EXPLANATORY MEMORANDUM –WORK HEALTH AND SAFETY BILL 2019

Modernising Work Health and Safety in Western Australia

On 12 July 2017, the Premier announced that work would commence to develop modernised work health and safety (WHS) laws for Western Australia. The new laws would:

- be substantially based on the national model Work Health and Safety Bill (the model WHS Bill), to improve consistency with the rest of Australia;
- provide the primary legislation for workplace safety and health across all Western Australian industries; and
- be supported by a number of industry specific regulations to suit the State's unique conditions, enabling the resources sector to continue to use a risk-based approach, and continuing to support the safety-case approach for petroleum and major hazard facilities.

The legacy of harmonisation

The model WHS Bill was developed under the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (IGA) to underpin a harmonised WHS framework in Australia.

The harmonisation of WHS 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.

Key features of the Work Health and Safety Bill 2019

With two exceptions, all states, both territories and the Commonwealth have adopted the model WHS laws. New Zealand has also updated its safety and health laws based on the model WHS Bill. Victoria have not adopted the model WHS Bill and regulations.

The Work Health and Safety Bill 2019 (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, including the providers of WHS services;
- 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) including provisions for automated authorisations;

- provision for consultation on WHS matters, participation and representation provisions;
- provision for the resolution of WHS issues;
- protection against discrimination for those who exercise or perform or seek to exercise or perform powers, functions or rights under the Bill;
- provision for enforcement and compliance including a compliance role for WHS inspectors; and
- the continuation of Western Australia's peak tripartite consultative bodies, re-established as the Work Health and Safety Commission (WHSC) and the Mining and Petroleum Advisory Committee (MAPAC).

Other key reforms

Industrial manslaughter

The McGowan Government has decided to introduce offences of industrial manslaughter to ensure that deaths at the workplace, caused by the conduct of PCBUs and officers of PCBUs, are met with substantial penalties.

The Bill includes two separate offences for industrial manslaughter.

Industrial manslaughter – crime provides for the highest penalties for WHS offences, including imprisonment of 20 years and a fine of $5,000,000 for an individual PCBU, or a fine of $10,000,000 for a body corporate. Due to seriousness of this offence, it will be heard in the District Court and may only be prosecuted by the Director of Public Prosecutions (DPP). It will also require high standards of proof including a requirement for the prosecution to establish the person engaged in the conduct that caused the death of an individual knowing the conduct was likely to result in death, and in disregard of the likelihood.

Industrial manslaughter – simple offence provides lesser penalties but has correspondingly simpler elements of proof and will be heard in the Magistrate's Court as a simple offence. The maximum penalties for a PCBU convicted on industrial manslaughter – simple offence are 10 years and a fine of $2,500,000 for an individual PCBU, or $5,000,000 for a body corporate. For Industrial manslaughter – simple offence the prosecution must prove the person failed to comply with a health and safety duty that caused the death of an individual.

Officers may also be charged with industrial manslaughter offences but additional elements of the offences must be proven, including that the conduct was attributable to any neglect on behalf of the officer, or it was engaged in with the officer's consent or connivance.

The introduction of industrial manslaughter offences was recommended in the *Review of the model Work Health and Safety laws Final report* prepared by Marie Boland (the Boland Report), and in the Education and Employment References Committee report *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia* (the EERC report). Queensland and the Australian Capital Territory have already adopted industrial manslaughter laws prior to these reports, and Victoria has recently introduced industrial manslaughter laws to its Parliament.

WHS Issue Resolution – inspector must make a decision within two days

Another recommendation of the Boland Report related to provisions in the model WHS Bill that permit parties to a WHS dispute to request assistance from an inspector in the resolution of that dispute. The model WHS Bill clauses did not permit the inspector to make a decision to resolve the dispute, which would then be subject to review, and the Boland Report recommended this be amended to require the inspector to make a decision within two days of the request.

The Bill implements this recommendation by making amendments to clause 82. The parties must make reasonable efforts to achieve resolution in accordance with relevant agreed procedures prior to requesting assistance from an Inspector (clause 81). The inspector must make a decision to resolve the issue within two days, and may request an extension of time from the Work Health and Safety Tribunal (Tribunal) where this is not practicable. An inspector's decision is subject to review by the Tribunal.

Prohibition on insurance for monetary penalties

The Boland Report also recommended inclusion in the model WHS Bill of a prohibition on insurance against fines imposed. A specific exclusion against this practice has been included in the Bill, modelled on a similar provision in New Zealand's WHS laws. The prohibition provides that an insurance policy is of no effect to the extent that, apart from this subsection, it would indemnify a person for the person's liability to pay a fine for an offence against this Bill.

Inclusion of a new duty of care for WHS service providers

A specific duty of care for the providers of WHS services has been included in the Bill.

The intent of the new duty is that WHS service providers take appropriate care in the provision of WHS services to require, so far as is reasonably practicable, that the health or safety of persons is not put at risk as a result of the provision of the WHS services.

The risks to health or safety may occur during the provision of the WHS services or by the conduct of the WHS service provider. The risks may occur sometime later, as a result of reliance on the services.

Exceptions from the definition of WHS services are included for services provided:

- by a WHS authority, health and safety representative (HSR), or health and safety committee (HSC);
- under a corresponding WHS law by a WHS authority, HSR or HSC;
- emergency services provided by police officers or emergency services personnel where there is a serious risk to the health and safety of an individual; and
- services subject to legal professional privilege.

The duty of care for WHS service providers only applies to services that are provided from one PCBU to another, and does not cover services provided internally to a PCBU. It is not intended this new duty will diminish the duties of the PCBU that engaged the WHS service provider under the Bill.

Health and safety committee to include a representative of the PCBU with sufficient authority to ensure the duties of the PCBU can be met

HSCs will be required to include at least 1 member who has sufficient authority to ensure that duties for PCBUs provided under clause 79 can be met. In particular, the PCBU must without unreasonable delay:

- consider any recommendation or other decision made by the HSC;
- provide a response to the HSC stating the extent to which the person agrees with the recommendation or other decision; and
- if the person agrees with the decision, take any action required to implement the decision.

It is an offence to unreasonably withhold agreement to implement a recommendation or decision of the HSC.

Consultation

On 3 July 2008, the Council of Australian Governments formally committed to harmonising the occupational safety and health (OSH) laws in Australia by signing the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*. A draft of the model WHS Bill was released in September 2009 for public consultation resulting in 480 submissions. A revised model WHS Bill was endorsed by the former Workplace Relations Ministers Council on 11 December 2009. Western Australia's Commission for Occupational Safety and Health was involved in reviewing proposals for the model WHS Bill.

A review of the model WHS laws, for adoption in Western Australia, was conducted by the Ministerial Advisory Panel for Work Health and Safety Reform (MAP) from July 2017 to April 2018. The membership of the MAP included representatives of unions, employers, regulators and the Government.

The MAP provided its recommendations to the Minister in April 2018 and a comprehensive two-month public consultation period was held from 1 July 2018 to 31 August 2018. Sixty-six submissions were accepted during the public consultation period consisting of more than 600 pages of comment. As a result of the public consultation, the Minister made amendments and introduced new proposals.

Some amendments to the model WHS Bill have been included in this Bill, based on recommendations provided in the Boland Report, which was prepared after Australia-wide consultation with workplace participants. Proposals for the adoption of industrial manslaughter laws have also been the subject of significant consultation around Australia, including consultation conducted for the Boland Report, the EERC Report, and *the Best practice review of Workplace Health and Safety Queensland – Final report*.

Regulatory analysis

A National Decision Regulation Impact Statement (ND-RIS) was prepared by Access Economics in September 2009 for the model WHS Bill and accepted for regulation impact assessment purposes in Western Australia by the then Regulatory Gatekeeping Unit (now the Better Regulation unit).

Preliminary impact assessments were conducted in relation to proposed amendments to the model WHS Bill, prior to and during the drafting of this Bill. The Better Regulation Unit has concluded that not further regulatory impact assessment is required of the proposals.

Regulatory Burden Estimate

All workplace participants in Western Australia will be impacted by the changes. Employers working in multiple jurisdictions will benefit from the harmonisation of WHS laws, while workers and the community will be net beneficiaries of improvements to safety and health in the workplace. Small businesses working entirely within Western Australia may see a small increase in costs.

The inclusion of all workplaces under a single WHS Bill will provide additional administrative benefits to PCBUs operating across the mines, petroleum and general industry segments.

The ND-RIS for the model WHS Bill estimated the regulatory benefit to Australia at $180.7 million. Extrapolated to Western Australia it can be estimated the regulatory benefit will be $19.5 million, with the benefit mostly accruing to multi-state firms, workers and the community.

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 155(7), 155B(5), 167C(4), 171(8), 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.

Person, individual or body corporate

The term 'person' is used generally throughout the Bill and takes its meaning from the *Interpretation Act 1984* (the Interpretation Act):

> ***person*** *or any word or expression descriptive of a person includes a public body, company, or association or body of persons, corporate or unincorporate;*

In most circumstances, whether the word 'person' applies to a natural person or a body corporate or both is determined by the context of the clause in which it is used.

