or perform or seek to exercise or perform powers, functions or rights under the Bill
- an entry permit scheme that allows authorised permit holders to:
  - inquire into suspected contraventions of work health and safety laws affecting workers who are members, or eligible to be members of the relevant union and whose interests the union is entitled to represent, and
  - consult and advise such workers about work health and safety matters.
- provision for enforcement and compliance including a compliance role for work health and safety inspectors, and
- regulation-making powers and administrative processes including mechanisms for improving cross-jurisdictional cooperation.

### **Drafting the model laws**

This Bill was drafted by the Parliamentary Counsel's Committee (PCC), consistent with its *Protocol on Drafting National Uniform Legislation* (2008). The PCC is a national committee representing the drafting offices in Australia and New Zealand.

The PCC has drafted the Bill to be national 'model' legislation in non-jurisdictional specific terms. This means that it uses labels like 'the court', 'the regulator', 'the tribunal' and 'the authorising authority'. The intention is that the Bill will be 'mirrored' in all jurisdictions, subject to any local variations that are necessary to achieve the agreed national policy when the legislation forms part of the local law.

The Bill has been based on the recommendations that were made in the first and second reports of the National Review into Model Occupational Health and Safety Laws. Although many recommendations were accepted by the Workplace Relations Ministers' Council, some were not adopted and others have been modified following consultative processes. For that reason, the first and second reports should only be used as a guide to the policy underpinning the provisions in the Bill.

### **Use of jurisdictional notes**

Jurisdictional notes have been used in this Bill to indicate the matters that may be taken into account by a local jurisdiction when implementing the legislation or to provide necessary information about the operation of the harmonised legislation.

Jurisdictional notes have been designed to ensure the workability of the model provisions in each jurisdiction without affecting harmonisation. For example, jurisdictional notes have been used to explain how non-jurisdictional specific terms may be substituted, to enable appropriate institutional arrangements to be put into place and to remove any unnecessary duplication with local laws. The effect of jurisdictional notes is further explained in the Appendix.

### **Penalty units**

Because of differences in current levels of the value of penalty units among jurisdictions and the potential for further variations to occur, the Bill specifies monetary fines for offences. This is consistent with the PCC's view that it would be confusing to adopt a unique penalty unit figure for national uniform legislation.

Because this Bill requires a high level of uniformity, local laws that set 'penalty units' will not apply. That is because future changes in the value of penalty units would result in different applicable monetary fines applying across jurisdictions. The intention is to regularly review monetary fines and, if necessary, adjust them to be consistent with Safe Work Australia's determinations.

### **Ongoing consistency**

Safe Work Australia will play an ongoing role in maintaining consistency during the national implementation of the model work health and safety laws. Safe Work Australia will also facilitate further legislative developments to ensure that the laws remain relevant and responsive to changes in work health and safety.

The PCC, through its members, also has a role in maintaining consistency of implemented national uniform legislation. When members draft local legislation that will impact on the complementary legislation of other jurisdictions, advice will be provided to other members of the proposed legislation (at least at the time of introduction or earlier if possible) so that any necessary consequential changes to that complementary legislation can be made.

## FINANCIAL IMPACT STATEMENT

[To be completed by each jurisdiction.]

## REGULATORY ANALYSIS

Refer to the *Decision Regulation Impact Statement for a Model Occupational Health and Safety Act*.

## NOTES ON CLAUSES

The following abbreviations are used in this Explanatory Memorandum [to be completed]:

|  |   |
|--|---|
| Acts Interpretation Act                  | <i>Acts Interpretation Act 1901</i> (Cth)   |
| DPP                                      | Director of Public Prosecutions   |
| Fair Work Act                            | <i>Fair Work Act 2009</i> (Cth)   |
| Fair Work (Registered Organisations) Act | <i>Fair Work (Registered Organisations) Act 2009</i> (Cth)  |
| HSR                                      | Health and safety representative  |
| ILO                                      | International Labour Organisation   |
| IGA                                      | <i>Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety</i>   |
| The Bill/this Bill                       | Model Work Health and Safety Bill   |
| Model WHS regulations                    | Model Work Health and Safety Regulations  |
| National review into OHS laws            | <i>National Review into Model Occupational Health and Safety Laws</i> , first report, October 2008<br><i>National Review into Model Occupational Health and Safety Laws</i> , second report, January 2009 |
| PCBU                                     | Person conducting a business or undertaking   |
| PCBU duties                              | Health and safety duties and obligations owed by a PCBU under the Bill  |
| PCC                                      | Parliamentary Counsel's Committee   |
| Privacy Act                              | <i>Privacy Act 1988</i> (Cth)   |
| WHS                                      | Work health and safety  |
| WHS inspector                            | Inspector appointed under Part 9 of the Bill  |

## GENERAL CONCEPTS

### ***Employment***

References to 'employment', 'employer' and 'employee' are intended to capture the traditional meaning of those terms.

### **Evidential burden**

An evidential burden requires a person to provide evidence of an asserted fact in order to prove that fact to a court. In some instances, the Bill places an evidential burden on an individual to demonstrate a reasonable excuse as to why they have failed to meet a duty or obligation.

Subclauses 118(4), 144(2), 155(6), 165(3), 171(7), 177(7), 185(5), 200(2), 242(2) and 268(3) shift the evidential burden by requiring the defendant to show a reasonable excuse. This is because the defendant is the only person who will be able to provide evidence of any reasonable excuse for refusing or failing to meet the relevant duty or obligation.

Superseded

## **Part 1 – Preliminary**

### **Division 1 – Introduction**

#### **Clause 1 – Citation**

1. Clause 1 provides that, once enacted, the short title of the Bill will be the *Work Health and Safety Act 2010*.

#### **Clause 2 – Commencement**

2. Clause 2 provides for commencement on 1 January 2012, consistent with the IGA.
3. Transitional and consequential legislation will be set out [*in separate legislation*].

### **Division 2 – Object**

#### **Clause 3 – Object**

4. Clause 3 sets out the main object of the Bill, which is to provide a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by the means set out in the clause.
5. Subclause 3(2) extends the object of risk management set out in subclause 3(1)(a) by applying the overriding principle that workers and other persons should, so far as is reasonably practicable, be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work.

### **Division 3 – Interpretation**

6. This Division includes a dictionary of terms that are used throughout the Bill and also separately defines key definitions and concepts in clauses 5 – 8.

#### **Subdivision 1 – Definitions**

##### **Clause 4 – Definitions**

7. Clause 4 includes a dictionary of terms used in the Bill. Key definitions are explained below in alphabetical order.

##### ***Compliance powers***

8. The term ‘compliance powers’ is used throughout the Bill as a short-hand way of referring to all of the functions and powers of WHS inspectors under the Bill.

##### ***Employee record***

9. The term ‘employee record’ takes its meaning from the Privacy Act.

##### ***Health***

10. The term ‘health’ is defined to clarify that it is used in its broadest sense and covers both physical and psychological health. This means that the Bill covers psychosocial risks to health like stress, fatigue and bullying.

##### ***Import***

11. The term ‘import’ is defined to mean importing into the jurisdiction from outside Australia. This means that interstate movements are excluded from the definition. It is not intended to capture any movement of goods to or from the external territories as defined by the Acts Interpretation Act.

##### ***Plant***

12. The term ‘plant’ is defined broadly to cover a wide range of items, ranging from complex installations to portable equipment and tools.

13. The definition includes 'anything fitted or connected', which covers accessories but not other things unconnected with the installation or operation of the plant (e.g. floor or building housing the plant).

#### **Officer**

14. The term 'officer' is defined by reference to the 'officer' definitions in section 9 of the *Corporations Act 2001*, but does not include a partner in a partnership. It also includes 'officers' of the Crown within the meaning of clause 247 and 'officers' of public authorities within the meaning of clause 252. All of these 'officers' owe the officers' duty provided for in clause 27, subject to the volunteers' exemption from prosecution in clause 34.

#### **This Act**

15. 'This Act' is defined to include the regulations unless a particular provision provides otherwise.

#### **Volunteer**

16. The term 'volunteer' is defined to mean a person who acts on a voluntary basis, irrespective of whether the person receives out-of-pocket expenses. Whether an individual is a 'volunteer' for the purposes of the Bill is a question of fact that will depend on the circumstances of each case.
17. 'Out-of-pocket expenses' are not defined but should be read to cover expenses an individual incurs directly in carrying out volunteer work (e.g. reimbursement for direct outlays of cash for travel, meals and incidentals) but *not* any loss of remuneration. Any payment over and above this amount would mean that the person was not a volunteer for purposes of the Bill and the volunteers' exemption would *not* apply. For example, a director of a body corporate that received money in the nature of directors' fees would not be covered by the volunteers' exemption.

### **Subdivision 2 – Other important terms**

#### **Clause 5 – Meaning of *person conducting a business or undertaking***

18. The principal duty holder under the Bill is a 'person conducting a business or undertaking' (PCBU).
19. Clause 5 provides that a person may be a PCBU whether:
  - the person conducts a business or undertaking alone or with others (e.g. as a partner in a partnership or joint venture) (paragraph 5(1)(a)), or
  - the business or undertaking is conducted for profit or gain or not (paragraph 5(1)(b)).
20. The term 'person' is not defined but will take its meaning from Acts interpretation laws. It will cover persons including individuals and bodies corporate.
21. To ensure consistency, subclause 5(2) makes it clear that the term covers partnerships and unincorporated associations.
22. Subclause 5(3) clarifies that PCBU duties and obligations under the Bill fall on each partner of a partnership. This means they could be prosecuted in their capacity as a PCBU and the relevant penalty for individuals would apply.

#### **Who is a PCBU?**

23. The phrase 'business or undertaking' is intended to be read broadly and covers businesses or undertakings conducted by persons including employers, principal contractors, head contractors, franchisors and the Crown.

### *Running a household*

24. The Bill will cover householders where there is an employment relationship between the householder and a worker.
25. However, the following kinds of persons are not intended to be PCBUs:
  - individuals who carry out domestic work in and around their own home (e.g. domestic chores etc)
  - individual householders who engage persons other than employees for home maintenance and repairs in that capacity (e.g. tradespersons to undertake repairs), and
  - individual householders who organise one-off events such as dinner parties, garage sales, lemonade stalls etc.

### *PCBU duties do not apply to workers or 'officers'*

26. Subclause 5(4) clarifies that a worker or officer is not, solely in that capacity, a PCBU for the purposes of the Bill.

### *PCBU duties do not apply to elected members of local authorities*

27. Subclause 5(5) provides that an elected member of a local authority is not a PCBU in that capacity for the purposes of the Bill.

### *Exclusions*

28. Subclause 5(6) allows the regulations to exclude prescribed persons from application of the Bill, or part of the Bill.
29. The duties and obligations under the Bill are placed on 'persons conducting a business or undertaking'. This is a relatively new concept to work health and safety and is currently only used in two jurisdictions in Australia. An exemption contemplated by subclause 5(6) may be required to remove unintended consequences associated with the new concept and to ensure that the scope of the Bill does not inappropriately extend beyond work health and safety matters. For example, regulations could be made to exempt:
  - prescribed agents from supplier duties under the Bill (the duties would instead fall to the principal), and
  - prescribed 'strata title' bodies corporate from PCBU duties under the Bill.

### *'Volunteer associations' not covered by Bill*

30. Subclause 5(7) excludes 'volunteer associations' from PCBU duties and obligations under the Bill. Volunteer associations are only excluded if they have one or more community purposes and they do not have any employees (e.g. employed by one or more of the volunteers) carrying out work for the association (subclause 5(8)). Hiring a contractor (e.g. to audit accounts, drive a bus on a day trip etc) would not, however, jeopardise exempt status under this provision.
31. Volunteer associations with one or more employees owe duties and obligations under the Bill to those employees and to any volunteers who carry out work for the association.
32. The term 'community purposes' is not defined in the Bill but is intended to cover purposes including:
  - philanthropic or benevolent purposes, including the promotion of art, culture, science, religion, education, medicine or charity, and
  - sporting or recreational purposes, including the benefiting of sporting or recreational clubs or associations.

**Clause 6 – Meaning of *supply***

33. Clause 6 defines the term ‘supply’ broadly to cover both direct and indirect forms of supply, such as the sale, re-sale, transfer, lease or hire of goods in a company that owns the relevant goods. A ‘supply’ is defined to occur on the passing of possession of a thing from either a principal or agent to the person being supplied.
34. The term ‘possession’ is not defined but should be read broadly to cover situations where a person has any degree of control over supply of the thing.
35. A supply of goods does not include:
  - sale of goods by an agent who never takes physical custody or control of the thing (see below)—the principal is the supplier in those circumstances
  - the return of goods to their owner at the end of a lease or other agreement (paragraph 6(3)(a)), and
  - any other kind of supply excluded by the regulations (paragraph 6(3)(b)).

***Supply involving a ‘financier’***

36. Subclause 6(4) excludes passive financing arrangements from the definition of ‘supply’. This means that the suppliers’ duty under the Bill would not apply to a financier who, in the course of their business as a financier, acquires ownership or some other kind of right in goods for or on behalf of a customer. Action not taken on behalf of the customer would however attract the duty (e.g. on selling the specified goods at the conclusion of a financing arrangement).
37. If the exemption applies subclause 6(5) provides that the suppliers’ duty instead applies to the person (other than the financier) who had possession of the goods immediately before the financier’s customer.

**Clause 7 – Meaning of *worker***

38. The Bill adopts a broad definition of ‘worker’ instead of ‘employee’ to recognise the changing nature of work relationships and to ensure health and safety protection is extended to all types of workers.
39. Clause 7 defines the term ‘worker’ as a person who carries out work in any capacity for a PCBU, including work in any of the capacities listed in the provision. The examples of workers in the provision are illustrative only and are not intended to be exhaustive. That means that there will be other kinds of workers covered under the Bill that are not specifically listed in this clause (e.g. students on clinical placement and bailee taxi drivers).
40. The term ‘work’ is not defined in the Bill but is intended to include work, for example, that is carried out:
  - under a contract of employment, contract of apprenticeship or contract for services
  - in a leadership role in a religious institution, as part of the duties of a religious vocation or in any other capacity for the purposes of a religious institution
  - as an officer of a body corporate, member of the committee of management of an unincorporated body or association or member of a partnership, and
  - as practical training as part of a course of education or vocational training.
41. Subclause 7(2) is included for the avoidance of doubt only. This subclause clarifies that a police officer is a ‘worker’ for purposes of the Bill, while on duty or lawfully performing duties as a police officer. It would not cover periods while the police officer was not on active duty.



42. Subclause 7(3) clarifies that a self-employed person may simultaneously be both a PCBU and a worker for purposes of the Bill.

#### **Clause 8 – Meaning of *workplace***

43. Clause 8 defines ‘workplace’ broadly to mean a place where work is carried out for a business or undertaking. It includes any place where a worker goes, or is likely to be, while at work (e.g. areas like corridors, lifts, lunchrooms and bathrooms).
44. This definition is a key definition that in many ways defines the scope of rights, duties and obligations under the Bill.
45. For example, the term ‘workplace’ is used in the primary duty under the Bill and extensively throughout the Bill. Parts 9 and 10 of the Bill give extensive powers to WHS inspectors to conduct inspections, to require production of documents and answers to questions (clause 171), to seize certain things at workplaces for examination and testing or as evidence (clause 175) and to direct that a workplace not be disturbed (clause 198).
46. Subclause 8(2) is an avoidance of doubt provision that clarifies that a ‘place’ should be read broadly to include things like vehicles, ships, off-shore units and platforms.
47. Paragraph 8(2)(b) clarifies that a place includes any waters and any installation on land, on the bed of any waters or floating on any waters.

#### *No requirement for an immediate temporal connection*

48. A ‘workplace’ is a place where work is performed from time to time and is treated as such under the Bill even if there is no work being carried out at the place at a particular time.
49. In other words, there is no requirement for an immediate temporal connection between the place or premises and the work to be performed: see *Telstra Corporation Ltd v Smith* [2009] FCAFC 103. That is because the main object of the Bill is to secure the health and safety of workers at work as well as others who are in the vicinity of a workplace. A place does not cease being a workplace simply because there is no work being carried out at a particular time.
50. This means for example that a shearing shed used for shearing only during the few weeks of the shearing season does not cease to be a workplace outside of the shearing season and a department store does not cease to be a workplace when it is closed overnight.

#### **Clause 9 – Examples and notes**

51. This clause provides that an example or note at the foot of a provision forms part of the Bill.

#### **Division 4 – Application of Act**

52. This Division deals broadly with the application of the Bill to the Crown and also beyond the territorial boundaries of the relevant jurisdiction.
53. This Division also allows for provisions to deal with the relationship between this Bill and other Acts.

#### **Clause 10 – Act binds the Crown**

54. Clause 10 provides for the Crown to be bound by the Bill and clarifies that the Crown is liable for an offence against the Bill. This clause makes it clear that the ‘Crown shield’ that would otherwise provide immunity against prosecution for the Crown does not apply.

#### **Clause 11 – Extraterritorial application**

55. The Bill is intended to apply as broadly as possible but in a way that is consistent with the national work health and safety framework and the legislative power of the jurisdiction. This means that some provisions will have some extra-territorial application.

56. For example, it is intended that the Bill apply to all PCBUs who operate state or territory-registered ships out of the relevant jurisdiction, subject to Commonwealth maritime work health and safety laws. To the extent that there is overlap between the laws of jurisdiction (e.g. where a South Australian ship is in the coastal waters of another State or the Northern Territory), the principles of double jeopardy would preclude conviction for a criminal offence in respect of conduct for which a person had already been convicted of an offence.
57. Importantly, inspection powers (Parts 9 and 10) and powers of inquiry (Part 7) would *not* have any extra-territorial application to workplaces outside the jurisdiction.
58. Other relevant extraterritorial rules may be included in general criminal laws, 'crimes at sea' laws, federal maritime laws and Acts interpretation laws.

#### **Clause 12 – Scope**

59. Refer to Appendix.

#### **Application to public health and safety**

60. The primary purpose of the Bill is to protect persons from work-related harm. The status of such persons is irrelevant. It does not matter whether they are workers, have some other work-related status or are members of the wider public. They are entitled to that protection. At the same time, the Bill is not intended to extend such protection in circumstances that are not related to work. There are other laws, including the common law, that require such protection and provide remedies where it is not supplied.
61. The duties under the Bill are intended to operate in a work context and will apply where work is performed, processes or things are used for work or in relation to workplaces. It is not intended to have operation in relation to public health and safety more broadly, without the necessary connection to work.
62. These elements are reflected in the model Bill by the careful drafting of obligations and the terms used in the Bill and also by suitably articulated objects.
63. The intention is that further, nationally consistent guidance about the application of the work health and safety laws to public safety be made available by the regulator.

## **Part 2 – Health and safety duties**

### **Division 1 – Introductory**

#### **Subdivision 1 – Principles that apply to duties**

64. This Subdivision sets out the principles that apply to all duties under the Bill, including health and safety duties in Part 2, incident notification duties in Part 3 and the duties to consult in Divisions 1 and 2 of Part 5. They also apply to the health and safety duties that apply under the regulations.

#### **Clause 13 – Principles that apply to duties**

#### **Clause 14 – Duties not transferable**

#### **Clause 15 – Person may have more than one duty**

#### **Clause 16 – More than one person can have a duty**

65. These clauses provide that duties under the Bill are non-transferable. A person can have more than one duty and more than one person can concurrently have the same duty.

66. Subclause 16(2) provides that each duty holder must comply with that duty to the required standard even if another duty holder has the same duty. If duties are held concurrently, then each person retains responsibility for their duty in relation to the matter and must discharge the duty to the extent to which the person has capacity to influence or control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity (subclause 16(3)).

67. In formulating these principles, the Bill makes it clear that:

- a person with concurrently held duties retains responsibility for the duty and must ensure that the duty of care is met,
- the capacity to control applies to both ‘actual’ or ‘practical’ control
- the capacity to influence, connotes more than just mere legal capacity and extends to the practical effect the person can have on the circumstances
- where a duty holder has a very limited capacity, that factor will assist in determining what is ‘reasonably practicable’ for them in complying with their duty of care.

68. The provisions of the Bill do not permit, directly or indirectly, any duty holders to avoid their health and safety responsibilities.

69. Proper and effective coordination of activities between duty holders can overcome concerns about duplication of effort or no effort being made.

#### **Clause 17 – Management of risks**

70. Clause 17 specifies that a duty holder can ensure health and safety by managing risks, which involves:

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

#### **Subdivision 2 – What is reasonably practicable**

#### **Clause 18 – What is *reasonably practicable* in ensuring health and safety**

71. The standard of ‘reasonably practicable’ has been generally accepted for many decades as an appropriate qualifier of the duties of care in most Australian jurisdictions. This qualifier is well known and has been consistently defined and interpreted by the courts.

72. 'Reasonably practicable' represents what can reasonably be done in the circumstances. Clause 18 provides meaning and guidance about what is 'reasonably practicable' when complying with duties to ensure health and safety under the Bill, regulations and codes of practice. To determine what is (or was at a particular time) reasonably practicable in relation to managing risk, a person must take into account and weigh up all relevant matters, including:
- the likelihood of the relevant hazard or risk occurring
  - the degree of harm that might result
  - what the person knows or ought reasonably to know about the hazard or risk and the ways of eliminating or minimising the risk, and
  - the availability and suitability of ways to eliminate or minimise the risk.
73. After taking into account these matters, only then can the person consider the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

### **Division 2 – Primary duty of care**

74. This Division specifies the work health and safety duties for the Bill. Generally the provisions identify the duty holder, the duty owed by them and how they must comply with the duty.
75. The changing nature of work organisation and relationships means that many who perform work activities do so under the effective direction or influence of someone other than a person employing them under an employment contract. The person carrying out the work:
- may not be in an employment relationship with any person (e.g. share farming or share fishing or as a contractor working under a contract for services), or
  - may work under the direction and requirements of a person other than their employer (as may be found in some transport arrangements with the requirements of the consignor).
76. For these reasons, the Bill provides a broader scope for the primary duty of care, to require those who control or influence the way work is done to protect the health and safety of those carrying out the work.

### **Clause 19 – Primary duty of care**

77. Clause 19 sets out the primary work health and safety duty which applies to PCBUs.
78. The PCBU has a duty to ensure, so far as is reasonably practicable, the health and safety of workers that are:
- directly engaged to carry out work for their business or undertaking
  - placed with another person to carry out work for that person, or
  - influenced or directed in carrying out their work activities by the person, while the workers are at work in the business or undertaking.
79. Duties of care are imposed on duty holders because they influence one or more of the elements in the performance of work and in doing so may affect the health and safety of themselves or others. Duties of care require duty holders—in the capacity of their role and by their conduct—to ensure, so far as is reasonably practicable, the health and safety of any workers that they have the capacity to influence or direct in carrying out work.

*Primary duty of care not limited to physical 'workplaces'*

80. The primary duty of care is tied to the work activities wherever they occur and is not limited to the confines of a physical workplace.

*Duty extends to 'others'*

81. Subclause 19(2) extends whom the primary duty of care is owed to beyond the PCBU's workers to cover all other persons affected by the carrying out of work. It requires PCBUs to ensure, so far as is reasonably practicable, that the health and safety of all persons is not put at risk from work carried out as part of the business or undertaking.
82. This wording is different to that used in subclause 19(1). Unlike the duty owed to workers in subclause 19(1), the duty owed to others is not expressed as a positive duty, as it only requires that persons other than workers 'not [be] put at risk'.
83. However, the general aim of both subclauses 19(1) and (2) is preventative and both require the primary duty of care to be discharged by managing risks (see clause 17).

*Specific elements of the primary duty*

84. Subclause 19(3) outlines the key things a person must do in order to satisfy the primary duty of care. The list does not limit the scope of the duties in subclauses 19(1) and (2).
85. PCBUs must comply with the primary duty by ensuring, so far as is reasonably practicable, the provision of the specific matters listed in the subclause, or that the relevant steps are taken. This means that compliance activities can be undertaken by someone else, but the PCBU must actively verify that the necessary steps have been taken to meet the duty.
86. Where there are multiple duty holders in respect of the same activities, a PCBU may comply with the duty of care by ensuring that the relevant matters are attended to.
87. For example, a PCBU may not have to provide welfare facilities themselves if another PCBU is doing so. However, the PCBU must ensure that the facilities are available, accessible and adequate.

*Duty in relation to PCBU-provided accommodation*

88. Subclause 19(4) requires workers' accommodation provided by a PCBU to be maintained, so far as is reasonably practicable, so that the worker occupying the premises is not exposed to risks to health and safety. This duty only applies in relation to accommodation that is owned by or under the management or control of the PCBU, in circumstances where the occupancy is necessary for the purposes of the worker's engagement because other accommodation is not reasonably available.

*Self-employed persons*

89. Subclause 19(5) deals with the situation where a self-employed person is simultaneously both a PCBU and a worker. In that case, the self-employed person must ensure, so far as is reasonably practicable, his or her own health and safety while at work. The duties owed to others at the workplace would also apply (see subclause 19(2)).

**Division 3 – Further duties of persons conducting businesses or undertakings**

90. This Division sets out the work health and safety duties of a person conducting a business or undertaking who is involved in specific activities that may have a significant effect on work health and safety. These activities include the management or control of workplaces, fixtures, fittings and plant, as well as the design, manufacture, import, supply of plant, substances and structures used for work.
91. Designers, manufacturers, installers, constructors, importers and suppliers of plant, structures or substances can influence the safety of these products before they are used in the workplace. These people are known as 'upstream' duty holders. Upstream duty holders are required to ensure, so far as is reasonably practicable, that products are made

without risks to the health and safety of the people who use them 'downstream' in the product lifecycle. In the early phases of the lifecycle of the product, there may be greater scope to remove foreseeable hazards and incorporate risk control measures.

### **Clause 20 – Duty of persons conducting businesses or undertakings involving management or control of workplaces**

92. Clause 20 sets out the additional health and safety duties a person conducting a business or undertaking has if that business or undertaking involves, in whole or in part, the management or control of a workplace. 'Workplace' is defined in clause 8. The duty requires the person with management or control of a workplace to ensure, so far as is reasonably practicable, that the workplace and the means of entering and leaving the workplace are without risks to the health and safety of any person.
93. Paragraph 20(1)(a) excludes the application of the duty to an occupier of a residence if that residence is not occupied for the purpose of the conduct of the business or undertaking. The exclusion does not apply if the residence is partially used to conduct the business or undertaking.
94. The duties of a person who owns and controls a workplace and the duties of a person who occupies and manages that workplace differ. For example, the owner of an office building has a duty as a person who controls the operations of the building, to ensure it is without risks to the health and safety of any person. The owner is required to ensure people can enter and exit the building and that anything arising from the workplace is without risk to others. Concurrently, a tenant who manages an office premises in the building has a duty to ensure people can enter and exit those parts of the premises. For example, this could include entry into facilities for workers. A tenant also has the duty to ensure that anything arising in that office is without risks to the health and safety of any person. For example, this could include ensuring the safe maintenance of kitchen appliances.