In some cases the Bill uses the term 'individual' which is also defined in the Interpretation Act:

> ***individual*** means a natural person;

This is used to exclude natural persons from the definition of PCBU in subclause 5(4). The term 'individual' is used in certain clauses to add clarity to those clauses. This approach does not preclude other clauses that use the term 'person' from being interpreted as referring to an individual, a body corporate or both according to their context.

Abbreviations

The following abbreviations are used throughout this document:

Boland Report	*Review of the model Work Health and Safety laws Final Report*
DGSA	*Dangerous Goods Safety Act 2004*
DPP	Director of Public Prosecutions
EERC Report	*They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*
FWA	*Fair Work Act 2009*
HSC	Health and Safety Committee
HSR	Health and Safety Representative
Interpretation Act	*The Interpretation Act 1984*
IR Act	*Industrial Relations Act 1979*
MAP	Ministerial Advisory Panel for Work Health and Safety Reform
MAPAC	Mining and Petroleum Advisory Committee
MSIA	*Mines Safety and Inspection Act 1994*
MSIL	Mines Safety and Inspection Levy
ND-RIS	National Decision Regulation Impact Statement
OSH	Occupational safety and health
OSH Act	*Occupational Safety and Health Act 1984*
OSH Regulations	Occupational Safety and Health Regulations 1996
PCBU	Person conducting business or undertaking
PGERA	*Petroleum and Geothermal Energy Resources Act 1967*
PGESLA	*Petroleum and Geothermal Energy Safety Levies Act 2011*
PIN	Provisional Improvement Notice
PPA	*Petroleum Pipelines Act 1969*
PSLA	*Petroleum (Submerged Lands) Act 1982*
PSM Act	*Public Sector Management Act 1994*
Tribunal	Work Health and Safety Tribunal
WHS	Work Health and Safety
WHSC	Work Health and Safety Commission

Part 1 – Preliminary

Division 1 – Introduction

1. Part 1 is divided as follows:

- Division 1 deals with the short title and commencement;
- Division 2 provides the object of the Bill;
- Division 3 provides the definitions and other important terms;
- Division 4 deals with the application of the Bill to the Crown;
- Division 5 deals with the application Schedule 1 in relation to dangerous goods and high risk plant; and
- Division 6 deals with Schedule 2 in relation to establishing offices and bodies such as the WHSC.

Clause 1 – Citation

2. Clause 1 provides that, once enacted, the short title of the Bill will be the *Work Health and Safety Act 2019.*

Clause 2 – Commencement

3. Clause 2 provides for commencement on proclamation to permit time for supporting regulations to be developed.

4. Consequential and transitional provisions set out in Part 15 and Part 16.

Division 2 – Object

Clause 3 – Object

5. 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.

6. Clause 3(1)(h) provides for the formulation of policies and the coordination of the administration of laws, to facilitate the activities of the WHSC, the MAPAC Committee, and the WorkSafe Commissioner.

7. 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

8. This Division includes terms that are used throughout the Bill and separately defines key definitions and concepts in clauses 4A – 8. Definitions that are only used in one Division or Section are defined within those definitions and sections.

Subdivision 1 – Definitions

Clause 4 – Definitions

9. Clause 4 includes terms used in the Bill. Key definitions are explained below in alphabetical order.

Compliance powers

10. 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.

Document

11. The definition of 'document' provides a non-exhaustive list that describes methods of recording information including electronic records.

Health

12. 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

13. The term 'import' is defined to mean importing into Western Australia and includes interstate movements.

Plant

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

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

Officer

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

Volunteer

17. 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.

18. '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*

19. The principal duty holder under the Bill is a PCBU.

20. 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)).

21. The term 'person' is not defined but will take its meaning from the Interpretation Act. It will cover persons including individuals and bodies corporate.

22. To ensure consistency, subclause 5(2) makes it clear that the term covers partnerships and unincorporated associations.

23. 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?

24. 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

25. The Bill will cover householders where there is an employment relationship between the householder and a worker.

26. 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'

27. Subclause 5(4) excludes individuals who are engaged solely as workers or officers of a business or undertaking. The word 'individual' is used in this clause to clarify the exclusion applies to 'natural persons'. Other uses of the word 'person' throughout the Bill should be construed to refer to a 'body corporate' or 'natural person' or both according to the context of its usage.

PCBU duties do not apply to elected members of local governments

28. Subclause 5(5) provides that a ***local government member*** is not a PCBU in that capacity for the purposes of the Bill.

Exclusions

29. Subclause 5(7) allows the regulations to exclude prescribed persons from application of the Bill, or part of the Bill.

30. The duties and obligations under the Bill are placed PCBUs. While this concept has been used since 2011/12 in most Australian jurisdictions it is a relatively new concept in Western Australia. An exemption contemplated by subclause 5(7) may be required to remove unintended consequences associated with this concept and to ensure that the scope of the Bill does not inappropriately extend beyond WHS 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

31. Subclause 5(8) 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(9)). 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.

32. 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.

33. 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*

34. 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.

35. 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.

36. 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'

37. 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).

38. 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*

39. 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.

40. 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).

41. 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.

42. 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. A police officer who is called on to perform their duties while rostered 'off-duty' is considered to be on active duty while lawfully performing those functions. Subclause 7(2) does not otherwise cover periods while the police officer is not on active duty.

43. 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*

44. 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).

45. This definition is a key definition that in many ways defines the scope of rights, duties and obligations under the Bill.

46. 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 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).

47. 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. 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 10 – Act binds the Crown

51. Clause 10 provides for the Crown to be bound by the Bill. This clause makes it clear that the 'Crown shield' that would otherwise provide immunity against prosecution for the Crown does not apply.

Application to public health and safety

52. 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.

53. 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.

54. 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.

Part 2 – Health and safety duties

55. Part 2 is divided as follows:

- Division 1 provides the principles that apply to duties and deals with what is reasonably practicable;
- Division 2 provides the primary duty of care;
- Division 3 deals with more specific duties of PCBUs including the providers of WHS services;
- Division 4 deals with the duty of officers, workers and other persons at the workplaces; and
- Division 5 provides for offences and penalties in relation to health and safety duties, including industrial manslaughter.

Division 1 – Introductory

Subdivision 1 – Principles that apply to duties

56. 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

57. 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.

58. 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)).

59. 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; and
- 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.

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

61. 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

62. 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

63. 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.

64. '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.

65. 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

66. This Division specifies the WHS duties for the Bill. Generally the provisions identify the duty holder, the duty owed by them and how they must comply with the duty.

67. 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).

68. 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

69. Clause 19 sets out the primary WHS duty which applies to PCBUs.

70. 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.

71. 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'

72. 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'

73. 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.

74. 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'.

75. 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

76. 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).

77. 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.

78. 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.

79. 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

80. 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

81. 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, their 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

82. This Division sets out the WHS duties of a PCBU who is involved in specific activities that may have a significant effect on WHS. 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, and the provision of WHS services.

83. 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.

84. Providers of WHS services can provide a range of services to a PCBU to assist in compliance with their WHS duties, and must ensure the services they provide do not put at risk the WHS of persons at the workplace.

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

85. Clause 20 sets out the additional health and safety duties a PCBU 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.

86. 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.

87. 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

88. 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.

89. 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.

90. 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

91. Clause 22 sets out the additional health and safety duties a PCBU 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.

92. 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.

93. 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.

94. 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.

95. 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).

96. 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

97. 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.

98. 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.

99. 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.

100. 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

101. 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.

102. 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.

103. 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.

104. 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

105. 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.

106. 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.

107. 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).

108. 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

109. This clause sets out the duty of a PCBU who installs, constructs or commissions plant or substances.

110. 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).

111. 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.

Clause 26A – Duty of persons conducting businesses or undertakings that provide services related to work health and safety

112. This clause sets out the duty of a PCBU that provides WHS services to another PCBU. Examples of activities that might be considered WHS services are provided at the end of subclause 26A(1).

113. For the avoidance of doubt, paragraph 26(1)(b) specifies certain services that are excluded from the definition of WHS services, such as emergency services provided by emergency services personnel and services subject to legal professional privilege.

114. The use of a WHS service does not limit the health and safety duties of the PCBU that is the recipient of that duty and section 272 of the Bill will apply to terms of the agreement or contract for the WHS service.

Division 4 – Officers, workers and other persons

115. This Division sets out the WHS duties owed by 'officers' of bodies, workers and other persons at workplaces.

Clause 27 – Duty of officers

116. 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.

117. 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 30A–33.

118. 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.

119. 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.

120. 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.

121. Importantly, this change helps to clarify the steps that an officer must take to comply with the duty under this clause.

122. 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 WHS matters and ensuring the PCBU has, and implements, processes for complying with any duty or obligation the PCBU has under the Bill.