### **Clause 21 – Duty of persons conducting businesses or undertakings involving management or control of fixtures, fittings or plant at workplaces**

95. Clause 21 sets out the additional health and safety duties a person conducting a business or undertaking has if that business or undertaking involves the management or control of fixtures, fittings or plant at a workplace. 'Plant' is defined in clause 4 and 'workplace' is defined in clause 8. The duty requires the person with management or control of fixtures, fittings or plant at a workplace to ensure, so far as is reasonably practicable, that those things are without risks to health and safety of any person.
96. For example, a person who manages or controls workplace fixtures, fittings or plant has a duty to ensure, so far as reasonably practicable, that torn carpets are repaired or replaced in that workplace to eliminate or if that is not reasonably practicable, minimise the risk of tripping or falling.
97. Paragraph 21(1)(a) excludes the application of the duty to an occupier of a residence if that residence is not occupied for the purpose of conducting a business or undertaking. The exclusion does not apply if the residence is partially used to conduct the business or undertaking.

### **Clause 22 – Duties of persons conducting businesses or undertakings that design plant, substances or structures**

98. Clause 22 sets out the additional health and safety duties a person conducting a business or undertaking has if that business or undertaking involves designing plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures this duty also applies if these things are used or to be used as a workplace.

99. For example, the designer of call centre workstations must ensure, so far as reasonably practicable, that the workstations are designed without risks to the health and safety of the persons who use, construct, manufacture, install, assemble, demolish or dispose of the workstations. This would include designing workstations to be adjustable and supportive of ergonomic needs.
100. Designers of structures have a duty to ensure, as far as is reasonably practicable, that the design does not create health and safety risks for those who construct the structure, as well as those who will later work in it.
101. The duty is for the designer to ensure, so far as is reasonably practicable that the plant, substance or structure is without risks to the health and safety of the persons listed in paragraphs (2)(a)–(f). The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose listed in paragraph (2)(e), such as storage, decommissioning, dismantling, demolition or disposal.
102. Subclauses 22(3)–(5) outline further matters that a designer must do in order to satisfy the duty including ensuring the carrying out of testing and the provision of information. Subclause 22(5) limits the duty to provide current relevant information, on request, only to persons who do or will carry out one of the activities listed in paragraphs (2)(a)–(f). The type of information that must be provided is limited by subclause 22(4).
103. The duty to provide current relevant information is based on what the designer knows, or ought reasonably to know, at the time of the request in relation to their original design. If another person modifies or changes the original design of the plant or structure, this person then has the responsibility of providing information in relation to the redesign or modification, not the original designer.

### **Clause 23 – Duties of persons conducting businesses or undertakings that manufacture plant, substances or structures**

104. Clause 23 sets out the duties for a PCBU who manufactures plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures these duties also apply if these things are used or are to be used as a workplace.
105. The duty is for the manufacturer to ensure, so far as is reasonably practicable that the plant, substance or structure is without risks to the health and safety of the persons listed in paragraphs (2)(a)–(f). The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose listed in paragraph (2)(e), such as assembly, storage, decommissioning, dismantling, demolition or disposal.
106. For example, a manufacturer of a commercial cleaning substance must ensure, so far as reasonably practicable, that the substance is without risks to the health and safety of the persons who handle, store and use the substance at a workplace. This may involve ensuring the substance is packaged to reduce the risk of spills and that the container is correctly labelled with appropriate warnings and a Safety Data Sheet is prepared for safe use.
107. Subclauses 23(3)–(5) outline further matters that a manufacturer must do in order to satisfy the duty including ensuring the carrying out of testing and the provision of information. Subclause 23(5) limits the duty to provide current relevant information, on request, only to persons who do or will carry out one of the activities listed in paragraphs (2)(a)–(f). The type of information that must be provided is limited by subclause 23(4).

**Clause 24 – Duties of persons conducting businesses or undertakings that import plant, substances or structures**

108. Clause 24 sets out the duties for a PCBU who imports plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures these duties also apply if these things are used or to be used as a workplace.
109. The duty is for the importer to ensure, so far as is reasonably practicable that the plant, substance or structure is without risks to the health and safety of the persons listed in paragraphs (2)(a)–(f). The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as in carrying out other reasonably foreseeable activities related to the intended purpose listed in paragraph (2)(e), such as storage, decommissioning, dismantling, demolition or disposal.
110. For example, a person who imports machinery must ensure, so far as reasonably practicable, that the imported product is without risks to the health and safety of the persons who assemble, use, maintain, decommission or dispose the machinery at a workplace. This would involve ensuring the machinery is designed and manufactured to meet relevant safety standards.
111. Subclauses 24(3)–(5) outline further matters that a importer must do in order to satisfy the duty including ensuring the carrying out of testing and the provision of information. Subclause 24(5) limits the duty to provide current relevant information, on request, only to persons who do or will carry out one of the activities listed in paragraphs (2)(a)–(f). The type of information that must be provided is limited by subclause 24(4).

**Clause 25 – Duties of persons conducting businesses or undertakings that supply plant, substance or structures**

112. Clause 25 sets out the duties for a PCBU which supplies plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures these duties also apply if these things are used or to be used as a workplace.
113. The duty is for the supplier to ensure, so far as is reasonably practicable that the plant, substance or structure is without risks to the health and safety of the persons listed in paragraphs (2)(a)–(f). The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose listed in paragraph (2)(e), such as storage, decommissioning, dismantling, demolition or disposal.
114. Subclauses 25(3)–(5) outline further matters that a supplier must do in order to satisfy the duty including ensuring the carrying out of testing and the provision of information. Subclause 25(5) limits the duty to provide current relevant information, on request, only to persons who do or will carry out one of the activities listed in paragraphs (2)(a)–(f). The type of information that must be provided is limited by subclause 25(4).
115. For example, a person who supplies chemicals to a workplace must ensure that the chemicals are properly labelled and packaged and that current Safety Data Sheets are provided at the time of supply.



**Clause 26 – Duty of persons conducting businesses or undertakings that install, construct or commission plant or structures**

116. This clause sets out the duty of a PCBU who installs, constructs or commissions plant or substances.
117. The duty on that person is to ensure, so far as reasonably practicable, that the plant or structure is installed, constructed or commissioned in a way that does not pose a risk to the health and safety of persons listed in paragraphs (2)(a)–(d).
118. For example, a person who installs neon business signs must ensure, so far as reasonably practicable, that they are installed without risks to the health and safety of themselves as well as people who will use, decommission, dismantle and work within the vicinity of the sign. This would involve ensuring the equipment is correctly installed, connected and grounded.

**Division 4 – Officers, workers and other persons**

119. This Division sets out the work health and safety duties owed by ‘officers’ of bodies, workers and other persons at workplaces.

**Clause 27 – Duty of officers**

120. Clause 27 casts a positive duty on officers (as defined in clause 4) of a PCBU to exercise ‘due diligence’ to ensure that the PCBU complies with any duty or obligation under the Bill.
121. Subclause 27(2) applies if officers fail to exercise due diligence to ensure that the PCBU complies with its health and safety duties under Part 2. Maximum penalties for these offences by officers are specified in clauses 31–33.
122. Subclause 27(3) sets the maximum penalties if an officer fails to exercise due diligence to ensure the PCBU complies with other duties and obligations under the Bill. In that case, the maximum penalty is the penalty that would apply to individuals for failing to comply with the relevant duty or obligation.
123. Subclause 27(4) clarifies that an officer may be convicted or found guilty whether or not the PCBU was convicted or found guilty of an offence under the Bill.
124. These provisions reflect a deliberate policy shift away from applying ‘accessorial’ or ‘attributed’ liability to officers, which is an approach currently adopted by several jurisdictions. The positive duty requires officers to be proactive and means that officers owe a continuous duty to ensure compliance with duties and obligations under the Bill. There is no need to tie an officer’s failure to any failure or breach of the relevant PCBU for the officer to be prosecuted under this clause.
125. Importantly, this change helps to clarify the steps that an officer must take to comply with the duty under this clause.
126. Subclause 27(5) contains a non-exhaustive list of steps an officer must take to discharge their duties under this provision, including acquiring and keeping up-to-date knowledge of work health and safety matters and ensuring the PCBU has, and implements, processes for complying with any duty or obligation the PCBU has under the Bill.
127. An officer must have high, yet attainable, standards of due diligence. These standards should relate to the position and influence of the officer within the PCBU.
128. What is required of an officer should be directly related to the influential nature of their position. This is because the officer governs the PCBU and makes decisions for management. A high standard requires persistent examination and care, to ensure that the resources and systems of the PCBU are adequate to comply with the duty of care required by the PCBU. This also requires ensuring that they are performing effectively.

Where the officer relies on the expertise of a manager or other person, that expertise must be verified and the reliance must be reasonable.

#### **Clause 28 – Duties of workers**

129. Clause 28 sets out the health and safety duties of workers. Workers have a duty to take reasonable care for their own health and safety while at work and also to take reasonable care so that their acts or omissions do not adversely affect the health and safety of other persons at the workplace.
130. The duty of care, being subject to a consideration of what is reasonable, is necessarily proportionate to the control a worker is able to exercise over his or her work activities and work environment.
131. Paragraph 28(c) makes it clear that workers must comply so far as they are able with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the Bill and regulations.
132. Paragraph 28(d) provides that workers must also cooperate with any reasonable policy or procedure of the PCBU relating to health or safety at the workplace that has been notified to workers.
133. Whether an instruction, policy or procedure is 'reasonable' will be a question of fact in each case. It will depend on all relevant factors, including whether the instruction, policy or procedure is lawful, whether it complies with the Bill and regulations, whether it is clear and whether affected workers are able to co-operate.

#### **Clause 29 – Duties of other persons at the workplace**

134. Clause 29 sets out the health and safety duties applicable to all persons while at a workplace, whether or not those persons have another duty under Part 2 of the Bill. This includes customers and visitors to a workplace.
135. Similar to the duties of workers, all other persons at a workplace must take reasonable care for their own safety at the workplace and take reasonable care that their acts or omissions do not adversely affect the health and safety of others at the workplace.
136. Other persons at a workplace must also comply, so far as they are reasonably able to, with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the Bill.

#### **Division 5 – Offences and penalties**

137. This Division sets out the offences framework in relation to breaches of health and safety duties under the Bill.
138. Contraventions of the Bill and regulations are generally criminal offences, although a civil penalty regime applies in relation to right of entry under Part 7. This generally reflects the community's view that any person who has a work-related duty of care but does not observe it should be liable to a criminal sanction for placing another person's health and safety at risk. Such an approach is also in line with international practice.
139. The Bill provides for three categories of offences against health and safety duties. Category 1 offences are for breach of health and safety duties that involve reckless conduct and carry the highest maximum penalty under the Bill.

##### *Penalties under the Bill*

140. There is a considerable disparity in the maximum fines and periods of imprisonment that can be imposed under current Australian work health and safety laws.
141. Penalties and the possibility of imprisonment in the most serious cases are a key part of achieving and maintaining a credible level of deterrence to complement other types of

enforcement action, for example, the issuing of inspector notices. The maximum penalties set in the Bill reflect the level of seriousness of the offences and have been set at levels high enough to cover the most egregious examples of offence.

### **Clause 30 – Health and safety duty**

#### **Clause 31 – Reckless conduct—Category 1**

142. Category 1 offences are offences involving recklessness. The highest penalties under the Bill apply, including imprisonment for up to five years.
143. Category 1 offences involve reckless conduct that exposes an individual to a risk of death or serious injury or serious illness without reasonable excuse. The prosecution will be required to prove the fault element of recklessness in addition to proving the physical elements of the offence.

#### **Clause 32 – Failure to comply with health and safety duty—Category 2**

#### **Clause 33 – Failure to comply with health and safety duty—Category 3**

144. Category 2 and 3 offences involve less culpability than Category 1 offences, as there is no fault element.
145. In each offence a person is required to comply with a health and safety duty. This is the first element of the offence.
146. The second element of the offence is that the person commits an offence if the person fails to comply with the health and safety duty.
147. Category 2 offences have a third element which provides that a person would only commit an offence if the failure to comply with the work health and safety duty exposed an individual to a risk of death or serious injury or serious illness.
148. Offences without this third element would be prosecuted as Category 3 offences.

#### **Burden of proof**

149. The burden of proof (beyond reasonable doubt) rests entirely upon the prosecution in matters relating to non-compliance with duties imposed by the Act. This includes whether the defendant failed to do what was reasonably practicable to protect the health and safety of the persons to whom the duty was owed.
150. This reflects the generally accepted principle that in a criminal prosecution, the onus of proof to the standard of beyond reasonable doubt normally rests on the prosecution.

#### **Clause 34 – Exceptions**

151. Subclause 34(1) creates an exception for volunteers so that volunteers cannot be prosecuted for a failure to comply with a health and safety duty, other than as a worker or 'other' person at the workplace (see clauses 28 and 29).
152. Subclause 34(2) creates an exception for unincorporated associations. Although unincorporated associations may be PCBUs for the purposes of the Bill, their failure to comply with a duty or obligation under the Bill does not constitute an offence and cannot attract a civil penalty. Instead, subclause 34(3) makes it clear that liability may rest with either an officer of the unincorporated association (other than a volunteer) under clause 27 (subject to the exception above), or a member of the association under clause 28 or 29.

### **Part 3 – Incident notification**

153. All Australian work health and safety laws currently require all workplace deaths and certain workplace incidents, injuries and illnesses to be reported to a relevant authority. Most laws also require workplace incident sites to be preserved by the relevant person.
154. The primary purpose of incident notification is to enable the regulator to investigate serious incidents and potential work health and safety contraventions in a timely manner.
155. The duty to report incidents in clause 38 is linked to the duty to preserve an incident site until an inspector arrives or otherwise directs so that evidence is not compromised.

#### **Clause 35 – What is a *notifiable incident***

156. Clause 35 defines the kinds of workplace incidents that must be notified to the regulator and that also require the incident site to be preserved. A ‘notifiable incident’ is an incident involving the death of a person, ‘serious injury or illness’ of a person or a ‘dangerous incident’.

#### **Clause 36 – What is a *serious injury or illness***

157. Clause 36 defines a ‘serious injury or illness’ as an injury or illness requiring a person to have treatment of a kind specified in paragraphs (a)–(d), including: immediate treatment as an in-patient in a hospital; immediate treatment for a serious injury of a kind listed in paragraph (b); or medical treatment within 48 hours of exposure to a substance at a workplace. The regulations may prescribe additional injuries or illnesses for this purpose, and may also prescribe exceptions to the list in this clause.
158. The test is an objective one and it does not matter whether a person actually received the treatment referred to in the provision. The test is whether the injury or illness could reasonably be considered to warrant such treatment.

#### **Clause 37 – What is a *dangerous incident***

159. Clause 37 defines a ‘dangerous incident’ in relation to a workplace as one that exposes a person to serious risk to their health or safety arising from an immediate or imminent exposure to the matters listed in paragraphs 37(a)–(l). These matters include an uncontrolled escape, spillage or leakage of a substance, an uncontrolled implosion, explosion or fire and an uncontrolled escape of gas or steam.
160. Clause 37 enables regulations to be made that add events to this list and also exclude incidents from being dangerous incidents.

#### **Clause 38 – Duty to notify of notifiable incidents**

161. This clause specifies who must notify the regulator of a notifiable incident and when and how this must be done.
162. Subclause 38(1) requires the PCBU to ensure that the regulator is notified immediately after becoming aware that a ‘notifiable incident’ arising out of the conduct of the business or undertaking has occurred. The requirement for ‘immediate’ notification would not however prevent a person from assisting an injured person or taking steps that were essential to making the site safe or from minimising the risk of a further notifiable incident (see subclause 39(3)).
163. Failure to notify is an offence.
164. Subclause 38(2) requires the notice to be given by the fastest possible means.
165. Subclause 38(3) requires the notice to be given by telephone or in writing. A legislative note advises that written notice can be given by facsimile, email and other electronic means.

166. Notification by telephone must include details requested by the regulator and may require the person to notify the regulator in writing within 48 hours (subclause 38(4)). If the person notifying the regulator is not required to provide a written notice, the regulator must give the relevant PCBU details of the information received or an acknowledgement of receiving the notice (subclause 38(6)).
167. Written notice must be in a form, or contain the details, approved by the regulator (subclause 38(5)).
168. Subclause 38(7) requires the PCBU to keep a record of each notifiable incident for five years from the date that notice is given to the regulator. Failure to do so is an offence.

#### **Clause 39 – Duty to preserve incident sites**

169. Subclause 39(1) requires the person with management or control of a workplace where a notifiable incident has occurred to take reasonable steps to ensure that the incident site is preserved until an inspector arrives or until such earlier time as directed by an inspector. Failure to do so is an offence.
170. Subclause 39(2) clarifies that this requirement may include preserving any plant, substance, structure or thing associated with the incident.
171. Subclause 39(3) sets out the kinds of things that can still be done to ensure work health and safety at the site, including assisting an injured person or securing the site to make it safe.
172. Paragraph 39(3)(e) allows inspectors or the regulator to give directions about the things that can be done.

Superseded

#### **Part 4 – Authorisations**

173. This Part establishes the offences framework for authorisations that will be required under the model WHS Regulations (e.g. licences for high-risk work).
174. Authorisations such as licences, permits and registrations are a regulatory tool to control activities that are of such high risk as to require demonstrated competency or a specific standard of safety.
175. Authorisation systems place costs on duty holders as well as on regulators and so the level of authorisation is intended to be proportionate to the risk, with a defined and achievable safety benefit.
176. Because authorisations are issued to control high risk activities, it is the Bill rather than the regulations that includes the relevant offence provisions.

#### **Clause 40 – Meaning of *authorised***

177. Clause 40 clarifies that the term ‘authorised’ means authorised by a licence, permit, registration or other authority (however described) that is required by regulation.
178. It is intended to capture all kinds of authorisations that are required:
- before work can be carried out by a person (e.g. high-risk work)
  - for work to be carried out at a particular place (e.g. major hazard facility), or
  - before certain plant or substances can be used at a workplace.
179. It is not intended to cover notifications to the regulator that do not affect whether work can be carried out lawfully. However the regulations could require such notifications to be made outside the framework provided for under this Part.

#### **Clause 41 – Requirements for authorisation of workplaces**

180. The regulations may require certain kinds of workplaces to be authorised (e.g. major hazard facilities).
181. Clause 41 makes it an offence for a person to conduct a business or undertaking at such a workplace, or allow a worker to carry out work at the workplace, if the workplace is not authorised in accordance with the regulations.

#### **Clause 42 – Requirements for authorisation of plant or substance**

182. The regulations may require certain kinds of plant or substances or their design to be authorised (e.g. high risk plant).
183. Subclause 42(1) makes it an offence for a person to use such plant or a substance if it is not authorised in accordance with the regulations. A PCBU would ‘allow’ a worker to use plant or substances in this situation if the PCBU did not take steps to prevent what they knew to be unauthorised use.
184. Subclause 42(2) makes it an offence for a PCBU to direct or allow a worker to use such plant or a substance if it is not authorised in accordance with the regulations.
185. The term ‘allowed’ is not defined but is intended to capture situations where a worker has not been expressly directed or requested to use the relevant plant or substance, but must do so in order to meet the PCBU’s requirements (e.g. to carry out a particular task).

#### **Clause 43 – Requirements for authorisation of work**

186. The regulations may require certain work, or classes of work, to be carried out only by or on behalf of a person who is authorised.



- 187. Subclause 43(1) makes it an offence for a person to carry out such work at a workplace if the appropriate authorisations are not in place as required under the regulations.
- 188. Subclause 43(2) makes it an offence for a PCBU to direct or allow a worker to carry out such work if the appropriate authorisations are not in place under the regulations.

**Clause 44 – Requirements for prescribed qualifications or experience**

- 189. The regulations may require certain kinds of work, or classes of work, to be carried out only by or under the supervision of a person who is appropriately qualified or experienced.
- 190. Subclause 44(1) makes it an offence for a person to carry out work at a workplace if these requirements are not met under the regulations.
- 191. Subclause 44(2) makes it an offence for a PCBU to direct or allow a worker to carry out work at a workplace if the relevant requirements are not met under the regulations.

**Clause 45 – Requirement to comply with conditions of authorisation`**

- 192. Clause 45 makes it an offence for a person to contravene any conditions attaching to an authorisation.

Superseded

## **Part 5 – Consultation, representation and participation**

193. This Part establishes the consultation, representation and participation mechanisms that apply under the Bill, including the duties to consult and provision for HSRs and Health and Safety Committees. Other arrangements are still a valid option, providing the duties under this Part are complied with.

### **Division 1 – Consultation, co-operation and co-ordination between duty holders**

194. Part 5 establishes comprehensive duties to consult in relation to specified work health and safety matters under the Bill. Division 1 deals with consultation between duty holders, while Division 2 deals with consultation with workers.

#### **Clause 46 – Duty to consult with other duty holders**

195. Managing work health and safety risks is more effective if duty holders exchange information on how the work should be done so that it is without risk to health and safety. Co-operating with other duty holders and co-ordinating activities is particularly important for workplaces where there are multiple PCBUs.

196. Clause 46 requires duty holders to consult, co-operate and co-ordinate activities with all other persons who have a work health and safety duty in relation to the same matter. This duty applies ‘so far as is reasonably practicable’. The phrase ‘so far as is reasonably practicable’ is not defined in this context, so its ordinary meaning will apply.

### **Division 2 – Consultation with workers**

#### **Clause 47 – Duty to consult workers**

197. Clause 47 requires PCBUs to, so far as is reasonably practicable, consult with their workers who may be directly affected by matters relating to work health or safety. Consultation must comply with the Bill and regulations, and also with any procedures agreed between the PCBU and its workers (subclause 47(2)). Agreed procedures must be consistent with requirements about the nature of consultation in clause 48.

#### *Scope of duty to consult*

198. The duty to consult is qualified by the phrase ‘so far as is reasonably practicable’. This qualification requires the level of consultation to be proportionate to the circumstances, including the significance of the workplace health or safety issue in question.

199. What is reasonably practicable will depend on the circumstances surrounding each situation. A PCBU may need to take into account the urgency of the requirement to change the work environment, plant or systems etc., and the availability of workers most directly affected or their representatives.

200. The extent of consultation that is reasonably practicable must be that which will ensure that the relevant PCBU has all relevant available information, including the views of workers and can therefore make a properly informed decision. More serious health or safety matters will generally attract more extensive consultation requirements.

201. The consultation should also ensure that the workers are aware of the reasons for decisions made by the PCBU—and even if they do not agree with the decisions—can understand them. This will make compliance with systems of work, including the use of protective devices or equipment provided, more likely to occur and be effective.



**Clause 48 – Nature of consultation**

202. Subclause 48(1) establishes the requirements for meaningful consultation. It requires PCBUs to: share relevant information about work health or safety matters (listed in clause 49) with their workers; give workers a reasonable opportunity to express their views; and contribute to the decision processes relating to those matters. It also requires PCBUs to take workers' views into account and advise workers of relevant outcomes in a timely manner.
203. Subclause 48(2) provides that consultation must involve any HSR that represents the workers.
204. Consulting with HSRs alone may be sufficient to meet the consultation duty, depending on the work health or safety issue in question.

**Clause 49 – When consultation is required**

205. Clause 49 sets out the kinds of work health and safety matters that must be consulted on under this Division, including at each stage of the risk management process. Additional matters requiring consultation under this Division may be prescribed by the regulations.

**Division 3 – Health and safety representatives**

206. There is considerable evidence that the effective participation of workers and the representation of their interests in work health and safety are crucial elements in improving health and safety performance at the workplace. Under the Bill this representation occurs in part through HSRs who are elected by workers to represent them in relation to health and safety matters at work.
207. This Division provides for the election, functions and powers and entitlements of HSRs and their deputies under the Bill.

**Subdivision 1 – Request for election of health and safety representatives**

208. This Subdivision sets out the process for electing HSRs for workers. The number of HSRs to be elected at a workplace is not limited by the Bill but is instead determined following discussions between workers who wish to be represented and the PCBU for whom they carry out work.

**Clause 50 – Request for election of health and safety representative**

209. The process for electing HSRs is initiated by a worker's request.
210. Clause 50 provides that a worker may ask a PCBU for whom they carry out work to facilitate elections for one or more HSRs.
211. This clause does not require the request to be in any particular form. The worker's request will trigger the PCBU's obligation to facilitate the determination of one or more work groups providing the worker's request is sufficiently clear.
212. A PCBU is required to facilitate the election of HSRs. Facilitating the election process requires a PCBU to adopt a supportive role during the election process rather than a directive one (see subclause 52(1) below for more information).

**Subdivision 2 – Determination of work groups**

213. This Subdivision sets out the process for determining work groups under the Bill.

**Clause 51 – Determination of work groups**

214. Clause 51 establishes the PCBU's obligation to facilitate the determination of one or more work groups, following a request under clause 50.
215. Subclause 51(2) clarifies that the purpose of dividing workers into work groups is to facilitate representation by HSRs in relation to work health and safety matters.

216. The legislation does not otherwise limit the determination of work groups, although the regulations may prescribe the matters that must be taken into account (subclause 52(5)).

217. Clause 51(3) clarifies that a work group may span one or more physical workplaces.

#### **Clause 52 – Negotiations for agreement for work group**

218. Clause 52 sets some parameters around negotiations for work groups.

219. Subclause 52(1) provides that work groups are negotiated and agreed between the relevant parties. That is, the PCBU and the workers who are proposed to form the work group or their representatives. A worker's representative could be a union delegate or official, or any other person the worker authorises to represent them (see the definition of 'representative' in clause 4).

220. Subclause 52(2) requires the relevant PCBU to take all reasonable steps to commence negotiations to determine work groups within 14 days after a request is made under clause 50.

221. Subclause 52(3) sets out the matters that are to be determined by negotiation, including the number and composition of work groups and the number of HSRs and deputy HSRs (if any) to be elected to represent them.

222. Subclause 52(4) provides that any party involved with determining an agreement for a work group or work groups, can negotiate a variation to that agreement at any time.

223. Subclause 52(5) prohibits the PCBU from, if asked by a worker, refusing to negotiate with the worker's representative or excluding the representative from negotiations. This includes negotiations for a variation of a work group agreement. A breach of these requirements is an offence.

224. This provision does not require the PCBU to reach agreement but requires the PCBU to genuinely try to negotiate with representatives.

225. Subclause 52(6) allows the regulations to prescribe the matters that must be taken into account in negotiations for and variation of agreements concerning work groups.

#### **Clause 53 – Notice to workers**

226. Subclause 53(1) requires the PCBU to notify workers of the outcome of negotiations and determination of any work groups, as soon as practicable after the negotiations are completed. Failure to notify is an offence.

227. Subclause 53(2) requires a PCBU who is negotiating to vary an agreement for the determination of a work group or work groups to notify workers of the outcome of those negotiations (if any) as soon as it is practicable after negotiations are complete. Failure to notify workers is an offence.

**Clause 54 – Failure of negotiations**

228. Clause 54 sets out the process for determining work groups if negotiations under clause 52 fail.
229. Negotiations are taken to have failed if, after 14 days of a request being made under clause 50 or if a party to the agreement requests a variation to an agreement, the PCBU has failed to take all reasonable steps to commence negotiations. Negotiations are also considered to have failed if an agreement cannot be reached on a relevant matter or variation to an agreement within a reasonable time after negotiations commence (subclause 54(3)).
230. Subclause 54(1) allows any person who is, or would be, a party to the negotiations to ask the regulator to appoint an inspector to decide the matter. This includes negotiations for a variation of a work group agreement.
231. Subclause 54(2) empowers the inspector to decide on the relevant matters (referred to in subclause 52(3) or any matter that is the subject of the proposed variation (as the case requires)) or to decide that work groups should not be established or that the agreement should not be varied (as the case requires). In exercising this discretion, the inspector must have regard to the relevant parts of the Bill, including the objects of the Part and the Bill overall.
232. Subclause 54(4) provides that the inspector's decision is taken to be an agreement under clause 52. This means that that the inspector's decision operates for all purposes as if it had been agreed between the relevant parties.

**Subdivision 3 – Multiple-business work groups**

233. This Subdivision provides a process for establishing and varying multiple-business work groups, that is work groups that span the businesses or undertakings of two or more persons. Unlike single-PCBU work groups, multiple-business work groups can only be determined by agreement between the relevant parties.

**Clause 55 – Determination of work groups of multiple businesses**

234. Clause 55 allows work groups to be determined in relation to two or more PCBUs (multiple-business work groups).
235. Subclause 55(2) requires multiple-business work groups to be determined by negotiation and agreement between the relevant parties (e.g. each of the PCBUs and the workers proposed to be included in the work groups).
236. Subclause 55(3) provides that any party involved with determining an agreement for a work group or work groups, can negotiate a variation to that agreement at any time.
237. Subclause 55(4) clarifies that the determination of multiple-business work groups would not affect pre-existing work groups or prevent the formation of additional work groups under Subdivision 2.

**Clause 56 – Negotiation of agreement for work groups of multiple businesses**

238. Subclause 56(1) limits negotiations for multiple-business work groups to the matters listed in paragraphs (a)–(d), including the number and composition of work groups and the number of HSRs and deputy HSRs (if any) for each work group.
239. Subclause 56(2) establishes representation rights for relevant workers, which mirror the rights explained in relation to subclause 52(4) above. A breach of these requirements is an offence.

240. Subclause 56(3) allows an inspector to assist negotiations, if agreement cannot be reached on a relevant matter within a reasonable time after negotiations have commenced.
241. Subclause 56(4) allows the regulations to prescribe the matters that must be taken into account in negotiations for (and variations of) agreements.

#### **Clause 57 – Notice to workers**

242. Subclause 57(1) sets out the matters that must be notified upon the completion of negotiations, that is the outcome of negotiations and determination of any work groups. A breach of these requirements is an offence.
243. Subclause 57(2) requires a PCBU who is negotiating to vary an agreement for the determination of a work group or work groups to notify workers of the outcome of those negotiations and variations (if any) as soon as it is practicable after negotiations are complete. Failure to notify workers is an offence. Failure to do so is an offence.

#### **Clause 58 – Withdrawal from negotiations or agreement involving multiple employers**

244. Clause 58 establishes a process that allows a party to withdraw from negotiations for multiple-employer work groups and also to withdraw from an agreement made under this Subdivision. This process is necessary as multiple-employer work groups are voluntary and are only available by agreement between all relevant parties.
245. Withdrawal by one party to an agreement (involving three or more PCBUs) would trigger the need to negotiate a variation to the agreement (in accordance with clause 56), but would not otherwise affect the validity of the agreement for other parties in the meantime (subclause 58(2)).

#### **Clause 59 – Effect of Subdivision on other arrangements**

246. Clause 59 clarifies that alternative representative arrangements can always be made between two or more PCBUs and their workers, provided that the PCBUs comply with this Subdivision.

#### **Subdivision 4 – Election of health and safety representatives**

247. This Subdivision sets out the procedures for electing HSRs.

#### **Clause 60 – Eligibility to be elected**

248. Clause 60 sets out the eligibility rules for HSRs.
249. Clause 60 provides that a worker is eligible to be elected as HSR for a work group if they are a member of that work group and they are not disqualified under clause 65.

#### **Clause 61 – Procedure for election of health and safety representatives**

250. Clause 61 sets out the procedure for the election of HSRs.
251. The procedures for the election of HSRs are determined by the workers in the work group for which elections are being held. The regulations may prescribe minimum requirements for the conduct of elections (subclause 61(1)–(2)).
252. Subclause 61(3) allows elections to be conducted with the assistance of a union or other person or organisation, provided that a majority of affected workers agree. The Australian Electoral Commission is an example of an 'other organisation'.
253. Subclause 61(4) requires the relevant PCBU to provide any resources, facilities and assistance that are reasonably necessary or are prescribed by the regulations to enable elections to be conducted. Failure to do so is an offence.

**Clause 62 – Eligibility to vote**

254. Clause 62 provides that the members of a work group are responsible for electing the HSR or HSRs for that work group and are therefore entitled to vote in the elections conducted for that work group.

**Clause 63 – When election not required**

255. Clause 63 sets out the circumstances in which an election is not required.

256. An election is not required if the number of candidates for HSR equals the number of vacancies for that position and the number of candidates for deputy HSR equals the number of vacancies for that position.

**Clause 64 – Term of office of health and safety representative**

257. Subclause 64(1) provides that an HSR holds office for a maximum term of three years, although that may be shortened upon:

- the person's resignation from office in writing to the PCBU (paragraph 64(2)(a))
- the person ceasing to be part of the work group they represent (paragraph 64(2)(b))
- the person being disqualified under clause 65 (paragraph 64(2)(c)), or
- the person being removed from office by a majority of the work group they represent in accordance with the regulations (paragraph 64(2)(d)).

258. Subclause 67(3) clarifies that an HSR is eligible for re-election, unless they are disqualified under clause 65 (see paragraph 60(b)).

**Clause 65 – Disqualification of health and safety representatives**

259. Clause 65 sets out a process for disqualifying HSRs from office for:

- performing a function or exercising a power under the Bill for an improper purpose, or
- using or disclosing any information acquired as an HSR for a purpose unconnected with their role as a HSR.

260. The regulator or any person who has been adversely affected by these actions may apply to the relevant court to have the HSR disqualified from office.

**Clause 66 – Immunity of health and safety representatives**

261. Clause 66 confers immunity on HSRs so they cannot be personally sued for anything done or omitted to be done in good faith while exercising a power or performing a function under the Bill, or in the reasonable belief that they were doing so.

**Clause 67 – Deputy health and safety representatives**

262. Clause 67 establishes the procedures for the election of deputy HSRs and establishes their powers and functions under the Bill.

263. Subclause 67(1) provides for deputy HSRs to be elected in the same way as HSRs (see the election procedure in clauses 60–63).

264. Deputy HSRs for a work group may only take over the powers and functions of an HSR for the work group if the HSR ceases to hold office or is unable (because of absence or any other reason) to exercise their powers or perform their functions as HSR under the Bill.

265. Paragraph 67(2)(b) makes it clear that the Bill applies to the deputy HSR accordingly. For example, this means a deputy HSR can exercise the powers and functions of the HSR and the PCBU must comply with the general obligations under clause 70.

266. Subclause 67(3) extends a number of relevant provisions so they apply equally to both HSRs and deputy HSRs. This means that provisions dealing with the term of office, disqualification, immunity and training apply equally to both HSRs and deputy HSRs.

### **Subdivision 5 – Powers and functions of health and safety representatives**

267. This Subdivision sets out the powers and functions of HSRs and deputy HSRs. The powers are intended to enable HSRs to most effectively represent the interests of the members of their work group and to contribute to health and safety matters at the workplace.

### **Clause 68 – Powers and functions of health and safety representatives**

268. Clause 68 confers the necessary powers and functions on HSRs to enable them to fulfil their representative role under the Bill. Clause 67 sets out the circumstances in which a deputy HSR may take over the powers and functions of the HSR under this clause.
269. Subclause 68(1) sets out HSRs' general powers and functions, while subclause 68(2) clarifies the specific powers of HSRs without limiting the general powers in subclause (1).
270. The primary function of HSRs is to represent workers in their work group in relation to health and safety matters at work (paragraph 68(1)(a)). As part of that function, HSRs may monitor the PCBU's compliance with the Bill in relation to their work group members (paragraph 68(1)(b)), investigate complaints from work group members about work health and safety matters (paragraph 68(1)(c)) and inquire into anything that appears to be a risk to the health or safety of work group members, arising from the conduct of the business or undertaking (paragraph 68(1)(d)).
271. These powers are generally exercisable in relation to the HSR's work group members, subject to clause 69.
272. Subclause 68(2) sets out the specific powers of HSRs, which are intended to reinforce their representative role under the Bill.
273. Paragraph 68(2)(a) allows HSRs to inspect the place where any work group member carries out work for the relevant PCBU:
- at any time after giving reasonable notice to the person conducting the business or undertaking at that workplace, and
  - at any time without notice in the event of an incident or any situation involving a serious risk to a person's health or safety arising from an immediate or imminent exposure to a hazard.
274. Paragraph 68(2)(b) entitles an HSR to accompany an inspector during an inspection of the workplace at which a work group member carries out work.
275. Paragraph 68(2)(c) entitles an HSR to be present at an interview concerning work health and safety between a worker who is a work group member and either an inspector, the PCBU at the workplace or the PCBU's representative. This entitlement only applies if the HSR has the consent of the worker being interviewed.
276. Paragraph 68(2)(d) entitles an HSR to be present at an interview concerning work health and safety between a group of workers and either an inspector, the PCBU at the workplace or the person's representative. This entitlement only applies if the HSR has the consent of at least one of their members being interviewed and regardless of whether non-work group members are present (or even object to the HSR's involvement).
277. Paragraph 68(2)(e) allows HSRs to request the establishment of a health and safety committee.

278. Paragraph 68(2)(f) entitles HSRs to receive information about the work health and safety of their work group members. However, there is no entitlement to access any personal or medical information about a worker without their consent, unless the information is in a form that does not identify the worker or that could not reasonably be expected to lead to the identification of the worker (subclause 68(3)).
279. Paragraph 68(2)(g) allows HSRs to have a person provide assistance to them in performing in their role as a HSR.
280. Subclause 68(3A) requires a HSR to notify the PCBU and the person with management or control of the workplace of the proposed entry of a person providing assistance to them in their role as a HSR. The notice must be given during the usual working hours at the workplace and be given at least 24 hours, but not more than 14 days, before the proposed entry of the assistant (subclause 68(3B)).
281. Subclause 68(4) makes it clear that the Bill does not impose a duty on HSRs to exercise any of these powers or perform any of these functions at any point in time. The HSR's functions and powers are exercisable entirely at the discretion of the HSR.

#### **Clause 69 – Powers and functions generally limited to the particular work group**

282. HSRs' and deputy HSRs' powers and functions under the Bill are generally limited to work health and safety matters that affect or may affect their work group members (subclause 69(1)).
283. However, an HSR may exercise powers and functions under the Bill in relation to another work group for the relevant PCBU if the HSR (and any deputy HSR) for that work group is found, after reasonable inquiry, to be unavailable and (subclause 69(2)):
- there is a serious risk to the health or safety emanating from an immediate or imminent exposure to a hazard that affects or may affect a member for the work group, or
  - a member of the work group asks for the HSR's assistance.
284. What constitutes 'reasonable inquiry' will depend on all the circumstances of the case and especially the seriousness of the risk to health or safety in question.

#### **Subdivision 6 – Obligations of person conducting business or undertaking to health and safety representatives**

285. This Subdivision sets out the obligations of PCBUs to support HSRs in their representative role, including the obligation to have HSRs trained upon request. The course of training that the HSR will be entitled to attend will be prescribed by the regulations.

#### **Clause 70 – General obligations of person conducting business or undertaking**

286. Clause 70 sets out the general obligations of PCBUs, many of which reflect the corresponding entitlements in clause 68, which establishes HSRs' powers and functions. These obligations will also apply in relation to deputy HSRs while they exercise the powers of HSRs (see subclause 67(2)).
287. It is an offence for a PCBU to fail to comply or refuse to comply with any of these obligations. PCBUs are required to:
- consult so far as is reasonably practicable with their HSRs on work health and safety matters at the workplace (paragraph 70(1)(a))
  - confer with HSRs, whenever reasonably requested by the HSR, for the purpose of ensuring the health and safety of their work group members (paragraph 70(1)(b))
  - give HSRs access to the information they are entitled to have, consistent with paragraph 68(2)(f) and subclause 68(3) (paragraph 70(1)(c) read together with subclause 70(1))

- allow their HSRs to attend the kinds of interviews they are entitled to attend under subclause 68(2)(c) (paragraphs 70(1)(d) and (e))
  - provide their HSRs with any resources, facilities and assistance that are reasonably necessary or prescribed by the regulations to enable the HSR to exercise their powers and perform their functions under the Bill (paragraph 70(1)(f))
  - allow persons assisting their HSRs (under subclause 68(2)(g)) to have access to the workplace if that is necessary to provide assistance (paragraph 70(1)(g)), but only if notice is given under subclause 68(3A), and
  - allow their HSRs to accompany an inspector during an inspection of any part of the workplace where the HSR's work group members work (paragraph 70(1)(h)).
288. Paragraph 70(1)(i) allows the regulations to prescribe further assistance that may be required to enable HSRs to fulfil their representative role.
289. HSRs must be given such time as is reasonably necessary (e.g. during work hours) to exercise their powers and perform their functions under the Bill (subclause 70(2)). Any time an HSR spends exercising their powers and performing their functions at work must be paid time, paid at the rate that the HSR would receive had they not been exercising their powers or performing their functions (subclause 70(3)). Any underpayment of wages may be recovered under the applicable industrial laws.

#### **Clause 71 – Exceptions from obligations under section 70(1)**

290. Clause 71 qualifies some of the PCBU's obligations under subclause 70(1).
291. Subclause 71(2) ensures that the personal or medical information HSRs receive under paragraph 70(1)(c) excludes any information that identifies individual workers, or could reasonably be expected to identify individual workers. It would be an offence for a PCBU to release such information to an HSR.
292. Subclause 71(3) clarifies that PCBUs are not required to provide any financial assistance to help pay for HSRs' assistants that are referred to in paragraph 70(1)(g).
293. Subclause 71(4) applies in relation to certain assistants to HSRs who are or who have been WHS entry permit holders. PCBUs may refuse access to such persons if they have had their WHS entry permit revoked, or during any period that the person's WHS entry permit is suspended or the assistant is disqualified from holding a WHS permit.
294. Subclause 71(5) allows PCBUs to refuse a HSR's assistant access to a workplace on 'reasonable grounds'. 'Reasonable grounds' are not defined, but it is intended that access could be refused, for example, if the assistant had previously intentionally and unreasonably delayed, hindered or obstructed any person, disrupted any work at a workplace or otherwise acted in an improper matter.
295. Subclause 71(5A) deems a PCBU's refusal to allow a HSR's assistant access to a workplace because the HSR failed to give notice under subclause 68(3A) to be a refusal on reasonable grounds under subclause 71(5).
296. Subclause 71(6) allows an inspector to assist in any dispute over an assistant's proposed entry, upon the HSR's request. In this situation, an inspector could provide advice or recommendations in relation to the dispute or exercise his or her compliance powers under the Bill. This provision is not intended to limit inspectors' compliance powers in any way.

#### **Clause 72 – Obligation to train health and safety representatives**

297. Clause 72 sets out PCBUs' obligations to train their HSRs and deputy HSRs (see subclause 67(3)). This clause establishes the entitlement to HSR training, which is available to HSRs and deputy HSRs upon request to their PCBU (subclause 72(1)).



298. The entitlement allows the HSR or deputy HSR to attend an HSR training course that has been approved by the regulator (paragraph 72(1)(a)) and that the HSR is entitled under the regulations to attend (paragraph 72(1)(b)).
299. An HSR or deputy HSR is also entitled to attend the course of their choice (e.g. in terms of when and where they propose to attend the course), although the course must be chosen in consultation with the PCBU. If the parties are unable to agree, subclauses 72(5)–(7) will apply.
300. Subclause 72 requires the PCBU to give the HSR or deputy HSR time off work to attend the agreed course of training as soon as practicable within three months of the request being made. The PCBU is also required to pay the course fees and any other reasonable costs associated with the HSR's or deputy HSR's attendance at the course of training.
301. Paragraph 72(3)(b) applies to multi-business work groups and provides that only one of the PCBUs needs to comply with this clause.
302. Subclause 72(4) provides that any time an HSR or deputy HSR is given off work to attend the course of training must be paid time, paid at the rate that the HSR or deputy HSR would receive had they not been attending the course. Any underpayment of wages may be recovered under the applicable industrial laws.
303. Subclauses 72(5)–(7) establish a procedure for resolving a disagreement if an agreement cannot be reached—as soon as practicable within the period of three months—on the course the HSR or deputy HSR is to attend or the reasonable costs of attendance that will be met by the relevant PCBU. In that case, either party may ask the regulator to appoint an inspector to decide matters in dispute. The parties would be bound by the inspector's determination and non-compliance by the PCBU would constitute an offence.

#### **Clause 73 – Obligation to share costs if multiple businesses or undertakings**

304. Clause 73 applies where HSRs or deputy HSRs represent multiple-business work groups and provides for the sharing of costs between relevant PCBUs. In general, costs of the HSR exercising powers under the Bill and training-related costs are shared equally, although the parties may come to alternative arrangements by agreement.

#### **Clause 74 – List of health and safety representatives**

305. Clause 74 requires PCBUs to prepare and keep up-to-date lists of their HSRs and deputy HSRs (if any).
306. The lists must be displayed in a prominent place at the PCBU's principal place of business and also any other workplace that is appropriate taking into account the constitution of the work groups. PCBUs should select a prominent place to display the list that is accessible to all workers, which could be the workplace intranet.
307. Non-compliance with these provisions constitutes an offence.

#### **Division 4 – Health and safety committees**

308. This Division provides for the establishment of health and safety committees for consultative purposes under the Bill. Health and safety committees are consultative bodies that are established for workplaces under the Bill, with functions that include assisting to develop work health and safety standards, rules and procedures for the workplace (see clause 77).

#### **Clause 75 – Health and safety committees**

309. Clause 75 sets out when a PCBU must establish a health and safety committee, including on the request of one of their HSRs or five or more workers that carry out work for the PCBU at the workplace. The regulations may also require health and safety committees to be established in prescribed circumstances.

310. A health and safety committee must be established within two months after the request is made and non-compliance constitutes an offence (paragraph 75(1)(a)).
311. A health and safety committee may also be established at any time on a PCBU's own initiative (subclause 75(2)).
312. Health and safety committees will usually be established for a physical workplace at one location. However, the provisions are not intended to be restrictive and it would be possible to establish a committee for workers who carry out work for a PCBU in two or more physical workplaces (e.g. at different locations) or for those who do not have a fixed place of work.
313. Non-compliance with these provisions constitutes an offence.

#### **Clause 76 – Constitution of committee**

314. Clause 76 sets out minimum requirements for establishing and running health and safety committees. The relevant PCBU and the workers for whom the committee is being established must negotiate on how the committee will be constituted (subclause 76(1)).
315. Unless they do not wish to participate, HSRs are automatically members of a relevant workplace's committee (subclause (76(2))). If there is more than one HSR, the HSRs may agree among themselves as to who will sit on the committee (subclause 76(3)).
316. Subclause 76(4) ensures genuine worker representation by requiring at least half of the members of the committee to be workers not nominated by the relevant PCBU (subclause 76(4)).
317. Subclauses 76(5)–(7) establishes a dispute resolution procedure if the constitution of the committee cannot be agreed between all relevant parties. In that case, an inspector may decide the membership of the committee or that the committee should not be established. In exercising this discretion, the inspector must have regard to the relevant parts of the Bill including the objects of the Bill overall. Any decision on how the committee is to be constituted is then taken to be an agreement between the relevant parties.

#### **Clause 77 – Functions of committee**

318. Clause 77 establishes the functions of health and safety committees, including facilitating co-operation between the PCBU and the relevant workers in instigating, developing and carrying out measures designed to ensure work health and safety and also assisting in developing the relevant standards, rules and procedures for the workplace. Additional functions may be agreed between the health and safety committee and the PCBU or prescribed by the regulations.

#### **Clause 78 – Meetings of committee**

319. Clause 78 sets minimum requirements for the frequency of health and safety committees. Under this clause, committees must meet at least once every three months and also at any reasonable time at the request of at least half of the committee members.

#### **Clause 79 – Duties of person conducting business or undertaking**

320. Clause 79 sets out the general obligations of PCBUs in relation to their health and safety committees.
321. The PCBU must allow committee members to spend such time at work as is reasonably necessary to attend meetings of the committee or carry out functions as a committee member (subclause 79(1)).
322. Subclause 79(2) clarifies that such time must be paid time, paid at the rate that the committee member would have been entitled to receive had they not been attending meetings of the committee or exercising powers or performing their functions as a

committee member. Any underpayment of wages may be recovered under the applicable industrial laws.

323. Subclause 79(3) entitles committee members to access the information the relevant PCBU has relating to hazards and risks at the workplace and the work-related health and safety of workers at the workplace. However, there is no entitlement to access any personal or medical information about a worker without the worker's consent, unless the information is in a form that does not identify the worker or that could not reasonably be expected to lead to the identification of the worker (subclause 79(4)).
324. Failure to provide committee members with the entitlements prescribed under subclauses 79(1) and (3) constitutes an offence. It is also an offence for a PCBU to provide personal or medical information about a worker contrary to subclause 79(4).

### **Division 5 – Issue resolution**

325. This Division establishes a mandatory process for resolving work health and safety issues. It applies after a work health and safety matter is raised but not resolved to the satisfaction of any party after discussing the matter.
326. Consultation is an integral part of issue resolution and conversely, issue resolution processes may be required to deal with issues arising during consultation. The provisions for consultation are dealt with separately in Divisions 1 and 2 of this Part.

### **Clause 80 – Parties to an issue**

327. Clause 80 defines the parties to an issue, who are:
- the PCBU with whom the issue has been raised or the PCBU's representative (e.g. employer organisation)
  - any other PCBU or their representative who is involved in the issue
  - the HSRs for any of the affected workers or their representative, and
  - if there are no HSRs—the affected workers or their representative.
328. If a PCBU is represented, subclause 80(2) requires the PCBU to ensure that the representative has, for purposes of issue resolution, sufficient seniority and competence to act as the person's representative. The subclause also prohibits the PCBU from being represented by an HSR. This latter restriction is necessary because HSRs are essentially workers' representatives and representing both sides would constitute a conflict of interest.

### **Clause 81 – Resolution of health and safety issues**

329. Clause 81 establishes a process for the resolution of work health and safety issues.
330. Subclause 81(1) sets out when the issue resolution process applies, that is after the work health and safety matter remains unresolved after the matter is discussed by parties to the issue. At that point, the matter becomes a work health and safety issue that is subject to the issue resolution process under this Division.
331. Subclause 81(2) requires each party and their representative (if any) to make reasonable efforts to achieve a timely, final and effective resolution of the issue using the agreed issue resolution procedure or—if there is not one—the default procedure prescribed by the regulations.
332. Provision for default procedures in the Bill reflects the view that it is preferable that issue resolution procedures be agreed between the parties. Agreed procedures may accommodate the subtleties of the relationship between the parties, the workplace organisation and the types of hazards and risks that are likely to be the subject of issues.

333. The intention is that issues should be resolved as soon as can reasonably be achieved to avoid further dispute or a recurrence of the issue or a similar issue; that is, an issue should be resolved 'once and for all' to the extent that is possible in the circumstances.

334. Subclause 81(3) entitles each party's representative to enter the workplace for the purpose of attending discussions with a view to resolving the issue.

#### **Clause 82 – Referral of issue to regulator for resolution by inspector**

335. Clause 82 gives parties to an issue under this Division the right to ask for an inspector's assistance in resolving the issue if it remains unresolved after reasonable efforts have been made. It applies whether all parties have made reasonable efforts or at least one of the parties has made reasonable efforts to have the work health and safety issue resolved. A party's unwillingness to resolve the issue would not prevent operation of this clause.

336. Subclause 82(3) preserves the rights to cease unsafe work, or direct that unsafe work cease, under Division 6 of Part 5 when an inspector has been called in to assist with resolving a work health and safety issue under this clause.

337. Subclause 82(4) clarifies that the inspector's role is to assist in resolving the issue, which could involve the inspector providing advice or recommendations or exercising any of their compliance powers under the Bill (e.g. to issue a notice). This provision is not intended to limit inspectors' compliance powers in any way.

#### **Division 6 – Right to cease or direct cessation of unsafe work**

338. This Division covers workers' rights to cease unsafe work and establishes HSRs' power to direct that unsafe work cease. These rights have been drafted in a way that maintains consistency with provisions dealing with the cessation of unsafe work under the Fair Work Act. This is found in the exception to the definition of industrial action in section 19 of that Act.