123. 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.

124. 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

125. 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.

126. 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.

127. 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.

128. 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.

129. 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

130. 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.

131. 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.

132. 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

133. This Division sets out the offences framework in relation to breaches of health and safety duties under the Bill.

134. Contraventions of the Bill and regulations are generally criminal offences. 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.

135. The Bill provides for five types of offence against health and safety duties, including two offences of industrial manslaughter. The most serious offences, industrial manslaughter – crime and industrial manslaughter – simple offence, apply only to PCBUs and officers and reflect the substantial level of control and authority exercised by these persons.

Penalties under the Bill

136. 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 30A – Industrial manslaughter – crime

137. Industrial manslaughter – crime is the most serious offence in the Bill with which a PCBU or officer may be charged and applies substantial maximum penalties. Consequently, industrial manslaughter – crime will be heard in the District Court and proceedings may only be commenced by the DPP.

138. For PCBUs there are five elements that must be proven for a person to be found guilty of industrial manslaughter – crime. These are:

- the person must have a health and safety duty as a PCBU;
- the person must have engaged in conduct (an act or omission) that causes the death of an individual;
- the conduct constitutes a failure to comply with the person's health and safety duty;
- the person engages in the conduct knowing that the conduct is likely to cause the death of the individual; and
- the person engages in the conduct in disregard of the likelihood of death.

139. For an officer, it must also be proven that the PCBU's conduct was attributable to any neglect on behalf of the officer, or that it was engaged in with the officer's consent or connivance.

Clause 30 B – Industrial manslaughter – simple offence

140. Industrial manslaughter – simple offence also applies to officers or PCBUs in the event of a death at a workplace. The lesser penalties reflect the reduced culpability that must be proven. For industrial manslaughter – simple offence to be proven for a PCBU, a clear line of causation must be established between the failure to comply with a health and safety duty, and the death of an individual:

- the person must have a health and safety duty as a PCBU;
- the person fails to comply with that duty; and
- the failure causes the death of an individual.

141. The key difference between industrial manslaughter – crime and industrial manslaughter – simple offence is there is no requirement in relation to a PCBU to establish that the person engaged in conduct knowing it was likely to cause the death of a an individual. However, for an officer, it must also be proven that the PCBU's conduct was attributable to any neglect on behalf of the officer, or that it was engaged in with the officer's consent or connivance

Clause 31 – Failure to comply with health and safety duty – Category 1

142. A PCBU commits a Category 1 offence where a failure to comply with a health and safety duty causes serious harm to an individual.

143. Persons other than PCBUs, including workers and officers, commit a Category 1 offence where a failure to comply with a health and safety duty causes the death of, or serious harm to, an individual. For officers, the Category 1 offence provides an alternative charge to Industrial manslaughter – simple offence if it cannot established that the death of an individual resulted from neglect on the part of the officer.

144. Serious harm is defined in subclause (3) and includes an injury or illness that endangers or is likely to endanger the individual's life, or results in or is likely to result in permanent injury or harm to the individual's health. Psychological injuries are included in this category due to the definition of ***health***.

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

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

145. Category 2 and 3 offences involve less culpability than Category 1 offences, as there is no fault element.

146. In each offence a person is required to comply with a health and safety duty. This is the first element of the offence.

147. 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.

148. Category 2 offences have a third element which provides that a person would only commit an offence if the failure to comply with the WHS duty exposed an individual to a risk of death or serious injury or serious illness. This will include serious dangerous incidents that do not result in a death or serious injury.

149. Offences without this third element would be prosecuted as Category 3 offences.

Burden of proof

150. The burden of proof (beyond reasonable doubt) rests entirely upon the prosecution in matters relating to non-compliance with duties imposed by the Bill. 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.

151. 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

152. 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).

153. 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. 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

154. Part 3 makes provision for incident notification. It is not separated into divisions.

155. All Australian WHS 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.

156. The primary purpose of incident notification is to enable the regulator to investigate serious incidents and potential WHS contraventions in a timely manner.

157. 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*

158. 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*

159. 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)–(c), or in circumstances described in paragraph (d) and (e) including:

- immediate treatment as an in-patient in a hospital; immediate treatment for a serious injury of a kind listed in paragraph (b);
- medical treatment within 48 hours of exposure to a substance at a workplace;
- an injury or illness that occurs in a remote location and requires the person to be transferred urgently to a medical facility for treatment; or
- that is likely to prevent the person from being able to do their normal work for at least 10 days after the day on which the illness or injury occurred.

160. The regulations may prescribe additional injuries or illnesses for this purpose, and may also prescribe exceptions to the list in this clause.

161. 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*

162. 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.

163. 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

164. This clause specifies who must notify the regulator of a notifiable incident and when and how this must be done.

165. 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)).

166. Failure to notify is an offence.

167. Subclause 38(2) requires the notice to be given by the fastest possible means.

168. 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.

169. 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)).

170. Written notice must be in a form, or contain the details, approved by the regulator (subclause 38(5)).

171. 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

172. 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.

173. Subclause 39(2) clarifies that this requirement may include preserving any plant, substance, structure or thing associated with the incident.

174. Subclause 39(3) sets out the kinds of things that can still be done to ensure WHS at the site, including assisting an injured person or securing the site to make it safe.

175. Paragraph 39(3)(e) allows inspectors or the regulator to give directions about the things that can be done.

Part 4 – Authorisations

176. This Part establishes the offences framework for authorisations that will be required under the WHS Regulations (e.g. licences for high-risk work).

177. 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.

178. 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.

179. Because authorisations are issued to control high risk activities, it is the Bill rather than the regulations that includes the relevant offence provisions.

180. Part 4 is divided as follows:

- Division 1 provides the meaning of 'authorised';
- Division 2 deals with the requirements for authorisation;
- Division 3 deals with prescribed qualifications or experience and includes a requirement to comply with conditions; and
- Division 4 enables the use of automated electronic systems for functions relating to authorisations.

Clause 40 – Meaning of *authorised*

181. Clause 40 clarifies that the term 'authorised' means authorised by a licence, permit, registration or other authority (however described) that is required by regulation.

182. 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); or
- before certain plant or substances can be used at a workplace.

183. 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

184. The regulations may require certain kinds of workplaces to be authorised.

185. 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

186. The regulations may require certain kinds of plant or substances or their design to be authorised (e.g. high risk plant).

187. 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.

188. 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.

189. 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

190. 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.

191. 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.

192. 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

193. 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.

194. 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.

195. 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`

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

Division 4 – Use of automated electronic systems for functions related to authorisations

Clause 45B – Use of automated electronic systems under authorisation provisions

197. Clause 45B permits the use of an automated electronic system to make decisions related to authorisations to. For example, workers might be able to submit applications for high risk work licences electronically and, where the conditions for the licence are able to be electronically verified, the system will be able to grant the licence without intervention from the regulator, or a delegate of the regulator. The system must be under the regulator's control, and applicants have the same rights to request a review of a decisions as if it had been made by the regulator.

198. To ensure transparency in the development and use of such systems, the regulator is required by subclause 45B(6) to publish specified details regarding the system in the Gazette.

199. This clause does not require an automated electronic system to be developed by the regulator, but facilitates the operation of such a system if it was to be developed in future.

Clause 45C – Replacing decision made by automate electronic system or re-exercising or re-performing authorisation function

200. Clause 45C provides the circumstances where the regulator may override the decision of the automated system where it is favourable to the affected person.

Part 5 – Consultation, representation and participation

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

202. Part 5 is divided as follows:

- Division 1 provides the duty to consult with other duty holders;
- Division 2 deals with the requirements for consultation with workers;
- Division 3 deals with the requirements for HSRs, including their election, powers and functions;
- Division 4 provides for the establishment and operation of HSCs;
- Division 5 deals with issue resolution;
- Division 6 sets out matters related to the cessation of unsafe work;
- Division 7 permits a trained HSR to issue provisional improvement notices; and
- Division 8 specifies the consultative provisions in Part 5 do not apply to prisoners.

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

203. Part 5 establishes comprehensive duties to consult in relation to specified WHS 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

204. Managing WHS 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.

205. Clause 46 requires duty holders to consult, co-operate and co-ordinate activities with all other persons who have a WHS 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

206. 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

207. 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.

208. 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.

209. 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.

210. 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

211. 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.

212. Paragraph 48(2)(a) provides that consultation must involve any HSR that represents the workers. This duty is modified by the phrase 'so far as is reasonably practicable' as there are circumstances when an HSR may be unable to attend. This is moderated by paragraph 48(2)(b) that requires the PCBU to make all reasonable efforts to carry out consultation at times and places, or in otherwise ways, that are convenient to the workers and their HSR(s).

213. This ensures that a meeting need not be cancelled if unforeseen circumstances mean the HSR is unable to attend (e.g. a cancelled flight) and provides the flexibility of virtual meetings if that is suitable for some of the participants.

214. 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

215. Clause 49 sets out the kinds of WHS 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

216. There is considerable evidence that the effective participation of workers and the representation of their interests in WHS 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.

217. 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

218. 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

219. The process for electing HSRs is initiated by a worker's request.

220. Clause 50 provides that a worker may ask a PCBU for whom they carry out work to facilitate elections for one or more HSRs.

221. 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.

222. 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

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

Clause 51 – Determination of work groups

224. Clause 51 establishes the PCBU's obligation to facilitate the determination of one or more work groups, following a request under clause 50.

225. Subclause 51(2) clarifies that the purpose of dividing workers into work groups is to facilitate representation by HSRs in relation to WHS matters.

226. 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)).

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

Clause 52 – Negotiations for determination of work group

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

229. 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).

230. 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.

231. 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.

232. 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.

233. 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.

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

235. 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

236. 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.

237. 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

238. Clause 54 sets out the process for determining work groups if negotiations under clause 52 fail.

239. Negotiations are taken to have failed if, 14 days after days 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)).

240. 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.

241. 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.

242. 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

243. This Subdivision provides a process for establishing and varying multiple-business work groups. These are 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

244. Clause 55 allows work groups to be determined in relation to two or more PCBUs (multiple-business work groups).

245. 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).

246. 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.

247. 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

248. 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.

249. 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.

250. 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.

251. 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

252. 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.

253. 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

254. 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.

255. 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

256. 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

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

Clause 60 – Eligibility to be elected

258. Clause 60 sets out the eligibility rules for HSRs.

259. 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

260. Clause 61 sets out the procedure for the election of HSRs.

261. 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)).

262. 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’.

263. 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

264. 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

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

266. 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

267. 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)).

268. 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

269. 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.

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

Clause 66 – Immunity of health and safety representatives

271. 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

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

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

274. 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.

275. 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.

276. 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

277. 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

278. 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.

279. 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).

280. 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 WHS 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)).

281. These powers are generally exercisable in relation to the HSR's work group members, subject to clause 69.

282. Subclause 68(2) sets out the specific powers of HSRs, which are intended to reinforce their representative role under the Bill.

283. 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.

284. 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.

285. Paragraph 68(2)(c) entitles an HSR to be present at an interview concerning WHS 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.

286. Paragraph 68(2)(d) entitles an HSR to be present at an interview concerning WHS 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).

287. Paragraph 68(2)(e) allows HSRs to request the establishment of a HSC.

288. Paragraph 68(2)(f) entitles HSRs to receive information about the WHS 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)).

289. Paragraph 68(2)(g) allows HSRs to have a person provide assistance to them in performing in their role as a HSR.

290. 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)).

291. 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

292. HSRs' and deputy HSRs' powers and functions under the Bill are generally limited to WHS matters that affect or may affect their work group members (subclause 69(1)) referred to as the 'relevant work group'.

293. However, an HSR may exercise powers and functions under the Bill in relation to another work group at the workplace if the HSR (and any deputy HSR) for that work group is found, after reasonable inquiry, to be unavailable and (subclause 69(2)) applies:

- 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.

294. 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

295. 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

296. 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)).

297. 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 WHS 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)).

298. Paragraph 70(1)(i) allows the regulations to prescribe further assistance that may be required to enable HSRs to fulfil their representative role.

299. 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)

300. Clause 71 qualifies some of the PCBU's obligations under subclause 70(1).

301. 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.

302. 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).

303. 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 IR entry authority is suspended or the assistant is disqualified from holding an IR entry authority.

304. 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.

305. 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).

306. 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 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

307. 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)).

308. The entitlement allows the HSR or deputy HSR to attend an HSR training course that has been approved by the WHSC (paragraph 72(1)(a)) and that the HSR is required under the regulations to attend (paragraph 72(1)(b)).

309. An HSR or deputy HSR has the right to attend a course of their choosing. 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. If the parties are unable to agree about the reasonableness of these costs, subclauses 72(5)–(7) will apply.

310. Paragraph 72(3)(b) applies to multi-business work groups and provides that only one of the PCBUs needs to comply with this clause.

311. Subclause 72(4) provides that any time an HSR or deputy HSR is given off work to attend the course of training must be 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.

312. Subclauses 72(5)–(7) establish a procedure for resolving a disagreement if an agreement cannot be reached on the matters identified in subclauses 72(2). 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.

313. The Inspector may only decide the matters provided in subclause 72(2) which relate to time off work, and costs. Course fees are set by the registered training organisation that provides the course and are not subject to change by the inspector.

314. In some circumstances, costs associated with the course selected by the HSR, including course fees, may be significantly higher than other courses that are conveniently available to the HSR (e.g. if the HSR chooses to attend a course that requires air travel and the provision of accommodation when a similar course is provided locally). If this is a factor in the dispute, the inspector may apportion reasonable costs to the PCBU and residual costs to the HSR. The inspector cannot require the HSR to change their choice of course.

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

315. 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

316. Clause 74 requires PCBUs to prepare and keep up-to-date lists of their HSRs and deputy HSRs (if any).

317. 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.

318. Non-compliance with these provisions constitutes an offence.

Division 4 – Health and safety committees

319. This Division provides for the establishment of HSCs for consultative purposes under the Bill. HSCs are consultative bodies that are established for workplaces under the Bill, with functions that include assisting to develop WHS standards, rules and procedures for the workplace (see clause 77).

Clause 75 – Health and safety committees

320. Clause 75 sets out when a PCBU must establish an HSC, 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 HSCs to be established in prescribed circumstances.

321. An HSC must be established within two months after the request is made and non-compliance constitutes an offence (paragraph 75(1)(a)).

322. An HSC may also be established at any time on a PCBU's own initiative (subclause 75(2)).

323. HSCs 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.

324. Non-compliance with these provisions constitutes an offence.

Clause 76 – Constitution of committee

325. Clause 76 sets out minimum requirements for establishing and running HSCs. 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)).

326. 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)).

327. 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)).

328. Subclauses 76(5) requires that at least 1 member of the committee must be a representative of the PCBU with sufficient authority to ensure compliance with the duties provided under clause 79. This includes taking action to ensure a decision of the committee is implemented without unreasonable delay. If the PCBU is an individual, subclause 76(6) can be complied with by that individual being the member required by 76(5).

329. Subclauses 76(9)–(9) 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

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

Clause 78 – Meetings of committee

331. Clause 78 sets minimum requirements for the frequency of HSCs. 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

332. Clause 79 sets out the general obligations of PCBUs in relation to their HSCs.

333. 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)).

334. 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.

335. 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)).

336. 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).

337. When the committee makes a recommendation or decisions within its scope and functions, subclause 79(5) requires the PCBU to consider the recommendation or decision without unreasonable delay. A PCBU must provide a response to the committee stating the extent to which they agree with the recommendation or decision, and take any action required to implement the recommendation or decision. Failure to comply with these requirements is an offence.

338. It is also an offence under subclause 79 (6) if a PCBU unreasonably withholds their agreement in relation to the recommendation or decision.

Division 5 – Issue resolution

339. This Division establishes a mandatory process for resolving WHS issues. It applies after a WHS matter is raised but not resolved to the satisfaction of any party after discussing the matter.

340. 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

341. 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.

342. 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

343. Clause 81 establishes a process for the resolution of WHS issues.

344. Subclause 81(1) sets out when the issue resolution process applies, that is after the WHS matter remains unresolved after the matter is discussed by parties to the issue. At that point, the matter becomes a WHS issue that is subject to the issue resolution process under this Division.

345. 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.

346. 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.

347. 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.

348. 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

349. 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 (clause 81). It applies whether all parties have made reasonable efforts to resolve the issue or at least one of the parties has made reasonable efforts to have the WHS issue resolved. A party's unwillingness to resolve the issue would not prevent operation of this clause.

350. Subclause 82(3) requires the inspector to make a decision resolving the issues no later than two days after the day on which the request is made. The regulator may refuse the request to appoint an inspector under subclause 82(4) if the party making the request has not made reasonable efforts to resolve the issued under subclause 81(2).

351. A decision made by the Inspector under subclause 82(3) is not subject to internal review by the regulator and must be referred to the Tribunal for review under paragraph 224(4)(a). A decision not to appoint an inspector made by the regulator under subclause 82(5) is a reviewable by the Tribunal.

Clause 82A – Extension of deadline for making decision resolving issues

352. For some disputes, it may not be practicable for the inspector to make a decision within the 2 day period required by subclause 82(3). In those circumstances, the regulator is required to apply to the Tribunal to set a new deadline. The Tribunal has discretion to set a new deadline that it considers to be practicable under subclause 82A(1).

353. Subclause 82A(2) requires the application to be made as soon as the regulator realises the deadline is not practicable or if no decision has been made within the deadline (e.g. if a dispute is notified immediately prior to inclement weather making it impracticable for the parties to meet due to flooding).

354. Any party to the issue is permitted to make a submission on the matter to the Tribunal, prior to the Tribunal setting a new deadline under subclause 82(3).