#### **Clause 83 – Definition of cease work under this Division**

339. Clause 83 clarifies that 'ceasing work' includes ceasing or refusing to carry out work.

#### **Clause 84 – Right of worker to cease unsafe work**

340. Clause 84 sets out the right of workers to cease unsafe work. A worker has the right to cease work if:

- they have a reasonable concern that carrying out the work would expose them to a serious risk to their health or safety, and
- the serious risk emanates from an immediate or imminent exposure to a hazard.

341. This right is subject to the notification requirements in clause 86 and the worker's obligation to remain available to carry out suitable alternative work under clause 87.

#### **'Serious risk'**

342. The term 'serious risk' is not defined, but captures the recommendations of the first report (see paragraph 28.42 – 43 of that report). As the report states, this formulation has the advantage of being effective to deal with risks of diseases of long latency from immediate exposure to a hazard and circumstances of psychological threat or other similar conditions. For the right to cease work to apply, the risk (the likelihood of it occurring and the consequences if it did) would have to be considered 'serious' and emanates from an immediate or imminent exposure to a hazard.

#### **'Reasonable concern'**

343. The requirement for the worker to have a 'reasonable concern' is intended to align with equivalent provisions under the Fair Work Act.

344. For this entitlement to apply, it will not be sufficient for a worker to simply assert that their action is based on a reasonable concern about a serious and immediate or imminent risk to his or her safety. A 'reasonable concern' for health or safety can only be a concern which is both reasonably held and which provides a reasonable or rational basis for the worker's action. A concern may be reasonable if it is not fanciful, illogical or irrational.
345. It is not necessary to establish an existing serious health or safety risk to the worker. The question is whether the worker's action was based on a reasonable concern for their health or safety arising from a serious and immediate risk, rather than the existence of such a risk.

#### **Clause 85 – Health and safety representative may direct that unsafe work cease**

346. Clause 85 establishes HSRs' power to direct that unsafe work cease. In general, this power can only be used to direct workers in the HSR's own work group, unless the special circumstances in clause 69 apply. An HSR's deputy could also exercise this power in the circumstances set out in clause 67.
347. Subclause 85(1) sets out the circumstances in which an HSR may direct that unsafe work cease. Similar to clause 84, an HSR may issue the direction under this clause to a work group member if:
- they have a reasonable concern that carrying out the work would expose the work group member to a serious risk to their health or safety, and
  - the serious risk emanates from an immediate or imminent exposure to a hazard.
348. The term 'serious risk' is explained above in relation to clause 84.
349. Subclause 85(2) requires HSRs to consult with the relevant PCBU and attempt to resolve the work health or safety issue under Division 5 before giving a direction under this clause. However, these steps are not necessary if the risk is so serious and immediate or imminent that it is not reasonable to consult before giving the direction (subclause 85(3)). In that case, the consultation must be carried out as soon as possible after the direction is given (subclause 85(4)).
350. Subclause 85(5) requires a HSR to inform the PCBU of any direction to cease work that the HSR has given to workers.
351. Subclause 85(6) provides that only an appropriately trained HSR may exercise the powers under this provision, that is if the HSR has:
- completed initial HSR training as set out under the regulations, whether for the HSR's current work group or another workgroup (including a work group of another PCBU), or
  - undertaken equivalent training in another jurisdiction.

#### **Clause 86 – Worker to notify if ceases work**

352. Clause 86 requires workers who cease work under this Division (otherwise than under a direction from a HSR) to notify the relevant PCBU that they have ceased unsafe work as soon as practicable after doing so. It also requires workers to remain available to carry out 'suitable alternative work'. This would not however require workers to remain at any place that poses a serious risk to their health or safety.

#### **Clause 87 – Alternative work**

353. Clause 87 allows PCBUs to re-direct workers who have ceased unsafe work under this Division to carry out 'suitable alternative work' at the same or another workplace. The suitable alternative work must be safe and appropriate for the worker to carry out until they can resume normal duties.

**Clause 88 – Continuity of engagement of worker**

354. Clause 88 preserves workers' entitlements during any period for which work has ceased under this Division. It does not apply if the worker has failed to carry out suitable alternative work as directed under clause 87.

**Clause 89 – Request to regulator to appoint inspector to assist**

355. Clause 89 clarifies that inspectors may be called on to assist in resolving any issues arising in relation to a cessation of work.

**Division 7 – Provisional improvement notices**

356. This Division sets HSRs' powers to issue provisional improvement notices under the Bill, and related matters. Provisional improvement notices are an important part of the function performed by HSRs.

**Clause 90 – Provisional improvement notices**

357. Subclause 90(1) sets out the circumstances when an HSR may issue a provisional improvement notice, that is if the representative reasonably believes that a person:

- is contravening a provision of the Bill, or
- has contravened a provision of the Bill in circumstances that make it likely that the contravention will continue or be repeated.

358. A HSR may only exercise this power at a workplace, in relation to any work health or safety matters that affect, or may affect, workers in the HSR's work group (see subclause 69(2)). Subclause 69(2) provides that a HSR may also exercise powers and functions under the Bill in relation to another work group in some circumstances.

359. Subclause 90(2) sets out the kinds of things a provisional improvement notice may require a person to do (e.g. remedy the contravention or prevent a likely contravention from occurring).

360. Subclause 90(3) requires HSRs to consult with the person who is suspected of contravening the Act before issuing a provisional improvement notice.

361. Clause 90(4) provides that only a HSR can exercise the powers under this provision, that is if the HSR has:

- completed initial HSR training as set out under the regulations, whether for the HSR's current work group or another workgroup (including a work group of another PCBU), or
- undertaken equivalent training in another jurisdiction.

362. Subclause 90(5) relates to the situation where an inspector may have already dealt with a matter by issuing or deciding not to issue an improvement notice or prohibition notice. In that case the HSR would have no power to issue a provisional improvement notice in relation to the matter, unless the circumstances were materially different (e.g. the matter the HSR is proposing to remedy is no longer the same matter dealt with by the inspector).

**Clause 91 – Provisional improvement notice to be in writing****Clause 92 – Contents of provisional improvement notice****Clause 93 – Provisional improvement notice may give directions to remedy contravention****Clause 94 – Minor changes to provisional improvement notice****Clause 95 – Manner of issue of provisional improvement notice****Clause 96 – Health and safety representative may cancel notice**

363. Clause 91 requires provisional improvement notices to be issued in writing.
364. Clause 92 sets out the kind of information that must be contained in a provisional improvement notice. Importantly, a provisional improvement notice must specify a date for compliance, which must be at least eight days after the notice is issued. The day on which the notice is issued does not count for this purpose.
365. Clause 93 allows provisional improvement notices to recommend certain measures that may be taken to remedy the contravention, or prevent the likely contravention, that is subject of the notice. Although a PIN can recommend certain measures to remedy the contravention, a PIN can be complied with by taking alternative actions to those recommended in the PIN to remedy the contravention.
366. Subclause 93(2) makes clear that it is not an offence if a person fails to comply with recommendations in a provisional improvement notice.
367. Clause 94 enables HSRs to make minor changes to provisional improvement notices (e.g. for clarification or to correct errors or references).
368. Clause 95 requires provisional improvement notices to be served in the same way as improvement notices issued by inspectors.
369. Clause 96 allows HSRs to cancel a provisional improvement notice at any time. This must be done by giving written notice to the person to whom it was issued.

**Clause 97 – Display of provisional improvement notice**

370. Clause 97 establishes the display requirements for provisional improvement notices. It requires a person who is issued with a notice to display it in a prominent place at or near the workplace where work affected by the notice is carried out.
371. It is an offence for a person to fail to display a notice as required by this clause, or to intentionally remove, destroy, damage or deface the notice while it is in force.
372. Although not specified, it is intended that there is no requirement to display notices that are stayed under the review proceedings set out in clause 100, as they would not be considered to be 'in force' for the period of the stay.

**Clause 98 – Formal irregularities or defects in notice**

373. Clause 98 ensures that provisional improvement notices are not invalid merely because of a formal defect or an irregularity, so long as this does not cause or is not likely to cause substantial injustice.

**Clause 99 – Offence to contravene a provisional improvement notice**

374. Clause 99 makes it an offence for a person to not comply with a provisional improvement notice, unless an inspector has been called in to review the notice under clause 101. If an inspector reviews the notice, it may be confirmed with or without modifications or cancelled. If it is confirmed it is taken to be an improvement notice and may be enforced as such. However, it is not an offence if a person fails to comply with the recommendations in the notice.

**Clause 100 Request for review of provisional improvement notice****Clause 101 – Regulator to appoint inspector to review notice**

375. Clause 100 sets out a procedure for the review of provisional improvement notices by inspectors. Review may be sought within seven days after the notice has been issued by the person issued with the notice or, if that person is a worker, the PCBU for whom the worker carries out the work affected by the notice.
376. An application under this clause stays the operation of the provisional improvement notice until an inspector makes a decision on the review (subclause 100(2)).
377. Clause 101 sets out the procedure that the regulator and the reviewing inspector must follow after a request for review is made.
378. The regulator must arrange for a review to be conducted by an inspector at the workplace as soon as practicable after a request is made (subclause 101(1)).
379. The inspector must review the disputed notice and inquire into the subject matter covered by the notice (subclause 101(2)). An inspector may review a notice even if the time for compliance with the notice has expired (subclause 101(3)).

**Clause 102 – Decision of inspector on review of provisional improvement notice**

380. Clause 102 sets out the kinds of decisions the inspector may make upon review, the persons to whom a copy of the inspector's decision must be given and the effect of the inspector's decision on the notice.
381. The reviewing inspector must either (subclause 102(1)):
- confirm the provisional improvement notice, with or without modifications, or
  - cancel the provisional improvement notice.



382. In some cases the provisional improvement notice under review may have expired before the inspector can make a decision. However, inspectors may still confirm such notices and modify the time for compliance (see subclause 101(3)).
383. Subclause 102(2) requires the inspector to give a copy of their decision to the applicant for review and the HSR who issued the notice.
384. Subclause 102(3) provides that a notice that has been confirmed (with or without modifications by an inspector) has the status of an improvement notice under the Bill.

#### **Division 8 – Part not apply to prisoners**

##### **Clause 103 – Part does not apply to prisoners**

385. Clause 103 provides that Part 5 does not apply to a worker who is a prisoner in custody in a prison or police gaol. This exclusion applies in relation to any work performed by such prisoners, whether inside or outside the prison or police gaol. It would also cover prisoners on weekend detention, during the period of the detention.
386. This exclusion does not extend to any persons who are not held in custody in a prison or police gaol including persons on community-based orders.

Superseded

## **Part 6 – Discriminatory, coercive and misleading conduct**

387. Part 6 prohibits discriminatory, coercive and misleading conduct in relation to work health and safety matters. It establishes both criminal and civil causes of action in the event of such conduct.
388. These provisions complement the remedies contained in other Federal and State laws that deal with discrimination including the General Protections in the Fair Work Act.
389. The purpose of these provisions is to encourage engagement in work health and safety activities and the proper exercise of roles and powers under the Bill by providing protection for those engaged in such roles and activities from being subject to discrimination or other forms of coercion because they are so engaged. They clearly signal that discrimination and other forms of coercion that may have the effect of deterring people from being involved in work health and safety activities or exercising work health and safety rights are unlawful and may attract penalties and other remedies.

### **Division 1 – Prohibition of discriminatory, coercive or misleading conduct**

390. This Division sets out when conduct or actions will constitute discrimination, coercive or misleading conduct.

#### **Clause 104 – Prohibition of discriminatory conduct**

391. Clause 104 provides that it is an offence for a person to engage in discriminatory conduct for a prohibited reason. What is discriminatory conduct is outlined in clause 105 and prohibited reasons are outlined in clause 106.
392. Subclause 104(2) provides that a person will only commit an offence if a reason mentioned in clause 106 was the dominant reason for the discriminatory conduct. The Bill contains a rebuttable presumption that once a prohibited reason is proven it will be taken to be the dominant reason (see subclause 110(1)).
393. A note alerts the reader that civil proceedings relating to a breach of clause 104 may be brought under Division 3.

#### **Clause 105 – What is discriminatory conduct**

394. Subclause 105(1) sets out what actions will be discriminatory conduct under the Bill. The actions include:
- certain actions that may be taken in relation to a worker (e.g. dismissing a worker or detrimentally altering the position of a worker (paragraph 105(1)(a)))
  - certain actions that may be taken in relation to a prospective worker (e.g. a treating one job applicant less favourably than another (paragraph 105(1)(b)), and
  - certain actions relating to commercial arrangements (e.g. refusing to enter or terminating a contract with a supplier of materials to a workplace (paragraphs 105(1)(c) and 105(1)(d))).
395. In view of the changing nature of work relationships, this clause is cast in wide terms to protect all those who carry out work, or would do so but for the discriminatory conduct, whether under employment-like arrangements or commercial arrangements.

#### **Clause 106 – What is a prohibited reason**

396. The fact that a person is subjected to a detriment that may amount to discriminatory conduct does not by itself render the conduct unlawful. The conduct is only unlawful under the Bill if it is engaged in for a prohibited reason, that is, the person is subjected to a detriment for an improper reason or purpose.

397. Clause 106 sets out when discriminatory conduct will be engaged in for a prohibited reason. The prohibited reasons include discriminatory conduct engaged in because a worker, prospective worker or other person:
- is involved in, has been involved in, or intends to be involved in work health and safety representation at the workplace by being a HSR or member of a health and safety committee
  - undertakes, has undertaken, or proposes to undertake another role under the Bill
  - assists, has assisted, or proposes to assist a person exercising a power or performing a function under the Bill (e.g. an inspector)
  - gives, has given, or intends to give information to a person exercising a power or performing a function under the Bill
  - raises, has raised, or proposes to raise an issue or concern about work health and safety
  - is involved in, has been involved in, or proposes to be involved in resolving a work health and safety issue under the Bill, or
  - is taking action, has taken action, or proposes to take action to seek compliance with a duty or obligation under this Bill.

**Clause 107 – Prohibition of requesting, instructing, inducing, encouraging, authorising or assisting discriminatory conduct**

398. Clause 107 provides that it is an offence for a person to request, instruct, induce, encourage, authorise or assist another person to engage in discriminatory conduct in contravention of clause 104.
399. This clause ensures that a person who has organised or encouraged other persons to discriminate against a person cannot avoid being potentially penalised under the Bill because they have not directly engaged in the conduct themselves.
400. A note alerts the reader that civil proceedings relating to a breach of clause 107 may be brought under Division 3 of Part 6.

**Clause 108 – Prohibition of coercion or inducement**

401. Clause 108 prohibits various forms of coercive conduct taken, or threatened to be taken, intentionally to intimidate, force, or cause a person to act or to fail to act in relation to a work health and safety role.
402. Subclause 108(1) provides that a person must not organise or take, or threaten to organise or take, any action against another person with the intention to coerce or induce that person or another (third) person to do, not do or propose to do the things described in paragraphs 108(1)(a)–(d). These things include to: exercise or not exercise a power under the Bill; perform or not perform a function under the Bill; exercise or not exercise a power or perform a function in a particular way; and refrain from seeking, or continuing to undertake, a role under the Bill.
403. A note alerts the reader that civil proceedings relating to a breach of clause 108 may be brought under Division 3 of Part 6.
404. Subclause 108(2) clarifies that a reference in the clause to taking action or threatening to take action against a person includes a reference to not taking a particular action or threatening not to take a particular action (e.g. threatening not to promote a person if they exercise a power under the Bill).

405. Subclause 108(3) is an avoidance of doubt provision and ensures that a reasonable direction given by an emergency services worker in an emergency is not an action with intent to coerce or induce a person.

#### **Clause 109 – Misrepresentation**

406. Clause 109 provides that it is an offence for a person to knowingly or recklessly make a false or misleading representation to another person about their rights or obligations under the Bill, their ability to initiate or participate in processes under the Bill, or their ability to make a complaint or enquiry under the Bill.
407. Subclause 109(2) provides that subclause 109(1) does not apply if the person to whom the representation is made would not be expected to rely on it.

#### **Division 2 – Criminal proceedings in relation to discriminatory conduct**

408. This Division sets out the burden of proof on the defendant in criminal proceedings and what orders a court may make if a person is convicted of an offence under this Part.

#### **Clause 110 – Defendant to prove reason for conduct not dominant**

409. Clause 110 clarifies the way that the onus of proof works in criminal proceedings for discriminatory conduct. An offence is committed only where the prohibited reason for the discriminatory conduct is the dominant reason (see subclause 104(2)).
410. Subclause 110(1) provides that if the prosecution proves both discriminatory conduct and a prohibited reason for the conduct, it is presumed that the prohibited reason was the dominant reason for that discriminatory conduct—and therefore, that they have committed an offence under clause 104—unless the defendant proves otherwise on the balance of probabilities.
411. This approach is a reversal of the onus of proof applicable to criminal proceedings. Generally, the prosecution is required to establish beyond reasonable doubt that the action complained of was carried out for a particular reason or with a particular intent. However, subclause 110(1) provides that once the prosecution has proven that a person's discriminatory conduct is motivated by a prohibited reason, to avoid conviction that person must then establish, on the balance of probabilities, that the prohibited reason was not the dominant reason for the discriminatory conduct. In the absence of such a provision it would be extremely difficult, if not impossible, to establish that a prohibited reason was the dominant reason as the intention of the person who engages in discriminatory conduct will be known to that person alone.
412. Subclause 110(2) is an avoidance of doubt provision stating that the burden of proof on the defendant outlined in subclause 110(1) is a legal, not an evidential, burden of proof. The legal burden means the burden of proving the existence of a matter.

#### **Clause 111 – Order for compensation or reinstatement**

413. Clause 111 sets out the kind of orders a court may make in a proceeding where a person is convicted or found guilty of an offence under clause 104 or clause 107. In addition to imposing a penalty, a court may make an order that the offender pay compensation, that the affected person be reinstated or re-employed, or the affected person be employed in the position they applied for or in a similar position. A court may make one or more of these orders.

#### **Division 3 – Civil proceedings in relation to discriminatory or coercive conduct**

414. Division 3 enables a person affected by discriminatory or other coercive conduct to seek a range of civil remedies. Civil proceedings under Division 3 are additional to criminal proceedings under Divisions 1 and 2.

**Clause 112 – Civil proceeding in respect of engaging in or inducing discriminatory or coercive conduct**

415. Subclause 112(1) provides that an eligible person may apply to the designated court or tribunal for an order provided for in subclause (3). 'Eligible person' is defined in subclause 112(6) as a person affected by the contravention or a person authorised to be their representative. The person's representative may be any person, including a union representative.
416. Subclause 112(2) outlines the persons against whom a civil order may be sought.
417. Subclause 112(3) sets out the kind of orders that can be made in civil proceedings. These include injunctions, compensation, reinstatement of employment orders and any other order that [the designated court or tribunal] considers appropriate.
418. Subclause 112(4) provides that, for the purposes of clause 112, a person may be found to have engaged in discriminatory conduct for a prohibited reason only if the reason mentioned in clause 106 was a substantial reason for the conduct. This is a lower threshold than that applicable to criminal proceedings where the prohibited reason must be the dominant reason.
419. Subclause 112(5) clarifies that nothing in clause 112 limits any other power of [the designated court or tribunal].

**Clause 113 – Procedure for civil actions for discriminatory conduct**

420. Subclause 113(1) imposes a time limit on civil proceedings brought under clause 112. A proceeding under clause 112 must be commenced no later than one year after the date on which the applicant knew or ought to have known that the cause of action arose.
421. Subclauses 113(2)–(4) clarify the way that the onus of proof works in a civil proceeding under clause 112.
422. Subclause 113(2) provides that if the plaintiff proves a prohibited reason for discriminatory conduct, that reason is presumed to be a substantial reason for that conduct unless the defendant proves otherwise on the balance of probabilities.
423. Subclause 113(3) provides that it is a defence to a civil proceeding in respect of engagement in or encouragement of discriminatory conduct if the defendant proves that the conduct was reasonable in the circumstances and a substantial reason for the conduct was to comply with the requirements of the Bill or a corresponding work health and safety law.
424. Subclauses 113(2)–(4) reverse the onus of proof applicable to civil proceedings. Generally, the plaintiff is required to establish on the balance of probabilities that the action complained of was carried out for a particular reason or with a particular intent. However, subclause 113(2) provides that once the plaintiff has proven that a person's discriminatory conduct is motivated by a prohibited reason, to avoid civil consequences that person (the defendant) must then establish, on the balance of probabilities, that the prohibited reason was not a substantial reason for the discriminatory conduct. Such a provision is necessary as the intention of the person who engages in discriminatory conduct will be known to that person alone.
425. Subclause 113(4) is an avoidance of doubt provision and provides that the burden of proof on the defendant outlined in subclauses 113(2) and 113(3) is a legal, not an evidential, burden of proof. The legal burden of proof means the burden of proving the existence of a matter.

#### **Division 4 – General**

426. This Division contains provisions dealing with the interaction between criminal and civil proceedings under Part 6.

#### **Clause 114 – General provisions relating to orders**

427. Subclause 114(1) provides that the making of a civil order in respect of conduct referred to in paragraphs 112(2)(a) and (b) does not prevent the bringing of criminal proceedings under clause 104 or 107 in respect of the same conduct.

428. Subclause 114(2) limits the ability of a court to make an order under clause 111 in criminal proceedings under clause 104 or 107 if the [designated court or tribunal] has made an order under clause 112 in civil proceedings in respect of the same conduct (i.e. the conduct referred to in paragraphs 112(2)(a) and (b)).

429. Conversely, subclause 114(3) limits the ability of the [designated court or tribunal] to make an order under clause 112 in civil proceedings in respect of conduct referred to in paragraphs 112(2)(a) and (b) if a court has made an order under clause 111 in criminal proceedings brought under clauses 104 or 107 in respect of the same conduct.

#### **Clause 115 – Prohibition of multiple actions**

430. Clause 115 ensures that a person may not initiate multiple actions in relation to the same matter under two or more laws of that jurisdiction. Specifically, a person may not:

- commence a proceeding under Division 3 of Part 6 if the person has commenced a proceeding or made an application or complaint in relation to the same matter under a law of the Commonwealth or a State and the action is still on foot
- recover any compensation under Division 3 if the person has received compensation for the matter under a law of the Commonwealth or a State, or
- commence or continue with an application under Division 3 if the person has failed in a proceeding, application or complaint in relation to the same matter under another law. This does not include proceedings, applications or complaints relating to workers' compensation.

## **Part 7 – Workplace entry by WHS entry permit holders**

431. This Part confers rights on a person who holds an office in or is an employee of a union (WHS entry permit holders) to enter workplaces and exercise certain powers while at those workplaces. This Part also sets out requirements of WHS entry permit holders who are exercising or proposing to exercise a right of entry and describes conduct that must not be engaged in by WHS entry permit holders or other persons at a workplace in relation to WHS entry permit holders.
432. Throughout this Part the body responsible for the issuing, revocation and oversight of WHS entry permits is referred to as the authorising authority. In some jurisdictions the authorising authority will be a court or tribunal. However, in other jurisdictions the regulator may be the body responsible for administering WHS entry permits, wholly or in part. For example, the regulator may issue a permit but disputes about right of entry will be referred to a relevant court or tribunal.
433. Machinery provisions necessary for the operation of this Part, such as the issuing of WHS entry permits, are included in Division 5. Division 6 includes procedures for dealing with disputes that arises about the exercise or purported exercise of a right of entry under the Bill.
434. The penalties imposed in Part 7 are civil only and the civil penalty proceedings machinery provisions are included in Part 13 – Legal Proceedings.

### **Division 1 – Introductory**

#### **Clause 116 – Definitions**

435. Clause 116 of Division 1 contains the key definitions for Part 7.

#### ***Official of a union***

436. *Official of a union* is used in this Part to describe an employee of a union or a person who holds an office in a union.

#### **Relevant person conducting a business or undertaking**

437. A *relevant PCBU* is used throughout Part 7 and is defined to mean a person conducting a business or undertaking in relation to which a WHS entry permit holder is exercising, or proposes to exercise, a right of entry.
438. There may be more than one *relevant PCBU* at a workplace that a WHS entry permit holder is exercising, or proposes to exercise, a right of entry.

#### ***Relevant union***

439. *Relevant union* is defined in this Part as the union that a WHS entry permit holder represents.

#### ***Relevant worker***

440. The term *relevant worker* is used in this Part to describe a worker whose workplace a WHS entry permit holder has a right to enter. A *relevant worker* is one:
- who is a member, or potential member, of a union that the WHS entry permit holder represents
  - whose industrial interests the relevant union is entitled to represent, and
  - who works at the workplace at which the WHS entry permit holder is exercising, or intending to exercise, a right of entry under this Part.

## **Division 2 – Entry to inquire into suspected contraventions**

441. This Division sets out when the WHS permit holder may enter a workplace to inquire into a suspected contravention of the Bill and the rights that the WHS permit holder may exercise while at the workplace for that purpose.

### **Clause 117 – Entry to inquire into suspected contraventions**

442. Clause 117 allows a WHS entry permit holder to enter a workplace and exercise any of the rights contained in clause 118 in order to inquire into a suspected contravention of the Bill at that workplace.

443. These rights may only be exercised in relation to suspected contraventions that relate to, or affect, a relevant worker (as defined in clause 116).

444. Subclause 117(2) requires the WHS entry permit holder to reasonably suspect before entering the workplace that the contravention has occurred or is occurring. If this suspicion is disputed by another party, the onus is on the WHS entry permit holder to prove that the suspicion is reasonable.

445. Subclause 117(3) requires the WHS entry permit holder to give notice of the proposed entry and the suspected contravention to the PCBU and the person with management or control of the workplace before entering the workplace.

446. Subclause 117(4) requires the notice of the proposed entry and the suspected contravention to comply with the model WHS Regulations.

447. Subclause 117(5) sets out the notification times for the proposed entry of a workplace. Specifically, a HSR must provide notice during the usual working hours at that workplace and provide the notice at least 24 hours before, but not more than 14 days before, the proposed entry.

448. Subclause 117(6) allows an authorising authority, such as a regulator, to issue an exemption certificate whereby the notice of proposed entry is not required. However, if the WHS entry permit holder is issued an exemption certificate, they must provide that certificate to the PCBU and the person with management or control of the workplace before entering the workplace or as soon as is practicable after entering the workplace.