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

355. 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 2009* (FWA). This is found in the exception to the definition of industrial action in section 19 of FWA.

Clause 83 – Definition of cease work under this Division

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

Clause 84 – Right of worker to cease unsafe work

357. 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 the worker, or any other person, to a serious risk to their health or safety, and
- the serious risk emanates from an immediate or imminent exposure to a hazard.

358. 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.

359. An exception is provided in subclause 84(2) for police officers where the refusal could adversely affect a covert or dangerous operation. This exclusion does not relieve WA Police of any other duties under the Bill.

'Serious risk'

360. The term 'serious risk' is not defined, but 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 emanate from an immediate or imminent exposure to a hazard.

'Reasonable concern'

361. The requirement for the worker to have a 'reasonable concern' is intended to align with equivalent provisions under the FWA.

362. 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 their 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.

363. 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

364. 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.

365. 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.

366. The term 'serious risk' is explained above in relation to clause 84.

367. 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)).

368. Subclause 85(5) requires a HSR to inform the PCBU of any direction to cease work that the HSR has given to workers.

369. 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.

370. Consistent with the exclusion provided under subclause 84(2), an HSR is not able to direct the cessation of unsafe work if it would adversely affect a covert or dangerous operation. This exclusion does not relieve WA Police of any other duties under the Bill.

Clause 86 – Worker to notify if ceases work

371. 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

372. 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

373. 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

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

Clause 89A – Referral of issue about application of section 88 to Tribunal

375. Issues arising in relation to the continuity of engagement of a worker may be referred to the Tribunal for resolution, whether or not an inspector was appointed to resolve the matter.

Division 7 – Provisional improvement notices

376. This Division sets HSRs' powers to issue provisional improvement notices (PIN) under the Bill, and related matters. PINs are an important part of the function performed by HSRs.

Clause 90 – Provisional improvement notices

377. Subclause 90(1) sets out the circumstances when a HSR may issue a PIN, 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.

378. 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.

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

380. Subclause 90(3) requires HSRs to consult with the person who is suspected of contravening the Bill before issuing a PIN.

381. 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.

382. 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 PIN 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

383. Clause 91 requires the PIN to be issued in writing.

384. Clause 92 sets out the kind of information that must be contained in a PIN. Importantly, a PIN must specify a date for compliance, which must no earlier than the eighth day after the notice is issued. The day on which the notice is issued does not count for this purpose.

385. Clause 93 allows PINs 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.

386. Subclause 93(2) makes clear that it is not an offence if a person fails to comply with recommendations in a PIN.

387. Clause 94 enables HSRs to make minor changes to PINs (e.g. for clarification or to correct errors or references).

388. Clause 95 requires PINs to be served in the same way as improvement notices issued by inspectors.

389. Clause 96 allows HSRs to cancel a PIN 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

390. Clause 97 establishes the display requirements for PINs. 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.

391. 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.

392. 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

393. Clause 98 ensures that PINs 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

394. Clause 99 makes it an offence for a person to not comply with a PIN, unless an inspector has been requested 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

395. Clause 100 sets out a procedure for the review of PINs 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.

396. The person who makes the application for review by the regulator must, as soon as practicable, inform the HSR that an application for review by the regulator has been made. Notifying the HSR stays the operation of the PIN until an inspector makes a decision on the review under subclause 100(4).

Clause 101 – Inspector to review notice

397. Clause 101 sets out the procedure that the regulator and the reviewing inspector must follow after a request for review is made.

398. The regulator must arrange for a review to be conducted by an inspector as soon as practicable after a request is made (subclause 101(1)).

399. 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

400. 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.

401. The reviewing inspector must either (subclause 102(1)):

- confirm the PIN, with or without modifications; or
- cancel the PIN.

402. In some cases the PIN 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)).

403. 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.

404. 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

405. Clause 103 provides that Part 5 does not apply to a worker who is a prisoner in custody in a lock-up or prison as defined in section 3(1) of the *Prisons Act 1981*. This exclusion applies in relation to any work performed by such prisoners, whether inside or outside the lock-up or prison. It would also cover prisoners on weekend detention, during the period of the detention.

406. This exclusion does not extend to any persons who are not held in custody in a lock-up or prison including persons on community-based orders.

Part 6 – Discriminatory, coercive and misleading conduct

407. Part 6 prohibits discriminatory, coercive and misleading conduct in relation to WHS matters. It establishes both criminal and civil causes of action in the event of such conduct.

408. These provisions complement the remedies contained in other Federal and State laws that deal with discrimination including the General Protections in the FWA.

409. The purpose of these provisions is to encourage engagement in WHS 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 WHS activities or exercising WHS rights are unlawful and may attract penalties and other remedies.

410. Part 6 is divided as follows:

- Division 1 deals with the prohibition on discriminatory, coercive or misleading conduct;
- Division 2 provides for criminal proceedings in relation to discriminatory conduct;
- Division 3 provides for civil proceedings in relation to discriminatory or coercive conduct; and
- Division 4 provides general provisions relating to orders and a prohibition on multiple actions.

Division 1 – Prohibition of discriminatory, coercive or misleading conduct

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

Clause 104 – Prohibition of discriminatory conduct

412. 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.

413. 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)).

414. 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

415. 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))).

416. 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

417. 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.

418. 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 WHS representation at the workplace by being a HSR or member of an HSC;
- 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 WHS;
- is involved in, has been involved in, or proposes to be involved in resolving a WHS 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

419. 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.

420. 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.

421. 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

422. 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 WHS role.

423. 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.

424. A note alerts the reader that civil proceedings relating to a breach of clause 108 may be brought under Division 3 of Part 6.

425. 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).

426. 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

427. Clause 109 provides that it is an offence for a person to knowingly 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.

428. 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

429. 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

430. 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)).

431. 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.

432. 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

433. 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.

434. 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

435. 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. These orders form part of the sentence for the offence.

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

436. 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. Civil proceedings made before the Tribunal.

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

437. Subclause 112(1) provides that an eligible person may apply to the 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.

438. Subclause 112(2) outlines the persons against whom a civil order may be sought.

439. Subclause 112(3) sets out the kind of orders that can be made in civil proceedings. These include compensation, reinstatement of employment orders and any other order the Tribunal considers appropriate.

440. 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.

441. Subclause 112(5) clarifies that nothing in clause 112 limits any other power of the Tribunal.

Clause 113 – Procedure for civil actions for discriminatory conduct

442. 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.

443. Subclauses 113(2)–(4) clarify the way that the onus of proof works in a civil proceeding under clause 112.

444. 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.

445. 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 WHS law.

446. 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.

447. 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

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

Clause 114 – General provisions relating to orders

449. 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.

450. 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 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)).

451. Conversely, subclause 114(3) limits the ability of the 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

452. 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 or Territory 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 Territory, 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

453. Part 7 is not required. The current system of workplace entry permits provided under the *Industrial Relations Act 1979* (IR Act) and the FWA will continue to operate in relation to WHS matters.

Part 8 – The regulator

454. Part 8 is divided as follows:

- Division 1 provides the functions of the regulator; and
- Division 2 deals with the powers of the regulator to obtain information and require independent reports.

Division 1 – Functions of regulator

455. 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.

456. 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

457. Clause 152 lists the broad areas in which the regulator has functions.

458. Functions set out in 152 include advising and making recommendations to the Minister, monitoring and enforcing compliance and providing WHS advice and information. Clause 152 also describes the functions of the regulator in fostering and promoting WHS, and paragraph 152(i) enables the regulator to conduct and defend legal proceedings under this Bill.

459. Paragraph 152(c) provides the regulator with the function to investigate and report on WHS matters with a focus on particular hazards and industries, or in relation to a particular PCBU. The Minister may request the regulator to conduct an investigation (clause 2(3) of Schedule 2).

460. Paragraph 152(j) is a catchall provision that clarifies that the regulator has any other function conferred on it under the Bill.

Clause 153 – Powers of regulator

461. Subclause 153(1) confers a general power on the regulator to do all things necessary or convenient in relation to its functions.

462. Subclause 153(2) confers on the regulator all the powers and functions that an inspector has under the Bill.

Clause 154 – Delegation by regulator

463. 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.

464. 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 and require independent reports

465. 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 WHS 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.

466. 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').

467. 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.

Clause 155 – Powers of regulator to obtain information

468. 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.

469. Subclause 155(2) requires the regulator to exercise these powers by written notice given to the person. The Interpretation Act applies in relation to the service of a notice.

470. 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 subject to the approval of the regulator under subclauses 155(5) and 155(6).

471. Subclause 155(4) specifies that powers to request documents includes the power to request a copy or reproduction of the document in the form set out in the notice. This applies to the provision of reproductions of documents that are stored in an electronic format.

472. Notices may be given to a person, and a requirement stated in the notice applies to a person, in circumstances where the person or document is outside Western Australia, or where it relates to a matter occurring outside Western Australia. This subclause ensures there is no doubt about the application of the specified functions outside of Western Australia, consistent with the views of the Court in *Perilya Limited v Nash [2015] NSWSC 706*.

473. Subclause 155(6) prohibits a person from refusing or failing to comply with a requirement under clause 155 without a reasonable excuse. Subclause 155(7) 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.

155A – Supplementary provisions relating to appearances

474. Additional pre-requisites apply if the regulator wishes to obtain evidence from a person (the witness) by requiring them to appear before a person appointed by the regulator.

475. First, the regulator cannot require the witness 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) (subclause 155A(1)).

476. Second, if the witness is required to appear in person, then the regulator must make reasonable efforts to agree the time and place decided with the person who is required to appear (subclause 155A(2)).

477. Subclause 155(3) permits the appearance to be recorded in any way the person before whom the witness appears determines is appropriate, including by audio, audio-visual or electronic means. The witness must be warned beforehand that the recording will be done and the manner in which it will be done.

478. The witness may appear with a legal practitioner who must be approved by the regulator. The regulator may decline a nominated legal practitioner in specified circumstances. This could occur if a potential conflict of interest has been identified where the legal practitioner or their firm represents other persons with an interest in the matter, or if there are other reasonable grounds for withholding approval.

155B – Power of regulator to require independent report

479. Clause 155B provides the regulator with the power to require a PCBU to procure and provide to the regulator a report that relates to WHS at a workplace. Complex items of plant, or systems of work, may be outside the expertise of the regulator and the report may assist in determining whether a PCBU is compliant with their health and safety duties.

480. The request must be made by a notice in writing and must state the regulator's reasons for requiring the report. The report can be requested in general terms or in relation to a particular matter, including an accident or other occurrence at the workplace.

481. The report must:

- be prepared by a suitably qualified person who is independent of the PCBU;
- include any contents required in the notice; and
- be provided as soon as reasonably practicable after the request and within the timeframe specified in the notice.

482. Additional requirements may be prescribed in the regulations which can include specification of who must pay for the report.

155C – Powers to copy and retain documents

483. Clause 155C clarifies that documents provided to, or obtained by the regulator, may be retained for the period considered necessary by the regulator. The regulator may also take extracts, and make copies or reproductions of documents.

484. Certain persons have rights in relation to original documents that are retained by the regulator. The owner of the original document, or the person who provided access to, or from whom the document was obtained, may inspect or make copies of the original document at all reasonable times. These specified persons may also provide written authorisation to another person to access the document.

Part 9 – Securing compliance

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

486. Part 9 is divided as follows:

- Division 1 deals with the appointment of inspectors;
- Division 2 provides the functions and powers of inspectors;
- Division 3 relates to the powers of entry by inspectors including by the use of an entry warrant;
- Division 4 deals with powers relating to documents and information;
- Division 5 deals with seizure of things and dangerous workplaces;
- Division 6 deals with damage that might be caused during the exercise of compliance powers;
- Division 7 sets out other matters including the power to require name and address; and
- Division 8 sets out offences in relation to inspectors, such as obstruction and assault.

Division 1 – Appointment of inspectors

487. 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

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

489. 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.

490. 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

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

492. Inspectors are required to identify themselves when exercising compliance powers. This may be done by producing their identity card for inspection on request, or by other means prescribed by the regulations. This provides the flexibility to use certain compliance powers when the inspector is not physically present at a workplace.

493. Additional requirements may also apply when exercising certain powers (see clause 173).

Clause 158 – Accountability of inspectors

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

495. 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.

496. Inspectors employed under the *Public Sector Management Act 1994* (PSM Act) must also comply with the principles of conduct, including applicable public sector standards and codes of ethics.

Clause 159 – Suspension and ending of appointment of inspectors

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

498. 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

499. 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

500. 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).

501. However, paragraph 160(1)(a) is a stand-alone provision that empowers inspectors to provide information and advice about compliance with the Bill.

502. The function permitting an inspector to conduct investigations provided in paragraph 160(f) relates to the function of the regulator to investigate and report on matters under paragraph 152(c).

Clause 161 – Conditions on inspectors' compliance powers

503. 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

504. 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

505. 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

506. 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.

507. Subclause 163(2) clarifies that such entry may be with or without the consent of the person with management or control of the workplace.

508. 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).

Clause 164 – Notification of entry

509. Subclause 164(1) clarifies that an inspector is not required to give prior notice of entry under section 163.

510. 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 their 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)).

511. 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.

512. 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).

513. Special notification rules apply to entry on warrant (see clause 167C).

Clause 165 – General powers on entry

514. Subclause 165(1) sets out inspectors' general powers on entry to a workplace. The list of powers reflects a consolidation of powers currently included in WHS laws across Australia and modified by the inclusion of powers under current Western Australian occupational health and safety laws.

515. 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).

516. 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

517. 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).

518. This clause provides, in very wide terms, for an inspector to require any person at a workplace to assist 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

519. 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.

520. 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.

521. What will be a reasonable excuse will depend on all of the circumstances (e.g. for a remote workplace such as an offshore petroleum facility that is otherwise inaccessible, it would be reasonable for the person with management or control of that workplace to provide appropriate transport, accommodation and meals to the inspector without cost). A reasonable excuse for failing to assist an inspector as required may be that the person is physically unable to provide the required help.

522. 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

523. Subclause 166(1) provides for inspectors entering a workplace under clause 163 to be assisted by one or other persons if the inspector considers the assistance is necessary in the exercise of their compliance powers. For example, an assistant could be an interpreter, WHS expert or information technology specialist.

524. Subclause 166(2) provides that assistants may do anything the relevant inspector reasonably requires them to do to assist in the exercise of their compliance powers and must not do anything that the inspector does not have power to do. This provision ensures that assistants are always subject to directions from inspectors and the same restrictions that apply to inspectors.

525. 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 – Entry warrants

526. This Subdivision provides for entry 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 an entry warrant is additional to inspectors' compliance powers under Subdivisions 1 and 4 of Division 3.

Clause 166A – Terms used

Clause 166B – Entry to places under entry warrant

527. Clause 166B permits an inspector to enter any place if authorised to do so by an entry warrant.

Clause 167 – Applying for and issuing an entry warrant

528. Clause 167 requires an inspector to apply to a Justice of the Peace (JP) for an entry warrant and specifies:

- how the application is to be made, including the grounds on which the entry warrant is sought (paragraph 167(3)(c)).
- the circumstances under which the JP may issue the entry warrant; and
- the information that must be included in the application.

Clause 167A – Use of remote communication

529. Subclause 167(2) requires an application for an entry warrant to be made in person before a JP. Clause 167A provides an exception to that requirement in urgent or special circumstances (e.g. where it is apparent to required evidence might be destroyed in the near future, or if the inspector is in a remote location).

530. The JP may only grant the entry warrant if satisfied of the circumstances provided in the application (subclause 167A(3)).

531. Subclauses 167A(4) to 167A(5) specify how the warrant, or a copy of the warrant, is to be provided to the inspector, including by remote communication, and how the application for an entry warrant is to be later formalised.

532. Remote communication is defined in subclause 166A(1) and means any way of communicating at a distance. The list provided is not intended to be exhaustive and is open to new ways of remote communication being developed in future.

533. Where a copy of an entry warrant is provided by remote communication, the original must be available to be produced as evidence if an issue arises in a proceeding whether anything was done because of the entry warrant. If the original warrant is not able to be produced in evidence, the onus is on the person relying on the lawfulness of the thing done to prove it was authorised by an entry warrant (subclause 167(8)).

Clause 167B – Effect and execution of entry warrant

534. The content of an entry warrant (clause 167(5)) is the primary determinant of the effect of the warrant but some general matters that apply to all entry warrants are dealt with under clause 167B. These include specifying when the warrant comes into force, when it may be executed and by whom, and the right of a person to make a reasonable request to view to warrant (or a copy).

535. Subclause 167B(6) permits an inspector to use force (but not against a person) that is reasonable necessary to execute the entry warrant. An example of this might be breaking a locked door. Subclause 167B(7) permits the inspector to call on the assistance of a police officer, who may use reasonable force (including against a person) when executing the warrant.

536. A police officer who is called on to assist with the execution of an entry warrant is also considered a person assisting an inspector under clause 167D.

Clause 167C – General powers when executing entry warrant

537. Clause 167C provides the powers that may be used by an inspector when entering a place under an entry warrant. Many of these powers reflect the general powers of entry to a workplace provided under clause 165 and are replicated under entry warrants to remove any doubt about the exercise of these powers. Enhanced powers are provided in relation to searching for a thing specified in the warrant, making reasonable use of equipment (including requiring a person to assist) and for accessing documents, particularly where stored on a device.

538. It is an offence for a person to refuse or fail to comply with a request made under 167C(1)(g) to give the inspector reasonable help to exercise their compliance powers. A separate offence is provided if a person refuses or fails to comply, without reasonable excuse, with the requirements of 167C(1)(h)(ii) or 167C(i)(ii).