449. Subclause 117(7) requires an authorising authority to issue an exemption certificate to a union for entry under subclause 117(1) if the authorising authority is satisfied that the union applied for the certificate and the authoring authority reasonably believes that there is a serious risk to the health of safety emanating from an immediate or imminent exposure to a hazard at the workplace.

450. Subclause 117(8) requires an exemption certificate under subclause 117(7) to comply with the model WHS Regulations.

### **Clause 118 – Rights that may be exercised while at workplace**

451. Clause 118 lists the rights that a WHS entry permit holder may exercise upon entering a workplace under clause 117 to inquire into a suspected contravention. A WHS permit holder may do any of the following:

- inspect any thing relevant to the suspected contravention including work systems, plant, substances etc
- consult with relevant workers or the relevant PCBU about the suspected contravention
- require the relevant PCBU to allow the WHS entry permit holder to inspect and make copies of any document that is directly relevant to the suspected contravention that is kept at the workplace or accessible from a computer at the workplace, other than an employee record, or



- warn any person of a serious risk to his or health or safety emanating from an immediate or imminent exposure to a hazard that the WHS entry permit holder reasonably believes that person is exposed to.
452. Subclause 118(2) provides that the relevant PCBU must comply with the request to provide documents related to the suspected contravention unless allowing the WHS entry permit holder to access a document would contravene a Commonwealth, State or Territory law.
453. Subclause 118(3) provides that failure or refusal of a PCBU to comply with a request of a WHS entry permit holder to inspect documents under paragraph 118(1)(d) is a civil penalty provision. It is a defence if the PCBU can show they had a reasonable excuse for not complying. A reasonable excuse in such circumstances might be a belief that to provide access to the documents to the WHS entry permit holder would contravene another law.
454. The approach in subclauses 118(3) and (4) reverses the onus of proof generally applicable to civil proceedings because only the PCBU is in a position to show whether the reason they refused or failed to do something was reasonable. It would be too onerous to require the plaintiff in civil proceedings to prove that a refusal or failure to comply with a request of a WHS entry permit holder was unreasonable as they may not be privy to the reasons for that refusal or failure to comply.
455. Subclause (4) clarifies that the burden of proof on the defendant under subclause (3) is an evidential burden.
456. A legislative note to this provision provides that the use or disclosure of personal information obtained during entry to a workplace to inquire into a suspected contravention is regulated under the Privacy Act.

#### **Clause 120 – Entry to inspect employee records or information held by another person**

457. Clause 120 authorises a WHS entry permit holder to enter a workplace to inspect, or make copies of, employee records that are directly relevant to a suspected contravention or other documents directly relevant to a suspected contravention that are held by someone other than the relevant PCBU.
458. Subclause 120(3) requires the WHS entry permit holder to provide notice, in accordance with the regulations, of his or her proposed entry to inspect or make copies of these documents to the relevant PCBU and the person who has possession of the documents.
459. Subclauses 120(4) and (5) require the entry notice to comply with particulars prescribed in the regulations and to be given during the normal business hours of the workplace to be entered at least 24 hours, but not more than 14 days, before the proposed entry.
460. A legislative note to this provision explains that the use or disclosure of personal information obtained by a WHS entry permit holder during entry is regulated under the Privacy Act .

### **Division 3 – Entry to consult and advise workers**

461. This Division authorises a WHS entry permit holder to enter a workplace for the purpose of consulting with and providing advice to relevant workers about work health and safety matters and provides the requirements that must be met before that right can be exercised.

#### **Clause 121 – Entry to consult and advise workers**

462. Clause 121 authorises a WHS entry permit holder to enter a workplace to consult with and advise relevant workers who wish to participate in discussions about work health and safety matters.

463. While at a workplace for this purpose, a WHS entry permit holder may warn any person of a serious risk to his or her health or safety that the WHS entry permit holder reasonably believes that person is exposed to.

#### **Clause 122 – Notice of entry**

464. Clause 122 requires a WHS entry permit holder to give notice, in accordance with the regulations, of the proposed entry under clause 121 to consult with workers to the relevant PCBU during the normal business hours of the workplace at least 24 hours and not more than 14 days, before the proposed entry. The contents of the notice must comply with the regulations.

### **Division 4 – Requirements for WHS entry permit holders**

465. This Division sets out the mandatory requirements that WHS permit holders must meet when exercising or proposing to exercise a right under Division 2 and 3 of the Bill.

#### **Clause 123 – Contravening WHS entry permit conditions**

466. The authorising authority may impose conditions on a WHS entry permit holder at the time of issuing the permit (e.g. to provide a longer period of notice for a specific PCBU than otherwise required under the Bill (see clause 135)). Clause 123 requires a permit holder to comply with any such condition. This clause is a civil penalty provision.

#### **Clause 124 – WHS entry permit holder must also hold permit under other law**

467. The Fair Work Act requires a union official of an organisation (as defined under that Act) seeking to enter premises under a State or Territory OHS law (also as defined under that Act) to hold a Fair Work entry permit. Similarly, various State and Territory industrial relations laws require union officials to hold entry permits issued under those laws before exercising a right of entry at any workplace to which the State or Territory industrial law applies.

468. This clause requires a WHS entry permit holder to also hold an entry permit under the Fair Work Act or the relevant State or Territory industrial law, prior to entering the workplace. This clause is a civil penalty provision.

#### **Clause 125 – WHS entry permit to be available for inspection**

469. Clause 125 requires a WHS entry permit holder to produce his or her WHS entry permit and photographic identification, such as a driver's licence, when requested by a person at the workplace.

470. This clause is a civil penalty provision.

#### **Clause 126 – When right may be exercised**

471. Clause 126 prohibits the exercise of a right of entry under the Bill outside of the usual working hours at the workplace the WHS entry permit holder is entering. This refers to the usual working hours of the workplace the WHS entry permit holder wishes to enter.

472. This clause is a civil penalty provision.

**Clause 127 – Where the right may be exercised**

473. Clause 127 provides that when exercising a right of entry, a WHS entry permit holder may only enter the area of the workplace where the relevant workers carry out work or any other work area at the workplace that directly affects the health or safety of those workers.

**Clause 128 – Work health and safety requirements**

474. Clause 128 requires a WHS entry permit holder to comply with any reasonable request by the relevant PCBU or the person with management or control of the workplace to comply with a work health and safety requirement, including a legislated requirement that is applicable to the specific type of workplace. Clause 142 would allow the authorising authority to deal with a dispute about whether a request was reasonable.

475. This clause is a civil penalty provision.

**Clause 129 – Residential premises**

476. Clause 129 prohibits a WHS entry permit holder from entering any part of a workplace that is used only for residential purposes. For example, a WHS entry permit holder could enter a converted garage where work is being conducted but could not enter the living quarters of the residence if no work is undertaken there.

477. This clause is a civil penalty provision.

**Clause 130 – WHS entry permit holder not required to disclose names of workers who are union members**

478. The operation of the definition of ‘relevant worker’ means that a WHS entry permit holder may only exercise a right of entry at a workplace where there are workers who are members, or eligible to be members, of the relevant union.

479. Clause 130 protects the identity of workers by providing that a WHS entry permit holder is not required to disclose the names of any workers to the relevant PCBU or the person with management or control of the workplace.

480. However, a WHS entry permit holder can disclose the names of members with their consent.

481. Clause 148 deals separately with unauthorised disclosure of information and documents obtained during right of entry in relation to all workers.

**Division 5 – WHS entry permits**

482. This Division sets out the processes for the issuing of WHS entry permits. It also details the process of revocation of a WHS entry permit.

**Clause 131 – Application for WHS entry permit**

483. Clause 131 allows a union to apply for a WHS entry permit to be issued to an official of the union.

484. Subclause 131(2) lists the matters that must be included in an application including a statutory declaration from the relevant union official declaring that the official meets the eligibility criteria for a WHS entry permit. This clause duplicates the eligibility criteria that are listed in clause 133 of the Bill.

**Clause 132 – Consideration of application****Clause 133 – Eligibility criteria****Clause 134 – Issue of WHS entry permit**

485. Clause 134 allows the authorising authority to issue a WHS entry permit if it has taken into account the matters listed in clause 132 and 133.

486. Clause 132 lists the matters the authorising authority, when considering whether to issue a WHS entry permit, must take into account when determining an application. This includes the objects of the Bill (in clause 3) and the object of enabling unions to enter workplaces for the purposes of ensuring the health and safety of workers.
487. Clause 133 provides that the authorising authority must not issue a WHS entry permit unless satisfied of the matters listed in paragraphs (a)–(c).
488. The requirement in paragraphs 133(c) that the union official will hold an entry permit issued under another law has been included to deal with situations where a person has applied for such an entry permit and is simply waiting for it to be issued.

#### **Clause 135 – Conditions on WHS entry permit**

489. Clause 135 allows the authorising authority to impose specific conditions on a WHS entry permit when it is issued.

#### **Clause 136 – Term of WHS entry permit**

#### **Clause 137 – Expiry of WHS entry permit**

490. Clause 136 states that the term of a WHS entry permit is 3 years.
491. Clause 137 sets out when a WHS entry permit expires. Subclause 137(1) provides that unless it is revoked it will expire when the first of the following occurs:
- three years elapses since it was issued, or
  - the relevant industrial relations entry permit held by the WHS entry permit holder expires, or
  - the WHS entry permit holder ceases to be an official of the relevant union, or
  - the relevant union ceases to be an organisation registered under the Fair Work (Registered Organisations) Act or the relevant State or Territory industrial law.
492. Subclause 137(2) makes it clear that an application for the issue of a subsequent WHS entry permit may be submitted before or after the current permit expires.

**Clause 138 – Application to revoke WHS entry permit**

493. Clause 138 allows the regulator, a relevant PCBU or any other person affected by the exercise or purported exercise of a right of entry of the WHS entry permit holder to apply to the authorising authority for the revocation of the WHS entry holder's permit.
494. Subclause 138(2) provides the grounds for making an application to revoke the WHS entry permit holder's permit. These include:
- the permit holder no longer satisfies the eligibility criteria for a WHS entry permit or for an entry permit under a corresponding work health and safety law, or the Fair Work Act or the Commonwealth Workplace Relations Act 1996 or the relevant State or Territory industrial law specified in this clause
  - the permit holder has contravened any condition of the WHS entry permit they currently hold
  - the permit holder has acted, or purported to act, in an improper manner in the exercise of any right under the Bill, or
  - the permit holder has intentionally hindered or obstructed a person conducting the business or undertaking or workers at a workplace when exercising, or purporting to exercise, a right of entry under Part 7 of the Bill.
495. The applicant is required to give written notice of the application, including the grounds on which it is made, to the WHS entry permit holder to whom it relates and the relevant union.
496. Both the WHS entry permit holder and the relevant union will be parties to the application for revocation (subclause 138(4)).

**Clause 139 – Authorising authority must permit WHS entry permit holder to show cause**

497. Clause 139 provides that if the authorising authority receives an application for revocation of a WHS entry permit and believes that a ground for revocation exists, the authority must give notice to the WHS entry permit holder of this, including details of the application. The authorising authority must also advise the WHS entry permit holder of his or her right to provide reasons (within 21 days) as to why the WHS entry permit should not be revoked.
498. Paragraph 139(1)(b) requires the authorising authority to suspend a WHS entry permit while deciding the application for revocation if it considers that suspension is appropriate. The WHS entry permit holder must be notified if this occurs.

**Clause 140 – Determination of application**

499. Clause 140 allows the authorising authority to make an order to revoke a WHS entry permit or an alternative order, such as imposing conditions on or suspending a WHS entry permit if satisfied on the balance of probabilities of the matters listed in subclause 138(2). Subclause 140(2) lists a number of matters that the authorising authority must take into account when deciding the appropriate action to take.
500. In addition to revoking a current WHS entry permit, the authorising authority may make an order about the issuing of future WHS entry permits to the person whose WHS entry permit is revoked.

## **Division 6 – Dealing with disputes**

501. This Division sets out the powers of an inspector and the authorising authority to deal with a dispute that arises about an exercise or purported exercise of a right of entry.

### **Clause 141 – Application for assistance of inspector to resolve dispute**

502. Clause 141 allows the regulator, on the request of a party to the dispute, to appoint an inspector to assist in resolving a dispute about the exercise or purported exercise of a right of entry.

503. An inspector may then attend the workplace to assist in resolving the dispute. However, an inspector is not empowered to make any determination about the dispute. This does not prevent the inspector from exercising their compliance powers.

### **Clause 142 – Authorising authority may deal with a dispute about a right of entry under this Act**

504. Clause 142 allows the authorising authority, on its own initiative or on application, to deal with a dispute about a WHS entry permit holder's exercise, or purported exercise, of a right of entry. Subclause 142(1) specifically notes that this would include a dispute about whether a request by the relevant PCBU or the person with management or control of the workplace that a WHS entry permit holder comply with work health and safety requirements is reasonable. It would also include, for example, a dispute about a refusal by a PCBU to allow the WHS permit holder to exercise rights.

505. Subclause 142(2) provides that the authorising authority may deal with the dispute in any manner it thinks appropriate, such as by mediation, conciliation or arbitration.

506. Subclause 142(3) provides the orders available to the authorising authority if it deals with the dispute by arbitration. The authorising authority may make any order it considers appropriate and specifically may make an order revoking or suspending a WHS entry permit or about the future issue of WHS entry permits to one or more persons.

507. In exercising its power to make an order about the future issue of WHS entry permits to one or more persons under paragraph 142(3)(d), the authorising authority could, for example, ban the issue of a WHS entry permit to a person for a certain period. This provision is intended to ensure that a permit holder cannot gain a new permit while his or her previous permit is revoked or is still suspended.

508. However, the authorising authority may not grant any rights to a WHS entry permit holder that are additional to, or inconsistent with, the rights conferred on a WHS entry permit holder under the Bill.

### **Clause 143 – Contravening order made to deal with dispute**

509. Clause 143 provides that if the authorising authority makes an order following arbitration of a right of entry dispute a person could be liable to a civil penalty if they contravene that order.

510. This clause is a civil penalty provision.

## **Division 7 – Prohibitions**

511. This Division outlines the type of actions and conduct that are prohibited under the Part. The prohibitions relate to both permit holders and others.

### **Clause 144 – Person must not refuse or delay entry of WHS entry permit holder**

### **Clause 145 – Person must not hinder or obstruct WHS entry permit holder**

512. These clauses prohibit a person taking certain actions against a WHS entry permit holder who is exercising rights in accordance with this Part.

513. Clause 144 prohibits a person from unreasonably refusing or delaying entry to a workplace that the WHS entry permit holder is entitled under the Part to enter.
514. Subclause 144(2) provides that if civil proceedings are brought against a person for a contravention of this provision the evidential burden is on them, the defendant, to show that they had a reasonable excuse for refusing or delaying the entry of the WHS entry permit holder. A reasonable excuse in such an instance might be, for example, that the person reasonably believed that the WHS entry permit holder did not hold the correct entry permits.
515. Clause 145 prohibits a person from intentionally and unreasonably hindering or obstructing a WHS entry permit holder who is exercising a right of entry or any other right conferred on them under this Part. This would cover behaviour such as making repeated and excessive requests that a WHS entry permit holder show his or her entry permit or failing to provide access to records that the permit holder is entitled to inspect.
516. Both of these clauses are civil penalty provisions.

**Clause 146 – WHS entry permit holder must not delay, hinder or obstruct any person or disrupt work at workplace**

517. Clause 146 prohibits a WHS entry permit holder from intentionally and unreasonably delaying, hindering or obstructing any person, or disrupting any work, while at a workplace exercising or seeking to exercise rights conferred on them in the Part, or from otherwise acting in an improper manner. Conduct by a permit holder that would hinder or obstruct a person includes action that intentionally and unreasonably prevents or significantly disrupts a worker from carrying out his or her normal duties.
518. This clause is a civil penalty provision.

**Clause 147 – Misrepresentations about things authorised by this Part**

519. This clause provides that a person must not take action with the intention of giving the impression, or reckless as to whether they give the impression, that the action is authorised by the Part when it is not the case. An example of this behaviour would include where a person represents himself or herself as a permit holder when he or she does not hold a valid entry permit.
520. However, subclause 147(2) provides that a person has not contravened this clause if, when doing that thing, they reasonably believed that it was authorised by the Part. For instance, if a WHS entry permit holder reasonably believed that they were exercising a right of entry in an area of the workplace where relevant workers worked or that affected the health and safety of those workers.
521. This clause is a civil penalty provision.

**Clause 148 – Unauthorised use or disclosure of information or documents**

522. Clause 148 provides that a person must not use or disclose information or documents obtained by a WHS entry permit holder when inquiring into a suspected contravention.
523. This clause is intended to operate to prevent the use or disclosure of the information or documents for a purpose other than that for which they were acquired. The exceptions at (a) to (e) are the only other authorised reasons for use or disclosure.
524. Subclause 148(a) authorises use or disclosure if the person reasonably believes that it is necessary to lessen or prevent a serious risk to a person's health or safety or a serious threat to public health or safety.
525. Subclause 148(b) authorises use or disclosure as part of an investigation of a suspected unlawful activity or in the reporting of concerns to relevant persons or authorities of concerns of suspected unlawful activity.

526. Subclause 148(c) authorises use or disclosure if it is required or authorised by or under law.
527. Subclause 148(d) authorises use or disclosure if the persons doing so believes it is reasonably necessary for an enforcement body (as defined in the Privacy Act) to do a number of things such as prevent, detect, investigate, prosecute or punish a criminal offence or breach of a law.
528. Subclause 148(e) provides that disclosure or use is also authorised if it is made or done with the consent of the individual to whom the information relates.
529. This clause mirrors section 504 of the Fair Work Act.
530. This clause is a civil penalty provision.

#### **Division 8 – General**

531. This Division details when WHS entry permits must be returned, the information the relevant union is required to provide to the authorising authority and the authorising authority's obligation to keep a register of WHS entry permit holders.

#### **Clause 149 – Return of WHS entry permits**

532. If a person's WHS entry permit is revoked, suspended or expired, clause 149 requires them to return it to the authorising authority within 14 days.
533. This clause is a civil penalty provision.
534. Subclause 149(2) provides that at the end of a suspension period, the authorising authority must return any WHS entry permit that has not expired to the WHS entry permit holder if they, or the union they represent, applies for its return.

#### **Clause 150 – Union to provide information to authorising authority**

535. Clause 150 requires the relevant union to advise the authorising authority if a WHS entry permit holder leaves the union, has a Fair Work Act or other relevant industrial relations law entry permit suspended or revoked, or if the union ceases to be registered under the relevant State or Territory industrial relations law or the Fair Work (Registered Organisations) Act.
536. A civil penalty may be imposed if the union does not comply with this clause.

#### **Clause 151 – Register of WHS entry permit holders**

537. Clause 151 requires the authorising authority to maintain an up-to-date, publicly accessible register of all WHS entry permit holders in the jurisdiction.
538. The regulations may provide for the particulars of the register.



## **Part 8 – The regulator**

### **Division 1 – Functions of regulator**

539. This Division sets out the regulator's functions and allows additional functions to be prescribed by regulations. This Division also establishes the regulator's ability to delegate powers and functions under the Bill and to obtain information.
540. Other functions and powers of the regulator are included elsewhere under the Bill (e.g. powers and functions in relation to incident notification, inspector notices and WHS undertakings).

### **Clause 152 – Functions of regulator**

541. Clause 152 lists the broad areas in which the regulator has functions.
542. Functions set out in paragraphs 152(a)–(d) include advising and making recommendations to the Minister, monitoring and enforcing compliance and providing work health and safety advice and information. Paragraphs 152(e)–(g) describe the functions of the regulator in fostering and promoting work health and safety. Paragraph 152(h) enables the regulator to conduct and defend legal proceedings under this Bill.
543. Paragraph 152(i) is a catchall provision that clarifies that the regulator has any other function conferred on it under the Bill.

### **Clause 153 – Powers of regulator**

544. Subclause 153(1) confers a general power on the regulator to do all things necessary or convenient in relation to its functions.
545. Subclause 153(2) confers on the regulator all the powers and functions that an inspector has under the Bill.

### **Clause 154 – Delegation by regulator**

546. Subclause 154(1) allows the regulator to delegate the regulator's powers and functions under the Bill to any person. Subclause 154(1) further clarifies that the power to delegate cannot itself be delegated.
547. Subclause 154(2) clarifies that delegation may be made subject to conditions, is revocable and does not derogate from the regulator's power to act.

### **Division 2 – Powers of regulator to obtain information**

548. Powers under this Division are intended to facilitate the regulator's function of monitoring and enforcing compliance with the Bill and ensure effective regulatory coverage of work health and safety matters (paragraph 152(b)). Provisions have been designed to provide robust powers of inquiry and questioning subject to appropriate checks and balances to ensure procedural fairness.
549. Powers under this Division are only available if the regulator has reasonable grounds to believe that a person is capable of giving information, providing documents or giving evidence in relation to a possible contravention of the Bill or that will assist the regulator to monitor or enforce compliance under the Bill. These powers are only exercisable by way of written notice, which must set out the recipient's rights under the Bill (e.g. entitlement to legal professional privilege and the 'use immunity').
550. Additionally powers to require a person to appear before the regulator to give evidence are only exercisable if the regulator has taken all reasonable steps to obtain the relevant information by other means available under the clause but has been unable to do so. The time and place specified in the notice must be reasonable in the circumstances, including taking into account the circumstances of the person required to appear.

**Clause 155 – Powers of regulator to obtain information**

551. Clause 155 sets out the powers of the regulator to obtain information from a person in circumstances where the regulator has reasonable grounds to believe that the person is capable of:
- giving information
  - producing documents or records, or
  - giving evidence
- in relation to a possible contravention of the Bill or that will assist the regulator to monitor or enforce compliance with the Bill.
552. Subclause 155(2) requires the regulator to exercise these powers by written notice served on the person.
553. Subclause 155(3) sets out the content requirements for the written notice, which must include statements to the effect that the person:
- is not excused from answering a question on the ground that it may incriminate them or expose them to a penalty
  - is entitled, if they are an individual, to the use immunity provided for in subclause 172(2)
  - is entitled to claim legal professional privilege (if applicable), and
  - if required to appear—is entitled to attend with a lawyer (subparagraph 155(3)(c)(ii)).
554. Additional pre-requisites apply if the regulator wishes to obtain evidence from a person by requiring them to appear before a person appointed by the regulator (subclause 155(4)). First, the regulator cannot require a person to appear before the nominated person unless the regulator has first taken all reasonable steps to obtain the information by other means (i.e. by requiring production of documents or records etc).
555. Second, if the person is required to appear in person, then the day, time and place nominated by the regulator must be reasonable in all the circumstances (paragraph 155(2)(c)).
556. Subclause 155(5) prohibits a person from refusing or failing to comply with a requirement under clause 155 without a reasonable excuse. Subclause 155(6) clarifies that this places an evidential burden on the accused to show a reasonable excuse.
- Subclause 155(7) makes it clear that the provisions dealing with self-incrimination, including the use immunity, apply to a requirement made under this clause, with any necessary changes.

## **Part 9 – Securing compliance**

557. This Part establishes the WHS inspectorate and provides inspectors with powers of entry to workplaces and powers of entry to any place under a search warrant issued under the Bill. Part 9 also provides inspectors with powers upon entry to workplaces.

### **Division 1 – Appointment of inspectors**

558. The Division sets out the process for appointing, suspending and terminating inspector appointments. It also provides a process for dealing with conflicts of interest that may arise during the exercise of inspectors' compliance powers.

#### **Clause 156 – Appointment of inspectors**

559. Clause 156 lists the categories of persons who are eligible for appointment as an inspector. Only public servants, employees of public authorities, holders of a statutory office and WHS inspectors from other jurisdictions may be appointed as inspectors (paragraphs 156(a)–(d)).

560. Paragraph 156(e) additionally allows for the appointment of any person who is in a prescribed class of persons. Regulations could be made, for example, to allow for the appointment of specified WHS experts to meet the regulator's short-term, temporary operational requirements.

561. Restrictions on inspectors' compliance powers are provided for in clauses 161 and 162, which deal with conditions or restrictions attaching to inspectors' appointments and regulator's directions respectively.

#### **Clause 157 – Identity cards**

562. Clause 157 provides for the issue, use and return of inspectors' identity cards.

563. Inspectors are required to produce their identity card for inspection on request when exercising compliance powers (subclause 157(2)). Additional requirements may also apply when exercising certain powers (see clause 173).

#### **Clause 158 – Accountability of inspectors**

564. Subclause 158(1) requires inspectors to report actual or potential conflicts of interest arising out of their functions as an inspector to the regulator.

565. Subclause 158(2) requires the regulator to consider whether the inspector should not deal, or should no longer deal, with an affected matter and direct the inspector accordingly.

#### **Clause 159 – Suspension and ending of appointment of inspectors**

566. Subclause 159(1) provides the regulator with powers to suspend or end inspectors' appointments.

567. Subclause 159(2) clarifies that a person's appointment as an inspector automatically ends upon the person ceasing to be eligible for appointment as an inspector (e.g. the person ceases to be a public servant).

### **Division 2 – Functions and powers of inspectors**

568. This Division summarises inspectors' functions and powers under the Bill (referred to collectively as 'compliance powers') and specifies the general restrictions on those functions and powers.

### **Clause 160 – Functions and powers of inspectors**

569. Clause 160 lists the functions and powers of inspectors and cross-references a number of important compliance powers which are detailed elsewhere (e.g. the power to issue notices).
570. However, paragraph 160(1)(a) is a stand-alone provision that empowers inspectors to provide information and advice about compliance with the Bill.

### **Clause 161 – Conditions on inspectors' compliance powers**

571. Clause 161 allows conditions to be placed on an inspector's appointment by specifying them (if any) in the person's instrument of appointment. For example, an inspector may be appointed to exercise compliance powers only in relation to a particular geographic area or industry or both.

### **Clause 162 – Inspectors subject to regulator's directions**

572. Subclause 162(1) provides that inspectors are subject to the regulator's directions, which may be of a general nature or may relate to a specific matter (subclause 162(2)). For example, the regulator could direct inspectors to comply with investigation or litigation protocols that would apply to all matters. An inspector must comply with these directions. This ensures a consistent approach to the way that inspectors' compliance powers are exercised.

### **Division 3 – Powers relating to entry**

573. This Division sets out general powers of entry and makes special provision for entry under warrant and entry to residential premises. Inspectors have access to a range of powers to support their compliance and enforcement roles.