Clause 167D Person assisting inspectors

539. This provides a provision for a person assisting an inspector to enter a place under an entry warrant, similar to that provided in clause 166.

Subdivision 3 – Limitation on entry powers

Clause 170 – Places used for residential purposes

540. 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.

541. Entry to residential premises is also permitted with the consent of the person with apparent management or control of the part of the place used for residential purposes or by a person who is apparently an occupier of that part of the place (paragraph 170(a)). An inspector may also enter residential premises under the authority conferred by a search warrant.

Division 4 – Powers relating to documents and information

542. This Division provides for specific information-gathering powers 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. This power relates to entry to a workplace under clause 163 (Powers relating to entry) or to any place under clause 166B (Entry to places under entry warrant) or at any other time.

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

Identify who has relevant documents

543. Paragraph 171(1)(a) authorises an inspector to require a person to advise who has custody of, or access to, a document for compliance-related purposes.

544. The term ‘document’ is broad, and includes a record of information irrespective of how the information is recorded or stored or able to be recovered.

Request documents

545. Paragraph 171(1)(b) permits an inspector to require a person who has custody of, or access to, a document to provide it to the inspector while the inspector is at the place or within a specified period. The inspector may require a copy or reproduction of a document to be provided.

546. Paragraph 171(1)(d) permits the inspector to require a person to answer any questions by an inspector other than by way of an interview. The period and method for complying with the request must be specified by the inspector who may also direct the person to confirm the information by completion of a statutory declaration.

547. 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.

Interview

548. Paragraph 171(1)(c) authorises inspectors to require persons to submit to an interview at a reasonable time and place specified by the inspector, to answer question put by the inspector and, if directed, confirm the answers given by completion of statutory declaration.

549. This power to require an interview is modified by certain rights provided to the person requested to attend an interview. Before determining the time and place, the inspector must make reasonable efforts to agree that time and place with the person to be interviewed. The interview can be conducted in private if the inspector considers it appropriate, or if the person being interviewed requests it, but this does not prevent the inspector from having an assistant (such as an interpreter) present, or the person for having a representative present (such as an HSR or the union).

550. The interview may be recorded in any way the inspector considers appropriate but the inspector must inform the person before the interview begins that it will be recorded and how the recording will be done.

Offence provision

551. Subclause 171(7) 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).

552. Subclause 171(8) clarifies that subclause (7) places an evidential burden on the accused to prove a reasonable excuse for not complying with a requirement under that subclause.

Clause 172 – Abrogation of privilege against self-incrimination

553. The Bill seeks to ensure:

- that the strongest powers to compel the provision of information are available for securing ongoing WHS, and
- that the rights of persons under the criminal law are appropriately protected.

554. Subclause 172(1) clarifies that there is no privilege against self-incrimination under the Bill, including under clauses 171 (Powers of regulator to obtain information), 155 (Powers of regulator to obtain information) and 155B (Powers of regulator to require independent report).

555. 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.

556. These arrangements are included 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 WHS protections. Securing ongoing compliance with the Bill and ensuring WHS are sufficiently important objectives as to justify some limitation of the right to silence.

557. 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 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

558. 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.

559. Under clause 173, an inspector must first identify themselves by producing their identity card or in another way prescribed by the regulations and then:

- warn the person that failure to comply with the requirement or to answer the question without reasonable excuse would constitute and 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)).

560. 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.

561. If requirements to provide documents are made by written notice, the notice must also include the appropriate warnings and advice.

562. 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.

563. 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

564. Subclause 174(1) allows inspectors to make a copy or reproduction, 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.

565. Subclause 174(2) provides for access to such documents at all reasonable times by the persons listed in paragraphs 174(2)(a)–(c).

566. Separate rules apply to documents that are seized under clause 175.

Division 5 – Seizure

567. Division 5 provides the power for inspectors to seize things at a place which may be a workplace or any other place (if entry is authorised by a warrant) and includes the power to seize dangerous workplaces or things. The inspector is required to provide a receipt for things that have been seized, and specified person may access the seized thing in specified circumstances

Clause 175 – Power to seize things

568. This clause deals with the seizure of things under Division 3 of Part 9 where an inspector reasonably believes the circumstances provided in paragraphs 175(1)(a) – (c) apply.

569. The inspector may seize anything (including a document) that the inspector reasonably believes is evidence of an offence against the Bill (paragraph 175(1)(a)). The inspector may also take and remove a thing for examination, analysis or testing (paragraph 175(1)(b)) or if it is reasonably necessary to enable an inspector to exercise compliance powers (175(1)(c)).

570. If a place (even if it is not a workplace) has been entered with an entry warrant under this Part, then the inspector may seize anything or document specified ,or belonging to a class of things or documents, specified on the warrant. Documents include any print out or reproduction of a document. If the document is stored on or can be accessed from a computer or other device, that computer or other device can be seized if it is reasonably required to access or operate it. The power to seize a computer also includes the power to access or operate it and permits the Inspector to seize any document of the types specified in 175(2)(b) and 175(2)(c) that is stored in, accessed or recovered from the computer.

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

571. Clause 176 allows inspectors to seize certain things, including plant, substances and structures, at a 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. This also applies to any part of the workplace or plant at the workplace.

Clause 177 – Powers supporting seizure

572. 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.

573. Subclause 177(2) makes it an offence to tamper, or attempt to tamper, with a thing that an inspector has placed under restricted access.

574. Subclauses 177(3)–(7) enable inspectors to require certain things to be done to allow a thing to be seized.

575. 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.

576. 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.

577. 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.

578. 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

579. 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)).

580. Subclause 178(3) sets out the information that must be specified in the receipt.

581. Subclause 178(4) sets out the circumstances in which a recept is not required.

Clause 178A – Inspecting, examining, analysing and testing seized things

582. A thing seized under clauses 175 and 176 may be subject to any testing the inspector deems appropriate. While this may include destructive testing, the inspector is also obliged to minimise damage to the seized thing under clause 182.

Clause 179 – Forfeiture of seized things

583. 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.

584. 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).

585. 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)).

586. 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.

587. 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.

588. Subclause 179(8) allows the regulator to recover reasonable costs incurred by the State of storing and disposing of a thing that has been seized to prevent it being used to commit an offence against the Bill.

589. Subclause 179(9) defines the 'person entitled' to mean, in relation to a seized thing, 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

590. 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).

591. 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)).

592. 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

593. Clause 181 provides that a person from whom a thing was seized, the owner of the thing or a person they have authorised in writing with certain access rights, including the right of inspection and, if the thing is a document, the right to copy it.

594. This does not apply if it is impracticable or would be unreasonable to allow inspection or copying (subclause 181(2)) or if it provides evidence of an offence against the Bill.

595. Documents provided to an inspector under clause 171 are subject to the separate access regime under clause 174.

Division 6 – Damage

Clause 182 – Damage etc. to be minimised

596. 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

597. 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.

Division 7 – Other matters

Clause 185 – Power to require name and address

598. Subclauses 185(1) and (2) allow an inspector to require a person to tell the inspector their 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)).

599. 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)).

600. 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.

601. 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

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

Division 8 – Offences in relation to inspectors

603. This Division establishes offences against inspectors.

604. 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

605. 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.

606. Any reasonable action taken by a person to determine their 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

607. Clause 189 makes it an offence for a person who is not an inspector to hold themselves out to be an inspector.

Clause 190 – Offence to assault, threaten or intimidate inspector

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

609. 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.

610. The term assault takes its definition from section 222 of the *Criminal Code*.

Part 10 – Enforcement measures

611. Part 10 provides for enforcement measures including notices (i.e. improvement notices, prohibition notices and non-disturbance notices) and remedial action.

612. Many of the decisions that can be made under this Part are subject to review (see Part 12).

613. Part 10 is divided as follows:

- Division 1 deals with improvement notices;
- Division 2 deals with prohibition notices;
- Division 3 deals with non-disturbance notices;
- Division 4 provides the general requirements applying to notices;
- Division 5 provides for remedial action to be taken by the regulator; and
- Division 6 is not used.

Division 1 – Improvement notices

614. 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 WHS laws.

Clause 191 – Issue of improvement notices

615. Improvement notices may require a person to remedy a contravention, prevent a likely contravention of the Bill or take remedial action.

616. 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

617. 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)).

618. 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

619. 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).

620. Subclause 193(2) requires the person to whom the notice is issued to advise the regulator they have complied with the notice as soon as reasonably practicable.

Clause 194 – Extension of time for compliance with improvement notices

621. Clause 194 allows the regulator 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

622. Prohibition notices are designed to stop workplace activity that involves a serious risk to a person's health or safety.

Clause 195 – Power to issue prohibition notice

623. 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.

624. Subclause 195(2) provides that the notice may be issued to a person who the inspector reasonably believes has control over the activity. This would ordinarily be a PCBU.

625. Subclause 195(4) prevents an inspector from issuing a prohibition notice if compliance with the direction would adversely affect a covert or dangerous operation by WA Police.