#### **Subdivision 1 – General powers of entry.**

#### **Clause 163 – Powers of entry**

574. Subclause 163(1) provides for entry at any time by an inspector into any place that is, or the inspector reasonably suspects is, a workplace.
575. Subclause 163(2) clarifies that such entry may be with or without the consent of the person with management or control of the workplace.
576. Subclause 163(3) requires an inspector to immediately leave a place that turns out not to be a workplace. The note following the clause explains that this requirement would not prevent an inspector from passing through residential premises if this is necessary to gain access to a workplace under paragraph 170(c).
577. Subclause 163(4) provides for entry by an inspector under a search warrant.

#### **Clause 164 – Notification of entry**

578. Subclause 164(1) clarifies that an inspector is not required to give prior notice of entry under section 163.
579. Subclause 164(2) requires the inspector, as soon as practicable after entering a workplace or suspected workplace, to take all reasonable steps to notify relevant persons of his or her entry and the purpose of entry. Those persons are:
- the relevant PCBU in relation to which the inspector is exercising the power of entry (paragraph 164(2)(a))
  - the person with management or control of the workplace (paragraph 164(2)(b)), and
  - any HSR for either of these PCBUs (paragraph 164(2)(c)).

580. The requirements in paragraphs 164(2)(a) and (b) address multi-business worksites where the worksite is managed by some sort of management company (e.g. principal contractor on a construction site). In those situations, the management company, as well as any other PCBUs whose operations are proposed to be inspected, are subject to the notification requirements in this provision.
581. Subclause 164(3) provides that notification is not required if it would defeat the purpose for which the place was entered or would cause unreasonable delay (e.g. during an emergency).
582. Special notification rules apply to entry on warrant (see clause 168).

### **Clause 165 – General powers on entry**

583. Subclause 165(1) sets out inspectors' general powers on entry. The list of powers reflects a consolidation of powers currently included in work health and safety Acts across Australia.
584. Paragraph 165(1)(a) confers a general power on inspectors to inspect, examine and make inquiries at workplaces, which is supported by more specific powers to conduct various tests and analyses in paragraphs 165(1)(b)–(e).
585. Paragraph 165(1)(g) allows inspectors to exercise any compliance power or other power that is reasonably necessary to be exercised by the inspector for purposes of the Bill. This provision must be read subject to Subdivisions 3 and 4 of Part 9, which place express limitations around the exercise of specific powers (e.g. production of documents).

#### *Requirements for reasonable help*

586. Paragraph 165(1)(f) allows an inspector to require a person at the workplace to provide reasonable help to exercise the inspector's powers in paragraphs (a)–(e).
587. This clause provides, in very wide terms, for an inspector to require any person at a workplace to assist him or her in the exercise of their compliance powers. Although this could include an individual such as a self-employed person or member of the public at the workplace, the request would have to be reasonable in all the circumstances to fall within the scope of the power.

#### *Limits on what may be required*

588. Inspectors may only require reasonable help to be provided if the required help is—for example:
- connected with or for the purpose of exercising a compliance power
  - reasonably required to assist in the exercise of the inspector's compliance powers
  - reasonable in all the circumstances, or
  - connected to the workplace where the required assistance is being sought.
589. Subclause 165(2) makes it an offence for a person to refuse to provide reasonable help required by an inspector under this clause without a reasonable excuse.
590. What will be a reasonable excuse will depend on all of the circumstances. A reasonable excuse for failing to assist an inspector as required may be that the person is physically unable to provide the required help.
591. Subclause 165(3) places the evidentiary burden on the individual to demonstrate that they have a reasonable excuse. That is because that party is better placed to point to evidence that they had a reasonable excuse for refusing to provide the inspector with the required reasonable help.

**Clause 166 – Persons assisting inspectors**

592. Subclause 166(1) provides for inspectors to be assisted by one or other persons if the inspector considers the assistance is necessary in the exercise of his or her compliance powers. For example, an assistant could be an interpreter, WHS expert or information technology specialist.
593. Subclause 166(2) provides that assistants may do anything the relevant inspector reasonably requires them to do to assist in the exercise of his or her compliance powers and must not do anything that the inspector does not have power to do, except as provided under a search warrant (e.g. use of force by an assisting police officer to enter premises). This provision ensures that assistants are always subject to directions from inspectors and the same restrictions that apply to inspectors.
594. Subclause 166(3) provides that anything lawfully done by the assistant under the direction of an inspector is taken for all purposes to have been done by the inspector. This means that the inspector is accountable for the actions of the assistant. This provision is intended to ensure the close supervision of assistants by the responsible inspector.

**Subdivision 2 – Search warrants**

595. This Subdivision provides for search warrants to allow inspectors to search places (whether workplaces or not) for evidence of offences against the Bill. This power to apply for and act on a search warrant is additional to inspectors' compliance powers under Subdivisions 1 and 4 of Division 3.
596. Search warrants would be issued in accordance with each individual jurisdiction's law relating to warrants.

**Clause 167 – Search warrants**

597. Subclause 167 establishes an application process for obtaining search warrants under the Bill and establishes the process and requirements for their issue. Under this provision, an inspector may apply to a magistrate for the issue of a search warrant in relation to a place if they believe on reasonable grounds that there is particular evidence of an offence against the Bill at the place, or such evidence may be at the place within the next 72 hours.
598. The search warrant would enable the stated inspector to, with necessary and reasonable help and force, enter the place and exercise the inspector's compliance powers and seize the evidence stated in the search warrant, subject to the limitations specified in the search warrant (subclause 167(5)).
599. The power to seize evidence is subject to the relevant provisions in the Bill (clauses 175–181), in addition to any other limitations specified in the warrant.

**Clause 168 – Announcement before entry on warrant****Clause 169 – Copy of warrant to be given to person with management or control of place**

600. Clauses 168 and 169 set out the notification requirements that apply to entry on warrant.

**Subdivision 3 – Limitation on entry powers****Clause 170 – Places used for residential purposes**

601. Clause 170 limits entry to residential premises to hours that are reasonable, having regard to the times at which the inspector believes work is being carried out at the place. It also provides that an inspector may only pass through those parts of the premises that are used only for residential purposes for the sole purpose of accessing a suspected workplace and only if the inspector reasonably believes that there is no reasonable alternative access.

602. Entry to residential premises is also permitted with the consent of the person with management or control of the place (paragraph 170(a)) and under a search warrant (paragraph 170(b)).

#### **Subdivision 4 – Specific powers on entry**

603. This Subdivision provides for specific information-gathering powers on entry and for seizure and forfeiture of things in certain circumstances. It is intended that inspectors will obtain documents and information under the Bill co-operatively, as well as by requiring them under this Subdivision.

#### **Clause 171 – Power to require production of documents and answers to questions**

##### *Identify who has relevant documents*

604. Paragraph 171(1)(a) authorises an inspector to require a person at a workplace to tell him or her who has custody of, or access to, a document for compliance-related purposes.

605. The term ‘document’ is defined to include a ‘record’. It is intended that the term ‘document’ includes any paper or other material on which there is writing and information stored or recorded by a computer (see for example section 25 of the Acts Interpretation Act).

##### *Request documents*

606. Paragraph 171(1)(b) permits an inspector to require a person who has custody of, or access to, a document to produce it to the inspector while the inspector is at that workplace or within a specified period.

607. Subclause 171(2) provides that requirements for the production of documents must be made by written notice unless the circumstances require the inspector to have immediate access to the document.

608. There is no guidance in the Bill as to the time that may be stated for compliance with a notice, but it is intended that the time must be reasonable taking into consideration all of the circumstances giving rise to the request and the actions required by the notice.

609. The required information must be provided in a form that is capable of being understood by the inspector, particularly in relation to electronically stored documents (see for example section 25A of the Acts Interpretation Act).

##### *Interview*

610. Paragraph 171(1)(c) authorises inspectors to require persons at workplaces to answer any questions put by them in the course of exercising their compliance powers.

611. Subclause 171(3) provides that an interview conducted under this provision must be conducted in private if the inspector considers it appropriate or the person being interviewed requests it.

612. Subclause 171(4) clarifies that a private interview would not prevent the presence of the person’s representative (e.g. lawyer), or a person assisting the inspector (e.g. interpreter).

613. Subclause 171(5) clarifies that a request for a private interview may be made during an interview.

##### *Offence provision*

614. Subclause 171(6) makes it an offence for a person to fail to comply with a requirement under this clause, without having a reasonable excuse. This provision is subject to:

- legal professional privilege, if applicable (see clause 269), and
- the requirements to provide an appropriate warning, as referred to in subclause 173(2).

615. Subclause 171(7) clarifies that subclause (6) places an evidential burden on the accused to prove a reasonable excuse for not complying with a requirement under that subclause.
616. Clause 173 also sets out the steps an inspector must take before requiring a person to produce a document or answer a question under Part 9.

### **Clause 172 – Abrogation of privilege against self-incrimination**

617. The Bill seeks to ensure:
- that the strongest powers to compel the provision of information currently available to regulators across Australia are available for securing ongoing work health and safety, and
  - that the rights of persons under the criminal law are appropriately protected.
618. Subclause 172(1) clarifies that there is no privilege against self-incrimination under the Bill, including under clauses 171 (Power to require production of documents and answers to questions) and 155 (Powers of regulator to obtain information).
619. This means that persons must comply with requirements made under these provisions, even if it means that they may be incriminated or exposed to a penalty in doing so.
620. These arrangements are proposed because the right to silence is clearly capable of limiting the information that may be available to inspectors or the regulator, which may compromise inspectors' or the regulator's ability to ensure ongoing work health and safety protections. Securing ongoing compliance with the Bill and ensuring work health and safety are sufficiently important objectives as to justify some limitation of the right to silence.
621. Subclause 172(2) instead provides for a 'use immunity' which means that the answer to a question or information or a document provided by an individual under clause 171 is not admissible as evidence against that individual in civil or criminal proceedings. An exception applies in relation to proceedings arising out of the false or misleading nature of the answer information or document.

### **Clause 173 – Warning to be given**

622. Clause 173 sets out the steps an inspector must take before requiring a person to produce a document or answer a question under Part 9. These steps are not required if documents or information are provided voluntarily.
623. Under clause 173, an inspector must first identify himself or herself by producing his or her identity card or in some other way and then:
- warn the person that failure to comply with the requirement or to answer the question without reasonable excuse would constitute an offence (paragraph 173(1)(b))
  - warn the person about the abrogation of privilege against self-incrimination in clause 172 (paragraph 173(1)(c)), and
  - advise the person about legal professional privilege – which is unaffected by the Bill (paragraph 173(1)(d)).
624. This ensures that persons are fully aware about the legal rights and obligations involved when responding to an inspector's requirement to produce a document or answer a question.
625. If requirements to produce documents are made by written notice (see subclause 171(2)), the notice must also include the appropriate warnings and advice.



626. Subclause 173(2) provides that it is not an offence for an individual to refuse to answer an inspector's question on grounds of self-incrimination, unless he or she was first given the warning about the abrogation of the privilege against self-incrimination.
627. Subclause 173(3) clarifies that nothing in the clause would prevent the inspector from gathering information provided voluntarily (i.e. without requiring the information and without giving the warnings required by clause 173).

#### **Clause 174 – Powers to copy and retain documents**

628. Subclause 174(1) allows inspectors to copy, or take extracts from, documents given to them in accordance with a requirement made under the Bill and retain them for the period that the inspector considers necessary.
629. Subclause 174(2) provides for access to such documents at all reasonable times by the persons listed in paragraphs 174(2)(a)–(c).
630. Separate rules apply to documents that are seized under clause 175.

#### **Clause 175 – Power to seize evidence etc.**

631. This clause deals with the seizure of evidence under Part 9.
632. If the place is a workplace, then the inspector may seize anything (including a document) that the inspector reasonably believes constitutes evidence of an offence against the Bill (paragraph 175(1)(a)). The inspector may also take and remove for examination, analysis or testing a sample of any substance or thing without paying for it (paragraph 175(1)(b)).
633. If a place (even if it is not a workplace) has been entered with a search warrant under this Part, then the inspector may seize the evidence for which the warrant was issued (subclause 175(2)).
634. In either case, the inspector may also seize anything else at the place if the inspector reasonably believes the thing is evidence of an offence against the Bill, and the seizure is necessary to prevent the thing being hidden, lost, destroyed, or used to continue or repeat the offence (subclause 175(3)).

#### **Clause 176 – Inspector's power to seize dangerous workplaces and things**

635. Clause 176 allows inspectors to seize certain things, including plant, substances and structures, at a workplace or part of the workplace that the inspector reasonably believes is defective or hazardous to a degree likely to cause serious illness or injury or a dangerous incident to occur.

#### **Clause 177 – Powers supporting seizure**

636. Clause 177 provides that a thing that is seized may be moved, made subject to restricted access or, if the thing is plant or a structure, dismantled.
637. Subclause 177(2) makes it an offence to tamper, or attempt to tamper, with a thing that an inspector has placed under restricted access.
638. Subclauses 177(3)–(7) enable inspectors to require certain things to be done to allow a thing to be seized.
639. Subclause 177(3) allows an inspector to require a person with control of the seized thing to take it to a stated place by a certain time, which must be reasonable in all the circumstances.
640. Subclause 177(4) provides that the requirement must be made by written notice unless it is not practicable to do so, in which case the requirement may be made orally and confirmed in writing as soon as practicable.

641. Subclause 177(5) allows the inspector to make further requirements in relation to the same thing if it is necessary and reasonable to do so. For example, a requirement could be made to de-commission or otherwise make plant safe once it has been moved to the required place.
642. Subclause 177(6) makes it an offence for a person to refuse or fail to comply with a requirement made under this clause if they do not have a reasonable excuse. The evidentiary burden is on the individual to demonstrate that they have a reasonable excuse (subclause 177(7)).

#### **Clause 178 – Receipt for seized things**

643. Clause 178 requires inspectors to give receipts for seized things, as soon as practicable. This includes things seized under a search warrant. The receipt must be given to the person from whom the thing was seized or, if that is not practicable, the receipt must be left in a conspicuous position in a reasonably secure way at the place of seizure (subclause 178(2)).
644. Subclause 178(3) sets out the information that must be specified in the receipt.
645. Subclause 178(4) sets out the circumstances in which a receipt is not required.

#### **Clause 179 – Forfeiture of seized things**

646. Clause 179 provides that a seized thing may be forfeited if, after making reasonable inquiries, the regulator cannot find the 'person entitled' to the thing or, after making reasonable efforts, the thing cannot be returned to that person.
647. Subclauses 179(2) and (3) provide that inquiries or efforts to return a seized thing are not necessary if this would be unreasonable in the circumstances (e.g. the person entitled to return of the thing tells the regulator they do not want the thing returned to them).
648. Paragraph 179(1)(c) provides for a seized thing to be forfeited by written notice if the regulator reasonably believes it is necessary to retain the thing to prevent it from being used to commit an offence against the Bill (clause 179(4)). However, written notice is not required if the regulator cannot find the 'person entitled' to the thing after making reasonable inquiries or it is impracticable or would be unreasonable to give the notice (subclause 179(5)).
649. Subclause 179(6) specifies the matters that must be stated in a notice of forfeiture, including the reasons for the decision and information about the right of review.
650. Subclause 179(7) specifies matters that must be taken into account in taking steps to return a seized thing or give notice about its proposed forfeiture, including the thing's nature, condition and value.
651. Subclause 179(8) allows the State to recover reasonable costs of storing and disposing of a thing that has been seized to prevent it being used to commit an offence against the Bill.
652. Subclause 179(9) defines the 'person entitled' to mean the person from whom the thing was seized (which will usually be the person entitled to possess the thing) or if that person is no longer entitled to possession, the owner of the thing.

#### **Clause 180 – Return of seized things**

653. Clause 180 sets out a process for the return of a seized thing after the end of six months after seizure. Upon application from the person entitled to the thing, the regulator must return the thing to that person, unless the regulator has reasonable grounds to retain the thing (e.g. the thing is evidence in legal proceedings).

654. The applicant may be the 'person entitled' to the thing, that is, either the person entitled to possess the thing or the owner of the thing (subclause 180(4)).
655. Subclause 180(3) allows the regulator to impose conditions on the return of a thing, but only if the regulator considers it appropriate to eliminate or minimise any risk to work health or safety related to the thing.

#### **Clause 181 – Access to seized things**

656. Clause 181 provides that a person from whom a thing was seized, the owner of the thing or a person they have authorised with certain access rights, including the right of inspection and, if the thing is a document, the right to copy it.
657. This does not apply if it is impracticable or would be unreasonable to allow inspection or copying (subclause 181(2)).
658. Documents produced to an inspector under clause 171 are subject to the separate access regime under clause 174.

#### **Division 4 – Damage and compensation**

##### **Clause 182 – Damage etc. to be minimised**

659. Clause 182 requires inspectors to take all reasonable steps to ensure that they and any assistants under their direction cause as little inconvenience, detriment and damage as is practicable.

##### **Clause 183 – Inspector to give notice of damage**

660. Clause 183 sets out a process for giving written notice to relevant persons of any damage (other than damage that the inspector reasonably believes is trivial) caused by inspectors or their assistants while exercising or purporting to exercise compliance powers.

##### **Clause 184 – Compensation**

661. Subclause 184(1) allows a person to make a claim for compensation if they incur a loss or expense because of the exercise or purported exercise of a power under Division 3 of Part 9.
662. Subclause 184(2) specifies the forum and process for claiming compensation.
663. Subclause 184(3) limits the compensation that is recoverable to compensation that is 'just' in all the circumstances of the case. This means that compensation is not recoverable simply because the relevant powers have been exercised or purportedly exercised at a workplace. The intention is to limit the recovery of compensation to those cases where there is a sufficient degree of unreasonableness or unfairness in the exercise or purported exercise of those powers to warrant an award of just compensation. For example, compensation may be awarded if the taking of a sample of a thing by an inspector or forfeiture of a thing resulted in the acquisition of property other than on just terms, or in circumstances where an error by an inspector caused significant detriment.
664. Subclause 184(4) allows the regulations to prescribe the matters that may or must be taken into account by the relevant court when considering whether it is just to make the order for compensation.

#### **Division 5 – Other matters**

##### **Clause 185 – Power to require name and address**

665. Subclauses 185(1) and (2) allow an inspector to require a person to tell the inspector his or her name and residential address if the inspector:
- finds the person committing an offence against the Bill (paragraph 185)(1)(a))

- reasonably suspects the person has committed an offence against the Bill, based on information given to the inspector, or the circumstances in which the person is found (paragraph 185(1)(b)), or
  - reasonably believes the person may be able to assist in the investigation of an offence against the Bill (paragraph 185(1)(c)).
666. Before making a requirement under this provision, the inspector must give the person their reasons for doing so and also warn the person that failing to respond without reasonable excuse would constitute an offence (subclause 185(2)).
667. If the inspector reasonably believes the person's response to be false, the inspector may further require the person to give evidence of its correctness (subclause 184(3)). For example, an inspector could ask to see the person's driver's licence.
668. Subclause 185(4) makes it an offence for a person to refuse or fail to comply with a requirement under this clause if they do not have a reasonable excuse. Subclause (5) clarifies that there is an evidential burden on the accused to show a reasonable excuse.

#### **Clause 186 – Inspector may take affidavits**

669. Clause 186 clarifies that an inspector may take affidavits for any compliance-related purpose under the Bill.

#### **Clause 187 – Attendance of inspector at coronial inquests**

670. Clause 187 clarifies that an inspector may attend coronial inquests into the cause of death of a worker while the worker was carrying out work and allows inspectors to examine witnesses at the inquest. A jurisdictional note allows this provision to be omitted if this issue is adequately covered by other local laws.

#### **Division 6 – Offences in relation to inspectors**

671. This Division establishes offences against inspectors.
672. Given the importance of the role of the inspector and that the inspector is the most immediate personification at the workplace of the regulatory system, offences in relation to inspectors are considered to be serious and the subject of significant penalties.

#### **Clause 188 – Offence to hinder or obstruct inspector**

673. Clause 188 makes it an offence to intentionally hinder or obstruct an inspector in exercising compliance powers under the Bill, or induce or attempt to induce any other person to do so. This would include unreasonably refusing or delaying entry, as well as behaviour such as intentionally destroying or concealing evidence from an inspection.
674. Any reasonable action taken by a person to determine his or her legal rights or obligations in relation to a particular requirement (e.g. the scope of legal professional privilege) is not intended to be caught by this provision.

**Clause 189 – Offence to impersonate inspector**

675. Clause 189 makes it an offence for a person who is not an inspector to hold himself or herself out to be an inspector.

[Note: Code jurisdictions will amend this provision to specify 'recklessness' as the fault element for this offence to avoid 'intention' being implied as a default fault element].

**Clause 190 – Offence to assault, threaten or intimidate inspector**

676. Clause 190 makes it an offence to assault, threaten or intimidate, or attempt to do so, an inspector or a person assisting an inspector.

677. Although this is also an offence at general criminal law, the inclusion of this provision is intended to ensure greater deterrence by giving it more prominence and allowing its prosecution by the regulator.

[Note: The explanatory memoranda for the Code jurisdictions will need to specify that the *Model Criminal Code 2009* will imply intention as a default fault element].

Superseded

## **Part 10 – Enforcement measures**

678. Part 10 provides for enforcement measures including notices (i.e. improvement notices, prohibition notices, prohibited asbestos notices and non-disturbance notices), remedial action and court-ordered injunctions.
679. Many of the decisions that can be made under this Part are subject to review (see Part 12).

### **Division 1 – Improvement notices**

680. This Division provides for inspectors to issue improvement notices. Improvement notices and prohibition notices have for many years been fundamental tools used by inspectors to achieve compliance with work health and safety laws.

#### **Clause 191 – Issue of improvement notices**

681. Improvement notices may require a person to remedy a contravention, prevent a likely contravention of the Bill or take remedial action.
682. Clause 191 allows an inspector to issue improvement notices if the inspector reasonably believe a person:
- is contravening a provision of the Bill, or
  - has contravened a provision in circumstances that make it likely that that contravention will continue or be repeated.
  - Subclause 191(2) lists what action an improvement notice may require, including that the person remedy the contravention or take steps to prevent a likely contravention from occurring.

#### **Clause 192 – Contents of improvement notices**

683. Subclause 192(1) sets out the mandatory and optional content for improvement notices. The mandatory content aims to ensure that the person who is issued with the notice understands the grounds for the inspector's decision, including (in brief) how the laws are being or have been contravened. The optional content includes such things as directions about measures to be taken to remedy the contravention or prevent the likely contravention from occurring (subclause 192(2)).
684. Improvement notices must also specify a date for compliance with the notice (paragraph 192(1)(d)). The day stated for compliance with the improvement notice must be reasonable in all the circumstances. Relevant factors could include the seriousness of the contravention or the likely contravention.

#### **Clause 193 – Compliance with improvement notice**

685. Clause 193 makes it an offence for a person to fail or refuse to comply with an improvement notice within the time allowed for compliance as stated in the notice, including any extended time for compliance (see clause 194). This is subject to provisions for review of decisions, including stays of decisions to issue notices (see Part 12).

#### **Clause 194 – Extension of time for compliance with improvement notices**

686. Clause 194 allows inspectors to extend the time for compliance with improvement notices. An extension of time to comply with an improvement notice must be in writing and can only be made if the time for compliance stated in the notice (or as extended) has not expired.

### **Division 2 – Prohibition notices**

687. Prohibition notices are designed to stop workplace activity that involves a serious risk to a person's health or safety and are found in the current work health and safety laws of all Australian jurisdictions.

### **Clause 195 – Power to issue prohibition notice**

688. Clause 195 allows inspectors to issue prohibition notices to stop or prevent an activity at a workplace, or modify the way the activity is carried out, if they reasonably believe that:
- if the activity is occurring—it involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard, or
  - if the activity is not occurring but may occur, and if it does—it will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.
689. Subclause 195(2) provides that the notice may be issued to the person who has control over the activity. This would ordinarily be a PCBU.

#### *Pre-requisites for issue of prohibition notices*

690. The use of ‘serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard’ in subclause 195(1) has the advantage of being effective to deal with risks of diseases of long latency from immediate exposure to a hazard and circumstances of psychological threat or other similar conditions. For a prohibition notice to be issued, the risk would have to be considered ‘serious’ and be associated with an immediate or imminent exposure to a hazard.

#### *Operation of prohibition notices*

691. A prohibition notice takes effect immediately upon being issued and ordinarily continues to operate—subject to the review provisions in Part 12—until an inspector is satisfied that the matters that give or will give rise to the risk have been remedied.
692. There is no requirement for an inspector to visit a workplace to verify that the risks identified in the notice have been remedied. This recognises that an inspector may be satisfied of compliance with a prohibition notice in some circumstances without the need for a workplace visit (e.g. if an independent expert report is provided to the inspector, or independently verified video footage of the affected activity is submitted).

#### *Oral directions*

693. Because prohibition notices are designed as a response to serious risks to work health or safety, directions may be issued orally at first instance, but must be confirmed by a written notice as soon as practicable (subclause 195(3)). In general, for such oral directions to be enforceable the inspector must make it clear that the directions are being given under this provision and that it would be an offence for the person not to comply.

### **Clause 196 – Contents of prohibition notice**

694. Clause 196 sets out the mandatory and optional content for prohibition notices. The mandatory content requirements are designed to ensure that the person who is issued with the notice understands the inspector’s decision, including the basis for the inspector’s belief that a notice should be issued and (in brief) the activity the inspector believes involves or will involve a serious risk and the matters that give or will give rise to the risk. It must also cite the provision of the Bill or regulations that the inspector believes is being or is, likely to be, contravened by the activity.
695. Prohibition notices may also include directions about measures to be taken to remedy the risk, activities to which the notice related, or any contravention or likely contravention mentioned in the notice (subclause 196(2)).
696. Subclause 196(3) gives examples of the ways in which a prohibition notice may prohibit the carrying on of an activity, but does not limit the inspector’s power to issue prohibition notices in clause 195.

### **Clause 197 – Compliance with prohibition notice**

697. Clause 197 provides that it is an offence for a person to fail or refuse to comply with a prohibition notice or a direction issued under subsection 195(2) of the Bill. The penalties reflect the consequences that may result from failure to remedy serious risks to health or safety.

### **Division 2A – Prohibited asbestos notices**

698. This Division provides for a regulator to issue prohibited asbestos notices. It ensures a regulator has powers in relation to prohibited asbestos in circumstances where an inspector may not otherwise be able to issue an improvement notice or prohibition notice.

### **Clause 197A – Definitions**

699. Clause 197A includes key definitions for Division 2A Part 10 including ‘asbestos,’ ‘asbestos containing material (ACM),’ ‘prohibited asbestos’ and ‘relevant person in relation to a workplace.’

700. The definition of ‘relevant person in relation to a workplace’ provides discretion for a regulator to determine who a relevant person is when issuing the notice, taking into account that there may be various persons with responsibility for asbestos at a workplace because of different workplace arrangements and the complexity of modern supply chains. For example, the PCBU at the workplace at the time the prohibited asbestos is discovered may not have caused it to be fixed or installed, or be most able to comply with the notice and carry out measures in relation to the prohibited asbestos.

### **Clause 197B Issue of prohibited asbestos notices**

701. Clause 197B requires a regulator to issue a prohibited asbestos notice if they reasonably believe that prohibited asbestos is present in the workplace. A regulator must issue a prohibited asbestos if they form the necessary belief.

702. A regulator may be able to form the necessary belief for issuing a prohibited asbestos notice even where the regulator does not know the precise location of prohibited asbestos at the particular workplace. For example, a regulator may be able to form the necessary belief based on intelligence from other cases where the same products are used.

### **Clause 197C Contents of prohibited asbestos notice**

703. Clause 197C sets out the required contents of a prohibited asbestos notice. A prohibited asbestos notice must state:

- the basis for a regulator’s belief that prohibited asbestos is present in the workplace,
- details of the prohibited asbestos, including the location, type and condition,
- specific measures the relevant person is required to take in relation to the prohibited asbestos, including in relation to the management, and
- the day by which compliance is required by the relevant person.

704. The day specifying compliance with the prohibited asbestos notice must be reasonable. When considering whether the day is reasonable, all of the circumstances relating to the notice must be considered.

### **Clause 197D Compliance with prohibited asbestos notice**

705. Clause 197D provides that it is an offence for a relevant person not to comply with a prohibited asbestos notice. The penalties reflect the consequences for failing to remedy the serious risks to health and safety posed by prohibited asbestos.



**Clause 197E Extension of time for compliance with prohibited asbestos notices**

706. Clause 197E provides that a regulator may extend the compliance period for a prohibited asbestos notice. The compliance period can only be extended if the period has not ended.

**Division 3 – Non-disturbance notices**

707. This Division provides for non-disturbance notices. Non-disturbance notices are issued by inspectors and designed to ensure non-disturbance of ‘notifiable incident’ sites and also other sites if an inspector reasonably believes that this is necessary to facilitate the exercise of their compliance powers.

**Clause 198 – Issue of non-disturbance notice****Clause 199 – Contents of non-disturbance notice**

708. Clauses 198 and 199 allows an inspector to issue non-disturbance notices to the person with management or control of a workplace if the inspector reasonably believes that it is necessary to ensure non-disturbance of a site to facilitate the exercise of his or her compliance powers.
709. A non-disturbance notice may require the person to whom it is issued to preserve the site of a notifiable incident for a specified period or prevent a particular site being disturbed for a specified period. A ‘notifiable incident’ occurs where a person dies, suffers a serious injury or illness or where there is a dangerous incident (clause 35). The terms ‘serious injury or illness’ and ‘dangerous incident’ are defined in clauses 36 and 37 respectively.
710. A site includes any plant, substance, structure or thing associated with that site (subclause 199(3)).
711. A non-disturbance notice must specify how long it operates (this cannot be more than seven days), what the person must do to comply with the notice and the penalty for contravening the notice (subclause 199(2)).
712. Subclause 199(4) allows certain activities to proceed, despite the non-disturbance notice. These activities generally relate to ensuring health or safety of affected persons, assisting police investigations or activities expressly permitted by an inspector.

**Clause 200 – Compliance with non-disturbance notice**

713. Clause 200 makes it an offence for a person to, without reasonable excuse, fail or refuse to comply with a non-disturbance notice. This is subject to the provisions for review of decisions, including stays of decisions to issue notices (see Part 12).
714. Subclause 200(2) clarifies that the evidential burden of showing a reasonable excuse is on the accused.

**Clause 201 – Issue of subsequent notices**

715. Clause 201 allows inspectors to issue one or more subsequent non-disturbance notices in relation to a site, whether or not the previous notice has expired.
716. This would be subject to the requirements in clauses 198 and 199, which relate to the issue and contents of non-disturbance notices.

**Division 4 – General requirements applying to notices****Clause 202 – Application of Division****Clause 203 – Notice to be in writing**

717. This Division co-locates the provisions of a procedural nature that apply to all notices issued under this Part, unless otherwise specified.
718. Clause 203 requires that all notices issued under this Part be given in writing, although enforceable directions may be given orally in advance of a prohibition notice (clause 195).

**Clause 204 – Directions in notice****Clause 205 – Recommendations in notice**

719. Improvement and prohibition notices may include directions (see clauses 192(2), 196(2) and 196(3)). A prohibited asbestos notice must include directions (see subclause 197C(1)(c)).
720. Clause 204 clarifies that a direction included in an improvement or prohibition notice or a prohibited asbestos notice may refer to a Code of Practice and offer the person to whom it is issued a choice of measures to take or ways in which to remedy the contravention.
721. Clause 205 clarifies that improvement and prohibition notices, and prohibited asbestos notices may include recommendations. The difference between a direction and recommendation is that it is not an offence to fail to comply with recommendations in a notice (subclause 205(2)).

**Clause 206 – Changes to notice by inspector****Clause 207 – Regulator may vary or cancel notice**

722. Clauses 206 and 207 allow for notices to be varied or cancelled.
723. Clause 207 provides that a notice may only be varied or cancelled by the regulator, even if the notice was issued by an inspector. Clause 207 is subject to clause 206 in relation to minor changes or extensions to the compliance period for an improvement notice or prohibited asbestos notice.
724. Clause 206 allows an inspector and the regulator, whichever is relevant, to make minor technical changes to a notice that they have issued to improve clarity and to correct errors or references, or to reflect changes of address or other circumstances. An inspector or regulator may also extend the period for compliance with an improvement notice or prohibited asbestos notice, whichever is relevant, in accordance with clause 194 and clause 197E, respectively.

**Clause 208 – Formal irregularities or defects in notice**

725. Clause 208 makes it clear that formal defects or irregularities in notices issued under this Part do not invalidate the notices, unless this would cause or be likely to cause substantial injustice.
726. Subclause 208(b) clarifies that a failure to use the correct name of the person to whom the notice is issued falls within this provision, if the notice sufficiently identifies the person and has been issued or given to the person in accordance with clause 209.

### **Clause 209 – Issue and giving of notice**

727. Subclause 209(1) specifies how notices may be served. The regulations may prescribe additional matters such as the manner of issuing or giving a notice and the steps that must be taken to notify all relevant persons that the notice has been issued (subclause 209(2)).

#### *'Issuing' and 'giving' notices*

728. The terms 'issued' and 'given' in relation to serving notices have been used differently in current work health and safety laws in Australia.

729. Under this Part a notice is 'issued' to a person who is required to comply with it, but may be 'given' to another person (e.g. a manager or officer of a corporation). Those persons who are given the notice need not comply with it, unless they are also the person to whom it was issued.

### **Clause 210 – Display of notice**

730. Subclause 210(1) requires the person to whom a notice is issued to display a copy of that notice in a prominent place in the workplace at or near the place where work affected by the notice is performed. This must be done as soon as possible.

731. It is an offence for a person to refuse or fail to display a notice as required by this clause.

732. It is also an offence for a person to intentionally remove, destroy, damage or deface the notice while it is in force (subclause 210(2)).

733. There is no requirement to display notices that are stayed under review proceedings, as they would not be considered to be 'in force' for the period of the stay.

### **Division 5 – Remedial action**

#### **Clause 211 – When regulator may carry out action**

734. Clause 211 allows the regulator to take remedial action in circumstances where a person issued with a prohibition notice or prohibited asbestos notice has failed to take reasonable steps to comply with the notice.

735. The regulator may take any remedial action it believes reasonable to make the workplace or situation safe, but only after giving written notice to the alleged offender of the regulator's intent. The written notice must also state the owner's or person's liability for the costs of that action.

#### **Clause 212 – Power of the regulator to take other remedial action**

736. Clause 212 allows the regulator to take remedial action if the regulator reasonably believes that

- a prohibition notice or prohibited asbestos notice can and should be issued in a particular case, but
- in the case of a prohibition notice, the notice cannot be issued after reasonable steps have been taken because the person with management or control of the workplace cannot be found
- in the case of a prohibited asbestos notice, the notice cannot be issued because the relevant person in relation to the workplace cannot be found.

737. In these circumstances, the regulator may take any remedial action necessary to make the workplace safe. The word 'necessary' is intended to imply that the regulator should take the least interventionist approach possible, while making the workplace safe (e.g. erecting barricades around a site).

**Clause 213 – Costs of remedial or other action**

738. Clause 213 enables the regulator to recover the reasonable costs of remedial action taken under clauses 211 or 212 as a debt due to the regulator.
739. For costs to be recoverable from a person under clause 211, the person must have been notified of the regulator's intention to take the remedial action and the person's liability for costs.

**Division 6 – Injunctions**

740. This Division allows a relevant court to make injunctions to enforce notices issued under this Part (i.e. excluding provisional improvement notices, unless confirmed by an inspector). This provides a timely means for the regulator to ensure that contraventions of health and safety duties are addressed, rather than having to wait for the lengthy process of prosecution.

**Clause 214 – Application of Division****Clause 215 – Injunctions for noncompliance with notices**

741. Clause 215 allows the regulator to apply to a relevant court for an injunction to compel a person to comply with a notice or restrain the person from contravening a notice issued under this Part.
742. Injunctive relief may be sought in relation to an improvement notice even if any time for complying with the notice has expired (paragraph 215(2)(b)).

Superseded

## **Part 11 – Enforceable undertakings**

743. Part 11 allows for written, enforceable undertakings to be given by a person as an alternative to prosecuting them. Such undertakings are voluntary—a person cannot be compelled to make an undertaking and the regulator has discretion whether or not to accept the undertaking.

### **Clause 216 – Regulator may accept WHS undertakings**

744. Clause 216 enables the regulator to accept a WHS undertaking relating to a breach or alleged breach of the Bill, with the exception of a breach or alleged breach relating to a Category 1 offence. A Category 1 offence, as defined in clause 31, is the most serious work health and safety offence and involves reckless conduct by a duty holder that exposes an individual to a risk of death or serious illness or injury without reasonable excuse. The use of enforceable undertakings would not be appropriate in such circumstances.

745. A legislative note following subclause 216(1) directs the reader to subclause 230(3), which requires the regulator to publish general guidance for the acceptance of WHS undertakings on its website.

### **Clause 217 – Notice of decision and reasons for decision**

746. Subclause 217(1) requires the regulator to give the person wanting to make a WHS undertaking a written notice of its decision to accept or reject the undertaking, along with reasons for that decision.

747. In the interests of transparency, if the regulator accepts a WHS undertaking the reasons for that decision must be published on the regulator's website (subclause 217(2)). However, the decision is not subject to internal review.

### **Clause 218 – When a WHS undertaking is enforceable**

748. Clause 218 deals with when an undertaking becomes enforceable. That is, when the regulator's decision to accept is given to the person or at any later date specified by the regulator.

### **Clause 219 – Compliance with WHS undertaking**

749. Clause 219 provides that it is an offence to contravene a WHS undertaking.

### **Clause 220 – Contravention of WHS undertaking**

750. Clause 220 applies if a person contravenes a WHS undertaking. Where, on an application by the regulator, a court is satisfied that the person has contravened the undertaking it may, in addition to imposing a penalty, direct the person to comply with the undertaking, or discharge the undertaking. The court may also make any other order it considers appropriate in the circumstances, including orders that the person pay the costs of proceedings and orders that the person pay the regulator's costs in monitoring compliance with the WHS undertaking in the future.

751. Subclause 220(4) provides that an application for, or the making of, any orders under this clause will not prevent proceedings being brought for the original contravention or alleged contravention in relation to which the WHS undertaking was made. Subclause 232(1)(c) provides for the limitation period for the bringing of such proceedings.

### **Clause 221 – Withdrawal or variation of WHS undertaking**

752. Subclause 221(1) provides that, with the written agreement of the regulator, a person who has made a WHS undertaking may withdraw or vary the undertaking, but only in relation to the contravention or alleged contravention to which the WHS undertaking relates.

753. Once again, in the interests of transparency and accountability, variations and withdrawals must be published on the regulator's website (subclause 221(3)).

**Clause 222 – Proceeding for alleged contravention**

754. Clause 222 prevents a person being prosecuted for a contravention or alleged contravention of the Bill to which a WHS undertaking relates if that WHS undertaking is in effect or if the undertaking has been completely discharged.

755. Subclause 222(3) enables the regulator to accept a WHS undertaking while related court proceedings are on foot but before they have been finalised. In such circumstances, the regulator is required to take all reasonable steps to have the proceedings discontinued as soon as possible (subclause 222(4)).

Superseded

## **Part 12 – Review of decisions**

756. Part 12 establishes the procedures for the review of decisions that are made under the Bill. In general, reviewable decisions are those that are made by:

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

### **Division 1 – Reviewable decisions**

#### **Clause 223 – Which decisions are reviewable**

757. Clause 223 contains a table that sets out the decisions made under the Bill that are reviewable decisions.

758. The table in subclause 223(1) lists the reviewable decisions by reference to the provisions under which they are made and lists who is eligible to apply for review of a reviewable decision.

759. Item 13 in the table allows the regulations to prescribe further decisions that can be reviewable and who would be eligible to apply for the review of any such decision.

760. Subclause 223(2) states that, unless a contrary intention appears, a reference in Part 12 to a decision includes a reference to a number of actions listed in paragraphs (a) to (g), and includes a refusal to make a decision.

761. Subclause 223(3) defines a person entitled to a thing, for the purposes of a reviewable decision made under clauses 179 or 180.

### **Division 2 – Internal review**

#### **Clause 224 – Application for internal review**

762. Subclause 224(1) allows an eligible person to apply for internal review of a reviewable decision within 14 days of the decision first coming to the attention of the eligible person or a longer period as determined by the regulator.

763. In the case of a decision to issue an improvement notice, an application for internal review must be made within the period allowed for compliance specified in the notice if it is less than 14 days.

764. An application for internal review cannot be made in relation to a decision of the regulator or a delegate of the regulator (subclause 224(1)).

765. Subclause (2) requires that an application be made in the manner and form required by the regulator.

#### **Clause 225 – Internal reviewer**

766. Clause 225 provides that the regulator may appoint a body or person to conduct internal reviews applied for under this Division. However, subclause 225(2) provides that the regulator cannot appoint the person who made the original decision.

#### **Clause 226 – Decision of internal reviewer**

767. Subclause 226(1) requires an internal reviewer to make a decision as soon as reasonably practicable and within 14 days after receiving the application for internal review.

768. Subclause 226(2) allows the internal reviewer to confirm or vary the reviewable decision, or set aside the reviewable decision and substitute with another decision that the internal reviewer considers appropriate.

769. Subclauses 226(3)–(5) provide a process for seeking further information from an applicant. If the internal reviewer seeks further information, the 14 day decision making period will cease to run until that information is provided. Subclause 226(4) states that the internal reviewer can specify a period of not less than seven days in which additional information must be provided. If the information is not provided within the specified period, subclause 226(5) states that the reviewable decision is taken to be confirmed by the internal reviewer.
770. Subclause 226(6) provides that if the internal reviewer does not vary or set aside a decision within 14 days the reviewable decision is taken to have been confirmed.

#### **Clause 227 – Decision on internal review**

771. Clause 227 requires an internal reviewer to provide to the applicant in writing the decision on internal review and reasons for it as soon as practicable after making that decision.

#### **Division 3 – External review**

##### **Clause 228 – Application for external review**

772. Subclause 228(1) provides that an eligible person may apply for an external review of any reviewable decision made by the regulator or a decision made, or taken to have been made, on internal review.
773. Subclause 228(2) provides when an application for external review must be made. An application for external review must be made: within 28 days after an applicant is notified where a decision was to forfeit a thing; within 14 days after an applicant was notified where a decision does not involve forfeiting a thing; or within 14 days if the regulator is required by the external review body to give the eligible person a statement of reasons.

#### **Division 4 – Stays of reviewable decisions**

##### **Clause 229 – Stays of reviewable decisions**

774. Subclause 229(1) provides that an application for review of a reviewable decision automatically stays the operation of the decision, except in relation to a decision to issue a prohibition or non-disturbance notice.
775. On a reviewer's own initiative or application, a reviewer may stay a decision in relation to the issue of a prohibition or non-disturbance notice. The reviewer must make the decision on the stay within one working day after receiving an application or it will be taken that the reviewer has made a decision to grant a stay.
776. Subclause 229(6) provides that a stay that is in place for an internal review continues to have effect until an application is made for external review, or until the prescribed period for applying for external review expires, whichever is earlier.



## **Part 13 – Legal Proceedings**

777. This Part is divided as follows:

- Division 1 deals with the prosecution of offences
- Division 2 covers sentencing for offences
- Division 3 provides for infringement notices
- Division 4 deals with offences committed by bodies corporate
- Divisions 5 and 6 deal with offences committed by the Crown and public authorities
- Division 7 provides for WHS civil penalty proceedings, and
- Division 8 deals with the effect of the Bill on civil liability.

### **Division 1 – General matters**

#### **Clause 230 – Prosecutions**

778. Subclause 230(1) provides that proceedings for an offence against the Bill can only be brought by the regulator or an inspector authorised in writing (generally or in a particular case) by the regulator.
779. Subclause 230(2) provides that the regulator's authorisation is sufficient to authorise an inspector to continue proceedings in a case where the court amends the charge, warrant or summons.
780. The transparency and accountability of proceedings for an offence against this Bill are facilitated by:
- providing that the regulator must issue and publish on its website general guidelines about the prosecution of offences against the Bill and the acceptance of WHS undertakings under the Bill (subclause 230(3)), and
  - clarifying that nothing in clause 230 affects the ability of the Director of Public Prosecutions (DPP) to bring proceedings for an offence against the Bill (subclause 230(4)). Therefore, if the regulator does not bring proceedings for an offence against the Bill the DPP can.

#### **Clause 231 – Procedure if prosecution is not brought**

781. Clause 231 allows for the review by the DPP of a regulator's decision not to prosecute a serious offence, that is, a Category 1 or Category 2 offence.
782. Subclause 231(1) allows a person who reasonably believes that a Category 1 or 2 offence has been committed but no prosecution has been brought to ask the regulator, in writing, to bring a prosecution. The request can be made if no prosecution has been brought between six and 12 months after the occurrence of the act, matter or thing that they reasonably believed occurred. Subclause 231(7) clarifies that an application may be made about the occurrence of, or failure in relation to, an act, matter or thing.
783. Subclause 231(2) sets out how and when the regulator must respond to a request made in subclause 231(1). In particular, the regulator must provide a written response to a request within three months and must advise the person whether a prosecution will be brought and, if the decision has been made to not bring a prosecution, the reasons for that decision.
784. In the interests of transparency and fairness, paragraph 231(2)(b) requires the regulator to inform the person whom the applicant believes committed the offence of the application and of the regulator's response.

785. If the regulator advised under subclause 231(2) that a prosecution for an offence will not be brought, subclause 231(3) provides that they must also inform the applicant that they may ask for the matter to be referred to the DPP. If the applicant makes a written request, the regulator must refer the matter to the DPP within one month.
786. Subclause 231(4) requires the DPP to consider the referral and advise the regulator in writing within one month whether the DPP considers that a prosecution should be brought.
787. Subclause 231(5) requires the regulator to ensure that a copy of the DPP advice is given to the applicant and again for transparency, the person whom the applicant believes committed the offence.
788. Subclause 231(6) provides that if the regulator declines to follow the advice of the DPP to bring proceedings, the regulator must give written reasons for its decision to the applicant and the person whom the applicant believes committed the offence.

### **Clause 232 – Limitation period for prosecutions**

789. The limitation periods provided in clause 232 balance the need of a duty holder to have proceedings brought and resolved quickly with the public interest in having a matter thoroughly investigated by the regulator so that a sound case can be brought.
790. Subclause 232(1) sets out the limitation periods for when proceedings for an offence may begin. Proceedings must be commenced:
- within two years after the offence first came to the regulator’s attention (paragraph (a))
  - within one year after a finding in a coronial or other official inquiry that the offence has occurred (paragraph (b)), or
  - if a WHS undertaking has been given in relation to the offence, within six months of the undertaking being contravened or when the regulator becomes aware of a contravention or agrees under clause 221 to withdraw the undertaking.
791. Reflecting the seriousness of Category 1 offences, subclause 232(2) enables proceedings for such offences to be brought after the end of the applicable limitation period if fresh evidence is discovered and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period.

### **Clause 233 – Multiple contraventions of health and safety duty provision**

792. Clause 233 modifies the criminal law rule against duplicity. This rule means that, ordinarily, a prosecutor cannot charge two or more separate offences relating to the same duty in one count of an indictment, information or complaint.
793. Unless modified, the rule could complicate the prosecution of work health and safety offences and impede a court’s understanding of the nature of the defendant’s breach of duty particularly when an offence is ongoing. For example, the duplicity rule might prevent a charge from including all the information about how the defendant had breached their duty of care because information about a second breach of the duty could not be provided in the prosecution for a first breach of that duty. Presenting only one aspect of a defendant’s failure might deprive the court of the opportunity to appreciate the seriousness of the failure and result in inadequate penalties or orders being made.
794. Subclause 233(1) provides that more than one contravention of one health and safety duty provision by a person in the same factual circumstances may be charged as a single offence or as separate offences.
795. Subclause 233(2) clarifies that the clause does not authorise contraventions of two or more health and safety duty provisions being charged as a single offence.

796. Subclause 233(3) provides that only a single penalty may be imposed when more than one contravention of a health and safety duty provision is charged as a single offence.
797. Subclause 233(4) provides that in the clause a 'health and safety duty provision' means a provision of Division 2, 3 or 4 of Part 2.

### **Division 2 – Sentencing for offences**

798. Contemporary Australian OHS laws provide courts with a variety of sentencing options in addition to the traditional sanctions of fines and custodial sentences. The national review of OHS laws concluded that judicious combinations of orders can enhance deterrence, make meaningful action by an offender more likely, be better targeted and permit a more proportionate response. In these ways, the Bill's goals of increased compliance and a reduction in work-related injury and disease will be promoted. A range of sentencing options is provided for the court in Division 2. The court may:
- impose a penalty
  - make an adverse publicity order
  - make a restoration order
  - make a community service order
  - release the defendant on the giving of a court-ordered WHS undertaking
  - order an injunction, or
  - make a training order.

### **Clause 234 – Application of this Division**

799. Clause 234 provides that Division 2 applies if a court convicts a person or finds them guilty of an offence against the Bill.

### **Clause 235 – Orders generally**

800. Clause 235(1) provides that one or more orders under this Division may be made against an offender. Subclause 235(2) provides that orders can be made under this Division in addition to any penalty that may be imposed or other action that may be taken in relation to an offence.

### **Clause 236 – Adverse publicity orders**

801. Adverse publicity orders can be an effective deterrent for an organisation that is concerned about its reputation. Such orders can draw public attention to a particular wrongdoing and the measures that are being taken to rectify it.
802. Subclause 236(1) sets out the kinds of adverse publicity orders that a court may make. For instance, the court may order an offender to publicise the offence or notify a specified person or specified class of persons of the offence, or both. The offender must give the regulator evidence of compliance with the order within seven days of the end of the compliance period specified in the order.
803. Subclause 236(2) allows the court to make an adverse publicity order on its own initiative or at the prosecutor's request.
804. Subclauses 236(3)–(4) enable action to be taken by the regulator if an offender does not comply with the adverse publicity order or fails to give evidence to the regulator.
805. Subclause 236(5) provides that if action is taken by the regulator under subclauses 236(3) or (4), the regulator is entitled to recover from the offender reasonable expenses associated with it taking that action.

**Clause 237 – Orders for restoration**

806. Subclause 237(1) allows the court to order an offender to take steps within a specified period to remedy any matter caused by the commission of the offence that appears to be within the offender's power to remedy.
807. Subclause 237(2) enables the court to grant an extension of the period to allow for compliance, provided an application for extension is made before the end of the period specified in the original order.

**Clause 238 – Work health and safety project orders**

808. Subclause 238(1) allows the court to make an order requiring an offender to undertake a specified project for the general improvement of work health and safety within a certain period.
809. Subclause 238(2) provides that a work health and safety project order may specify conditions that must be complied with in undertaking the project.

**Clause 239 – Release on the giving of a court-ordered WHS undertaking**

810. Subclause 239(1) enables a court to adjourn proceedings, with or without recording a conviction, for up to two years and make an order for the release of an offender on the condition that an offender gives an undertaking with specified conditions. This is called a court-ordered WHS undertaking.
811. Court-ordered WHS undertakings must be distinguished from WHS undertakings. WHS undertakings are given to the regulator and are voluntary in nature.
812. Subclause 239(2) sets out the conditions that must be included in a court-ordered WHS undertaking. The undertaking must require the offender to appear before the court if called on to do so during the period of the adjournment. Furthermore, the offender must not commit any offence against the Bill during the period of adjournment and must observe any special conditions imposed by the court.
813. Subclauses 239(3) and (4) allow the court to call on an offender to appear before it if the offender is given not less than four days notice of the court order to appear.
814. Subclause 239(5) provides that when an offender appears before the court again, if the court is satisfied that the offender has observed the conditions of the undertaking, it must discharge the offender without any further hearing of the proceeding.

**Clause 240 – Injunctions**

815. Clause 240 allows a court to issue an injunction requiring a person to stop contravening the Bill if they have been found guilty of an offence against it. This power can be an effective deterrent where a penalty fails to provide one.
816. A note to this clause reiterates that an injunction for non-compliance with a non-disturbance notice, improvement notice or prohibition notice may also be obtained under clause 215.

**Clause 241 – Training orders**

817. Training orders enable a court to make an offender take action to develop skills that are necessary to manage work health and safety effectively. Clause 241 allows a court to make an order requiring a person to undertake, or arrange for workers to undertake, a specified course of training.

**Clause 242 – Offence to fail to comply with order**

818. Subclause 242(1) makes it an offence for a person to fail to comply with an order made under Division 2 without reasonable excuse.

819. Subclause 242(3) provides that the clause does not apply to an order under clauses 239 or 240. If a person does not comply with a court-ordered undertaking (made under clause 239) they may be prosecuted for the original offence to which the undertaking related and if a person does not comply with an injunction (issued under clause 240) they may be prosecuted for the contravention they have been ordered to cease. If a person fails to comply with a court ordered sanction the person may be prosecuted and charged with contempt of court.

### **Division 3 – Infringement notices**

#### **Clause 243 – Infringement notes**

820. Refer to Appendix.

### **Division 4 – Offences by bodies corporate**

#### **Clause 244 – Imputing conduct to bodies corporate**

821. A body corporate is an artificial entity that can only act and make decisions through individuals. Therefore, subclause 244(1) provides that any conduct engaged in on behalf of a body corporate by an employee, agent or officer of the body corporate is conduct also engaged in by the body corporate. Importantly, the operation of this rule is limited to actions that are within the actual or apparent scope of person's employment or within their actual or apparent authority.
822. Subclause 244(2) provides that if an offence requires proof or knowledge, intention or recklessness, it is sufficient for an employee, agent or officer of a body corporate to prove they had the relevant knowledge, intention or recklessness in proceedings against a body corporate concerning that offence.
823. Subclause 244(3) provides that if for an offence against the Act mistake of fact is relevant to determining whether a person is liable, it is sufficient for an employee, agent or officer of a body corporate to prove they made a mistake of fact in proceedings against a body corporate.

### **Division 5 – The Crown**

#### **Clause 245 – Offences and the Crown**

824. Subclause 245(1) provides that if the Crown is guilty of an offence against the Bill the penalty to be applied is the penalty applicable to a body corporate.
825. The Crown is also an artificial entity that acts and makes decisions through individuals. Subclause 245(2) provides that conduct engaged in on behalf of the Crown by an employee, agent or officer of the Crown is also conduct engaged in by the Crown. The conduct must be within the actual or apparent scope of the person's employment or authority. Clause 247 defines when a person will be an 'officer of the Crown'.
826. Subclause 245(3) provides that in proceedings against the Crown requiring proof of knowledge, intention or recklessness, it is sufficient to prove that the person referred to in subclause 245(2) possessed the relevant knowledge, intention or recklessness.
827. Similarly, subclause 245(4) provides that if mistake of fact is relevant in determining liability in proceedings against the Crown for an offence against the Bill, it is sufficient that the person referred to in subclause 245(2) made that mistake of fact.

#### **Clause 246 – WHS civil penalty provisions and the Crown**

828. Subclause 246(1) provides that if the Crown contravenes a WHS civil penalty provision then the monetary penalty to be imposed is the monetary penalty applicable to a body corporate.

829. Subclause 246(2) mirrors subclause 245(2). That is, any conduct that is engaged in on behalf of the Crown by an employee, agent or officer acting within the actual or apparent scope of their employment or their authority is conduct also engaged in by the Crown for the purposes of a WHS civil penalty provision of the Bill.
830. Subclause 246(3) mirrors subclause 245(3) in providing that if a WHS civil penalty provision requires proof of knowledge, it is sufficient in proceedings against the Crown to prove that the person referred to in subclause 246(2) had that knowledge.

#### **Clause 247 – Officers**

831. Subclause 247(1) defines when a person will be an officer of the Crown for the purposes of the Bill. A person will be taken to be an officer if they make, or participate in making, decisions that affect the whole or a substantial part of the business or undertaking of the Crown.
832. However, subclause 247(2) clarifies that, when acting in their official capacity, a Minister of a State or the Commonwealth is not an officer for the purposes of the Bill.

#### **Clause 248 – Responsible agency for the Crown**

833. Subclause 248(1) provides that certain notices for service on the Crown may be given to or served on the relevant responsible agency. The relevant notices are provisional improvement notices, prohibition notices, non-disturbance notices, infringement notices or notices of WHS entry permit holder entry.
834. Subclauses 248(2) and (3) provide, respectively, that if an infringement notice is to be served on the Crown or proceedings are to be brought against the Crown for an offence or contravention of the Bill, the responsible agency may be specified in the infringement notice or document initiating or relating to the proceedings.
835. Subclause 248(4) provides that the responsible agency in respect of an offence is entitled to act for the Crown in proceedings against the Crown for the offence. Also, subject to any relevant rules of court, the procedural rights and obligations of the Crown as the accused are conferred or imposed on the responsible agency.
836. Subclause 248(5) allows the prosecutor or the person bringing the proceedings to change the responsible agency during the proceedings with the court's leave.
837. Subclause 248(6) defines the expression 'responsible agency' and includes rules governing what happens if the relevant agency of the Crown has ceased to exist.

#### **Division 6 – Public authorities**

##### **Clause 249 – Application to public authorities that are bodies corporate**

838. Clause 249 provides that Division 6 is applicable only to public authorities that are bodies corporate.

##### **Clause 250 – Proceedings against public authorities**

839. Subclause 250(1) provides that proceedings under the Bill can be brought against a public authority in its own name. Subclause 250(2) clarifies that Division 6 does not affect any privileges that such a public authority may have under the Crown.

##### **Clause 251 – Imputing conduct to public authorities**

##### **Clause 252 – Officer of public authority**

840. Subclause 251(1) is an imputation provision that is similar to clause 244 (relating to bodies corporate) and subclause 245(2) (relating to the Crown). That is, conduct engaged in on behalf of a public authority by an employee, agent or officer within the actual or apparent scope of their employment or authority is conduct also engaged in by the public authority.

841. The expression 'officer of a public authority', which is used in clause 251, is defined in clause 252 as a person who makes or participates in making decisions that affect the whole or a substantial part of the business or undertaking of a public authority.
842. Subclause 251(2) provides that in proceedings against the public authority requiring proof of knowledge, intention or recklessness, it is sufficient to prove that the person referred to in subclause 251(1) possessed the relevant knowledge, intention or recklessness.
843. Similarly, subclause 251(3) provides that where proof of mistake of fact is relevant in proceedings against the public authority for an offence against the Bill, it is sufficient if the person referred to in subclause 251(1) made that mistake of fact.

#### **Clause 253 – Proceedings against successors to public authorities**

844. Subclause 253(1) provides that where a public authority has been dissolved, proceedings for an offence committed by that authority that were, or could have been, instituted against it before its dissolution, action can be taken against its successor if the successor is a public authority. A similar rule applies to infringement notices (subclause 253(2)).
845. Subclause 253(2) and (3) provide, respectively, that an infringement notice served on a public authority for an offence against the Bill or a penalty paid by a public authority in respect of such an infringement notice is taken to be an infringement notice served on, or penalty paid by, its successor if the successor is a public authority.

#### **Division 7 – WHS civil penalty provisions**

##### **Clause 254 – When is a provision a WHS civil penalty provision**

846. Subclause 254(1) clarifies that a provision in Part 7 is a 'WHS civil penalty provision' if it is identified as such in that Part. Part 7 contains right of entry offences subject to a civil penalty regime consistent with that in the Fair Work Act.
847. Subclause 254(2) clarifies that 'WHS civil penalty provisions' will also be identified as such in regulations made under the Bill.

##### **Clause 255 – Proceedings for contravention of WHS civil penalty provision**

848. Clause 255 provides that, subject to Division 7, court proceedings may be brought against a person for a contravention of a WHS civil penalty provision.

##### **Clause 256 – Involvement in contravention treated in the same way as actual contravention**

849. Subclause 256(1) provides that a person who is involved in a contravention of a WHS civil remedy provision is taken to have contravened that provision.
850. Subclause 256(2) clarifies that a person will be involved in a contravention of the civil remedy provision only if they have been involved in one of the acts listed in paragraphs (a) to (d). For example, if the person has aided and abetted the contravention or conspired in the contravention.

##### **Clause 257 – Contravening a civil penalty provision is not an offence**

851. Clause 257 clarifies that it is not a criminal offence to contravene a WHS civil penalty provision.

**Clause 258 – Civil proceeding rules and procedure to apply****Clause 259 – Proceeding for a contravention of a WHS civil penalty provision**

852. Clause 258 requires a court to apply the civil proceeding rules of evidence and procedure when hearing proceedings for a contravention of a WHS civil penalty provision.
853. Subclause 259(1) provides that in a proceeding for a contravention of a WHS civil penalty provision, if the court is satisfied that a person has contravened a WHS civil penalty provision, it may order the person to pay a monetary penalty and make any other order it considers appropriate, including an injunction.
854. Subclause 259(2) provides that a monetary penalty imposed under subclause (1) cannot exceed the maximum specified under Part 7 or the regulations in respect of the WHS civil penalty provision contravened.

**Clause 260 – Proceeding may be brought by the regulator or an inspector****Clause 261 – Limitation period for WHS civil penalty proceedings**

855. Similar to the bringing of proceedings for an offence against the Bill, clause 260 provides that proceedings for a contravention of a WHS civil penalty provision can only be brought by the regulator or an inspector authorised in writing by the regulator. Authorisation may be granted generally or to bring proceedings in a particular case.
856. The limitation period for bringing proceedings for a contravention of a WHS civil penalty is two years after the contravention first came to the regulator's notice (clause 261).
857. Clause 262 – Recovery of a monetary penalty
858. Clause 262 provides that a pecuniary penalty is payable to the Commonwealth, State or Territory, as the case may be, and the Commonwealth, State or Territory, as the case may be, may enforce the order as if it were a judgment of the court.

**Clause 263 – Civil double jeopardy**

859. Clause 263 applies the rule against double jeopardy to civil remedy proceedings under the Bill. That is, it disallows a court from making an order against a person under clause 259 if an order has been made against that person under a civil penalty provision of the Commonwealth, a State or a Territory in relation to conduct substantially the same as the conduct constituting the contravention of the Bill.

**Clause 264 – Criminal proceedings during civil proceedings**

860. Subclause 264(1) provides that proceedings against a person for a contravention of a WHS civil penalty provision are stayed if criminal proceedings commence or are already on foot against the person for an offence constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention of the WHS civil penalty provision.
861. If the person is not convicted of the criminal offence, subclause 264(2) allows the proceedings for the civil contravention to be resumed. If proceedings are not resumed they are taken to be dismissed.

**Clause 265 – Criminal proceedings after civil proceedings**

862. Clause 265 provides that regardless of any court order made under 259 for a contravention of a civil penalty provision that a person has found to have made, criminal proceedings may be commenced against the person for conduct that is substantially the same as the conduct constituting the civil contravention.



**Clause 266 – Evidence given in proceedings for contravention of WHS civil penalty provision not admissible in criminal proceedings**

863. Subclause 266(1) provides that evidence of information given or documents produced by an individual in proceedings against them for contravention of a WHS civil penalty provision is not admissible in criminal proceedings against the individual if conduct alleged to constitute the criminal offence involved substantially the same conduct. This is the case regardless of the outcome of the proceedings.
864. Subclause 266(2) is an exception to subclause 266(1). It provides that such evidence is admissible in a criminal prosecution for giving false evidence.

**Division 8 – Civil liability not affected by this Act****Clause 267 – Civil liability not affected by this Act**

865. Clause 267 provides that except as provided in Parts 6 and 7 and Division 7 of Part 13, nothing in the Bill is to be interpreted as conferring a right of action in civil proceedings because of a contravention of the Bill, conferring a defence to a civil action or otherwise affecting a right of action in civil proceedings, or as affecting the extent to which a right of action arises with respect of breaches of duties or obligations imposed by the regulations.

Superseded

## **Part 14 – General**

866. This Part collates a number of miscellaneous provisions.
867. Division 1 contains provisions relating to the giving of false or misleading information, legal professional privilege, immunity from liability, confidentiality of information, contracting out and levying workers.
868. Division 2 deals with codes of practice.
869. Division 3 sets out regulation making powers.

### **Division 1 – General provisions**

870. This Division contains provisions relating to the giving of false or misleading information, legal professional privilege, immunity from liability, confidentiality of information, contracting out and levying workers.

### **Clause 268 – Offence to give false or misleading information**

871. Clause 268 provides for the offence of giving false or misleading information.
872. Subclause 268(1) prohibits a person from giving information, when complying or purportedly complying with the Bill, knowing either that the information is false or misleading in a material particular or that it omits any thing without which the information is false or misleading.
873. Subclause 268(2) prohibits a person from producing a document, when complying or purportedly complying with the Bill, knowing that it is false or misleading in a material particular unless the person:
- indicates how the document is false or misleading and, where practicable, provides the correct information, or
  - accompanies the document with a written statement indicating that the document is false or misleading in a material particular and setting out or referring to the material particular in which the document is false or misleading.

[Note: the Code jurisdictions will remove this offence and will rely on the provisions in the *Model Criminal Code 2009* for this offence].

### **Clause 269 – Act does not affect legal professional privilege**

874. This clause provides that nothing in the Bill requires a person to produce a document disclosing information or otherwise provide information that is the subject of legal professional privilege.

### **Clause 270 – Immunity from liability**

875. Inspectors, in particular, have a crucial role to play in the promotion of work health and safety and in eliminating or minimising serious risks to health and safety. They may be required to exercise judgment, make decisions and exercise powers with limited information and in urgent circumstances.
876. As a result, it is important that they and others engaged in the administration of the Bill are not deterred from exercising their skill and judgment due to fear of personal legal liability.
877. Subclause 270(1) provides that inspectors and others engaged in the administration of the Bill are not personally liable for acts or omissions so long as those acts or omissions are done in good faith and in the execution or purported execution of their powers and functions. The protection provided by this subclause covers both criminal and civil liability.
878. Subclause 270(2) states that any civil liability that would otherwise attach to the person instead applies to the relevant State, Territory or the Commonwealth.

**Clause 271 – Confidentiality of information**

879. Inspectors are given broad powers and protections under the Bill. Clause 271 is one of a number of mechanisms designed to ensure that inspectors are accountable and credible when they perform functions and exercise powers.
880. Clause 271 applies where a person obtains information or gains access to a document in exercising a power or function under the Bill, other than under Part 7. Part 7 deals with workplace entry by WHS permit holders and contains its own provisions dealing with the use or disclosure of information or documents.
881. Subclause 271(2) prohibits the person who has obtained information or a document from doing any of the following:
- disclosing the information or the contents of the document to another person
  - giving another person access to the document, or
  - using the information or document for any purpose, other than in accordance with subclause 271(3).
882. Prohibited disclosures are an offence.
883. Subclause 271(3) provides a list of circumstances in which subclause 271(2) does not apply. These include where disclosure is necessary to exercise powers or functions under the Bill, certain disclosures by the regulator, or where it is required by law or by a court or tribunal or where it is provided to a Minister. It also enables the sharing of information between inspectors who exercise powers or functions under different Acts. Personal information can be disclosed with the relevant person's consent.
884. Subclause 271(4) prohibits a person from intentionally disclosing to another person the name of an individual who has made a complaint against that other person unless the disclosure is made with consent of the complainant or is required by law.

**Clause 272 – No contracting out**

885. This clause deems void any term of any agreement or contract that purports to exclude, limit or modify the operation of the Bill or any duty owed under the Bill, or that purports to transfer to another person any duty owed under the Bill. This upholds the principle that duties of care and obligations cannot be delegated therefore agreements cannot purport to limit or remove a duty held in relation to work health and safety matters.

**Clause 273 – Person not to levy workers**

886. This clause prohibits a PCBU from charging workers for anything done or provided relating to work health and safety.

**Division 2 – Codes of practice**

887. Codes of practice play an important role in assisting duty holders to meet the required standard of work health and safety. This Division sets out:
- how codes of practice are approved
  - the role that codes of practice play in assisting duty holders to meet their legislated obligations, and
  - how codes of practice may be used in proceedings for an offence against the Bill.

**Clause 274 – Approved codes of practice**

888. Subclause 274(1) permits the Minister to approve a code of practice for the purposes of the Bill and to revoke or vary such a code.
889. Subclause 274(2) provides that tri-partite consultation between State, Territory and Commonwealth governments, unions and employer organisations is a prerequisite for approving, varying or revoking a code of practice.
890. Subclause 274(3) provides that a code of practice can apply, incorporate or adopt anything in a document, with or without modification as in force at a particular time or from time to time.
891. Subclause 274(4) provides that an approval, variation or revocation of a code of practice takes effect when a notice is published in the Government Gazette or on a later date that is specified.
892. Subclause 274(5) provides that, as soon as practicable after approving, varying or revoking a code of practice, the Minister must ensure that notice is published in the Government Gazette and a newspaper circulating generally throughout the jurisdiction.
893. Subclause 274(6) provides that a regulator must ensure that members of the public are able to inspect free of charge, at the office of the regulator during normal business hours, a copy of each code of practice that is currently approved and each document applied, adopted or incorporated by a code of practice.

**Clause 275 – Use of codes of practice in proceedings**

894. Currently, provisions about how codes of practice are used vary in two significant ways across the jurisdictions:
- in some jurisdictions non-compliance with approved codes of practice creates a rebuttable presumption of non-compliance with a duty, and
  - other jurisdictions provide that compliance with an approved code constitutes ‘deemed compliance’ with a duty.
895. The Bill does not adopt either approach.
896. Codes of practice provide practical guidance to assist duty holders to meet the requirements of the Bill. A code of practice applies to anyone who has a duty of care in the circumstances described in the code. In most cases, following an approved code of practice would achieve compliance with the health and safety duties in the Bill, in relation to the subject matter of the code.
897. Duty holders can demonstrate compliance with the Bill by following a code or by another method which provides an equivalent or higher standard of health and safety than that provided in a code. This allows duty holders to take into account innovation and technological change in meeting their duty and to implement measures most appropriate for their individual workplaces without reducing safety standards.
898. Subclause 275(2) provides that a code of practice is admissible in proceedings as evidence of whether or not a duty or obligation under the Bill has been complied with.
899. Subclause 275(3) enables a court to use a code of practice as evidence of what is known about hazards, risk, risk assessment and risk control. A code may also be used to determine what is reasonably practicable in the circumstances to which the code relates.
900. Clause 275 does not prevent a person introducing evidence of compliance with the Bill apart from the code of practice—so long as this provides evidence of compliance at a standard that is equivalent to or higher than the code of practice (subclause 275(3)).

### **Division 3 – Regulation-making powers**

901. The function of regulations is to specify, in greater detail, what steps are required for compliance with the general duties in relation to particular hazards or risks.

#### **Clause 276 – Regulation-making powers**

902. Subclause 276(1) contains broad regulation making powers that allow for the making of regulations for or with respect to any matter relating to work health and safety and any matter or thing required or permitted by the Bill, or necessary or convenient to give effect to the Bill.

903. Without limiting the broad power in subclause 276(1), subclause 276(2) contains more specific regulation making power in relation to Schedule 3.

904. Subclause 276(3) makes further provision in relation to the nature of regulations. For instance, regulations may:

- be of general or limited application
- leave particular matters to the discretion of the regulator or an inspector
- apply, adopt or incorporate matters contained in any document
- prescribe exemptions or allow the regulator to make exemptions from compliance with a regulation
- prescribe fees, or
- prescribe infringement penalties for infringement offences and other penalties for contravention of a regulation.

#### **Schedule 1 – Application of Act to dangerous goods and high risk plant**

905. Schedule 1 extends the application of the Bill by providing that:

- the term 'carrying out work' refers to the operation and use of high risk plant affecting public safety as well as the storage and handling of dangerous goods
- the term 'workplace' refers to places where high risk plant affecting public safety is situated or used as well as where dangerous goods are stored and handled, and
- for the purposes of storage and handling of dangerous goods or the operation or use of high risk plant affecting public safety, the term 'work health and safety' includes a reference to public health and safety.

#### **Schedule 2 – The regulator and local tripartite consultation arrangements**

906. The Schedule is reserved for provisions to be inserted relating to the establishment of the regulator and local tripartite consultative arrangements.

907. For example, the Commonwealth, a State or a Territory may establish consultation arrangements for promoting work health and safety, including education and training programs and for sharing information about the incidence of work-related deaths, injuries or illnesses.

#### **Schedule 3 – Regulation-making powers**

908. Schedule 3 details a variety of matters that may be the subject of regulations (see clause 276). These include duties imposed by the Bill, the protection of workers, and matters relating to records, hazards, work groups, health and safety committees and WHS entry permits. These more specific regulation-making powers deal with matters that are not expressly identified within the scope or objects of the Bill for which regulations may be required. They do not limit the broad regulation making power in subclause 276(1).

## **Appendix – Jurisdictional notes**

909. The jurisdictional notes enable the Bill to complement other laws (e.g. police laws and industrial laws) and local mechanisms (e.g. regulators, courts, etc) that are established in a Commonwealth, a State or a Territory. The jurisdictional notes provide further information on how provisions apply or can be amended to suit the existing legislation and local mechanisms of jurisdictions. For more information, see ‘use of jurisdictional notes’ at the beginning of the explanatory memorandum.

### **Clause 1**

910. The citation of the Bill (clause 1) may be amended to create consistency with a jurisdiction’s drafting protocol.

### **Clause 4**

#### **Authorising authority**

911. The term ‘authorising authority’ is not defined in the model provisions. Each jurisdiction will nominate the regulator or a Court or tribunal as an authorising authority to perform all, or some, of the functions associated with administering the WHS permit scheme.

912. In some cases a tribunal will only have responsibility for administering part of the WHS permit scheme (e.g. reviews, appeals etc) while the regulator will retain more routine functions (e.g. issuing permits). This may mean that the term ‘authorising authority’ is not required and can be deleted.

#### **Medical treatment**

913. The term ‘medical treatment’ means treatment by a registered medical practitioner. Jurisdictions will specify the relevant registration laws.

#### **Public authority**

914. Each jurisdiction will define this term separately to allow for jurisdictional differences to be accommodated.

#### **Regulator**

915. Each jurisdiction will specify the regulator, that is, the person or body responsible for administering the Bill and appointing the WHS inspectors in the jurisdiction. The Bill may be administered by more than one regulator.

916. A jurisdictional note to clause 12 allows jurisdictions to insert local provisions in relation to the scope of the Bill, specifically to establish the relationship between the Bill and other legislation.

917. The Commonwealth will need to deal with the interaction of the operation of the Commonwealth, State and Territory laws here.

918. The Commonwealth may also need to insert provisions at this clause to deal with matters relating to national security, defence and federal police operations.

### **Part 7**

919. A jurisdictional note at the beginning of Part 7 allows jurisdictions to replace ‘authorising authority’ with ‘regulator’ in all or some of the provisions in Part 7.

920. A jurisdictional note to clause 116 allows for ‘relevant State or Territory industrial law’ to be defined separately by each State and Territory for the purposes of Part 7. The Commonwealth will be able to remove this definition as the Fair Work Act, which is already referred to throughout Part 7, is the relevant industrial law in that jurisdiction.

**Clause 152**

921. A jurisdictional note to clause 152 indicates that jurisdictions can add functions to the list of regulator functions. This would not however allow jurisdictions to modify or extend functions and powers already included in the Bill, or to depart from the regulatory framework that has been agreed under the IGA.

**Clause 154**

922. A jurisdictional note to subclause 154(1) states that a jurisdiction can specify local delegation requirements. This flexibility is necessary to address the application of Acts interpretation laws in each jurisdiction.

**Part 9 Division 3, Subdivision 2**

923. A jurisdictional note to Part 9, Division 3, Subdivision 2 allows the search warrant provisions to be amended as necessary to ensure their proper operation within each jurisdiction.

**Clause 185**

924. A jurisdictional note to subclause 185(4) allows jurisdictions to amend or remove the offence at that provision if it is inconsistent with the powers of police in that jurisdiction.

925. A jurisdiction may omit clause 187 if other legislation in the jurisdiction adequately deals with this matter.

**Clause 229**

926. The jurisdictional note for clause 229 will allow each jurisdiction to specify the appropriate external review body and the powers the review body may exercise in relation to that review (where this is not provided for in other laws). The jurisdictional note also states the intention of an external review is to be merit based and that an external review body has the power to affirm or overturn a decision or substitute a decision with another decision. The jurisdictional note provides that a jurisdiction can determine the nature and scope of the external review.

**Clause 230**

927. A jurisdictional note to subclause 230(1) allows a jurisdiction to add other officials who hold a relevant public office or administer the Bill to bring proceedings for an offence against the Bill with the written authorisation of the regulator.

928. A jurisdictional note to subclause 230(4) allows amendments that may be necessary for some jurisdictions to ensure that the provision does not conflict with arrangements under other legislation. The jurisdictional note also provides that a jurisdiction may confer jurisdiction on courts to hear prosecutions and appeals for work health and safety offences.

**Clause 231**

929. A jurisdictional note allows amendments to subclauses 231(2)–(6) to reflect the role of the Director of Public Prosecutions in a particular jurisdiction. Jurisdictions may also omit the provisions if they are given effect to under another law of the jurisdiction.

**Clause 232**

930. A jurisdictional note allows amendments to be made to paragraph 232(1)(b) to reflect the kinds of official inquiries that may be conducted in a jurisdiction.

**Clause 243**

931. A jurisdictional note following clause 243 states that jurisdictions must enact provisions as necessary to enable an infringement scheme to be established and prescribe the offences for which infringement notices may be issued.

**Clause 244**

932. A jurisdictional note allows a jurisdiction to omit clause 244 if relevant local laws already in place in that jurisdiction provide for particular conduct to be imputed to bodies corporate.

**Clause 245**

933. A jurisdictional note allows a jurisdiction to adjust clause 245.

**Clause 268**

934. The jurisdictional note for clause 268 allows the Commonwealth to use its *Criminal Code Act 1995* in place of the offence to give false or misleading information. Division 137 of that Act creates offences of providing false or misleading information or documents.

**Schedule 1**

935. The jurisdictional note for Schedule 1 provides that the Schedule is optional for jurisdictions. Jurisdictions may choose not to regulate high-risk plant or dangerous goods or both outside the workplace.

**Schedule 2**

936. Each jurisdiction will draft this Schedule as appropriate to establish the regulator and to provide for local consultation arrangements and for local arrangements for the collection of money and the provision of data.

**Additional jurisdictional notes**

937. Offence provisions in the Bill may be modified to comply with local drafting protocols that apply in the relevant jurisdiction. In practice, this means that the offence provisions in the Commonwealth, the Australian Capital Territory and the Northern Territory may designate strict liability elements. These jurisdictions are commonly referred to as 'model code' jurisdictions as they have adopted (either wholly or in part) the *Model Criminal Code 2009*. This requires those jurisdictions to take a different approach to drafting offence provisions.