Pre-requisites for issue of prohibition notices

626. 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

627. 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.

628. 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

629. 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

630. 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.

631. Prohibition notices may also include directions about measures to be taken to remedy the risk, activities to which the notice related (subclause 196(2)).

632. 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

633. 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 3 – Non-disturbance notices

634. 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

635. 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 their compliance powers.

636. 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.

637. A site includes any plant, substance, structure or thing associated with that site (subclause 199(3)).

638. 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)).

639. 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

640. 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).

641. Subclause 200(2) clarifies that the evidential burden of showing a reasonable excuse is on the accused.

Clause 201 – Issue of subsequent notices

642. 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.

643. 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

644. This Division co-locates the provisions of a procedural nature that apply to all notices issued under this Part, unless otherwise specified.

645. 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

646. Improvement and prohibition notices may include directions (see clauses 192(2), 196(2) and 196(3)).

647. Clause 204 clarifies that a direction included in an improvement or prohibition notice may refer to a Code of Practice and offer the person to whom it is issued a choice of ways to remedy the act.

648. Clause 205 clarifies that improvement and prohibition 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

649. Clauses 206 and 207 allow for notices to be varied or cancelled.

650. Clause 206 allows inspectors to make minor technical changes to a notice to improve clarity and to correct errors or references, including to reflect changes of address or other circumstances.

651. Clause 207 requires substantive variations to notices to be made by the regulator. It also empowers the regulator to cancel notices issued under this Part. The regulator may extend the compliance period for the notice which is in addition to the regulator's power to extend the period for compliance with an improvement notice under clause 194.

Clause 208 – Formal irregularities or defects in notice

652. 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.

653. 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

654. 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

655. The terms 'issued' and 'given' in relation to serving notices have separate meanings.

656. 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

657. 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.

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

659. 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)).

660. 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

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

662. 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

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

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

664. 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

665. 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.

666. 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.

Part 11 – Enforceable undertakings

667. 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.

668. Part 11 is not separated into divisions.

Clause 216 – Regulator may accept WHS undertakings

669. 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 industrial manslaughter or a Category 1 offence. These represent the most serious offences under the Bill, involving death or serious harm to a person, and the use of enforceable undertakings would not be appropriate in such circumstances.

670. 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

671. 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.

672. 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

673. 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

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

Clause 220 – Contravention of WHS undertaking

675. 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.

676. 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 220(5) ensures that action taken under clause 220 does not prevent proceedings being brought for a contravention of the WHS undertaking (clause 219).

677. Subclause 232(1)(c) provides for the limitation period for the bringing of such proceedings.

Clause 221 – Withdrawal or variation of WHS undertaking

678. 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.

679. 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

680. 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.

681. 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)).

Part 12 – Review of decisions

682. 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—the majority of these decision 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.

683. The exception is a decisions made by an inspector under clause 82 (Referral of issue to regulator for resolution by inspector). Issues involving continuity of engagement of a worker (clause 88) may be referred directly to the Tribunal for resolution.

684. Part 12 is divided as follows:

- Division 1 provides a table of reviewable decisions and provides the persons eligible to request a review of these decisions;
- Division 2 deals with matters subject to internal review; and
- Division 3 deals with matters subject to external review.

Division 1 – Reviewable decisions

Clause 223 – Which decisions are reviewable

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

686. 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.

687. 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.

688. A union is an eligible person if one or more eligible persons are members of the union when the reviewable decision is made. The union is able to make an application on behalf of any or all of the members who are eligible persons. Clause 223A provides additional requirements for a union to establish its standing as an eligible person.

689. Subclause 223(4) 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.

690. Subclause 223(5) defines a person entitled to a thing, for the purposes of a reviewable decision made under clauses 179 or 180.

Clause 223A – Review application by unions

691. A union is not required to identify the members that are eligible persons for the purpose of its application for review Tribunal (subclause 223A(1)). The internal reviewer or the Tribunal may request information or evidence that the union is an eligible person, including information that establishes the identity of its members who are eligible persons.

692. This information or evidence must not disclosed unless the internal reviewer or Tribunal believes it is reasonably necessary for the purpose of conducting the review and it can be disclosed in a form that does not identify any member of the union.

693. The identity of a union member may only be disclosed with their consent.

Division 2 – Internal review

Clause 224 – Application for internal review

694. 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.

695. 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.

696. An application for internal review cannot be made in relation to a decision by an inspector under 82(3) or made by the regulator (subclause 224(4)).

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

Clause 225 – Internal reviewer

698. 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

699. 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.

700. 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.

701. 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.

702. 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

703. 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.

Clause 228 – Stays of reviewable decisions on internal reviews

704. Subclause 228(1) provides that an application for an internal review of a decision automatically stays the operation of the decision, except in relation to a decision to issue a prohibition or non-disturbance notice.

705. 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 day after receiving an application or it will be taken that the reviewer has made a decision to grant a stay.

706. Subclause 228(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.

Division 3 – External review

Clause 229 – Application for external review

707. The external reviewer for decisions made under the Bill is the Tribunal.

708. Subclause 229(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. A decision made by an inspector under subclause 82(3) is referred directly to external review.

709. Subclause 229(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.

Clause 229A – Conduct and outcome of external review

710. Clause 229A sets out certain procedural matters for the conduct of a review by the Tribunal.

711. The Tribunal is required to:

- review the decision unless the application is withdrawn;
- conduct the review by way of a hearing de novo (approaching the decision afresh) and is not confined to considering material available to the internal review; and
- confirm, vary or substitute another decision.

712. Other matters relating to the Tribunal are provided in Division 5 of Schedule 2.

Clause 229B – Stays of decisions subject to external review

713. Subclause 229B(2) provides the Tribunal with discretion to stay the operation of a decision when an application is made for review of a decision under clause 229. The Tribunal is also empowered to cancel or vary a stay (subclause 229B(3)).

Part 13 – Legal Proceedings

714. Part 13 is divided as follows:

- Division 1 deals with the prosecution of offences;
- Division 2 covers sentencing of offenders;
- Division 3 is not used;
- Division 4 deals with offences committed by bodies corporate;
- Division 5 deals with offences committed by the Crown;
- Division 6 is not used;
- Division 7 is not used; and
- Division 8 deals with the effect of the Bill on civil liability.

Division 1 – General matters

Clause 229C – Terms used

715. Provides definitions of ***conduct*** and ***DPP*** for use in Division 1 of Part 13. The definition of ***conduct*** is that same as that provided in Division 5 – Offences and Penalties in Part 2 – Health and Safety Duties.

Clause 230 – Prosecutions

716. Subclause 230(1) provides that proceedings for an offence against the Bill can only be brought by the regulator or public service officer working in the WHS Department authorised in writing (generally or in a particular case) by the regulator. This does not apply to an industrial manslaughter offence under section 30A which may only be prosecuted by the DPP.

717. 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 DPP to bring proceedings for an offence against the Bill (subclause 230(3)). Therefore, if the regulator does not bring proceedings for an offence against the Bill the DPP can.

718. Guidelines about the prosecution of offences will continue to be developed within the broader Western Australian Government law enforcement policy context and should be read in conjunction with the *2005 Statement of Prosecution Policy and Guidelines*, gazetted under Section 24 of the *Director of Public Prosecutions Act 1991* (known as the DPP Guidelines).

Clause 231 – Procedure if prosecution is not brought

719. Clause 231 allows for the review by the DPP of a regulator's decision not to prosecute a serious offence that is an industrial manslaughter offence, a Category 1 or Category 2 offence.

720. Subclause 231(1) allows a person who reasonably believes that an industrial manslaughter or Category 1 or 2 offence has been committed where 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(8) clarifies that an application may be made about the occurrence of, or failure in relation to, an act, matter or thing.

721. 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 after the day on which the request is received, 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.

722. 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.

723. If the regulator advised under subclause 231(2) that a prosecution for an offence will not be brought, subclause 231(4) 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.

724. Subclause 231(5) requires the DPP to consider the referral and notify the regulator in writing within one month whether the DPP considers that a prosecution should be brought. The notice may be provided in any form the DPP deems suitable with a view to it being released to the parties specified under subclause 231(6). It is expected the notice will include a summary of the issues involved, rather than provide legal advice, although nothing prevents the DPP from providing legal advice to the regulator on the matter. Any legal advice on the matter is subject to legal professional privilege (clause 269) and may not be released under subclause 231(6).

725. Subclause 231(6) requires the regulator to ensure that a copy of the DPP notice is given to the applicant and again for transparency, the person whom the applicant believes committed the offence.

726. Subclause 231(7) provides that, if the regulator declines to bring proceedings on the recommendation of the DPP, 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

727. 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.

728. Subclause 232(1) sets out the limitation periods for when proceedings for an offence may begin. With the exception of an industrial manslaughter offence under clause 30A, 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.

729. Reflecting the seriousness of industrial manslaughter offences under clause 30B and 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.

730. There is no limitation period on bringing proceedings for industrial manslaughter under clause 30A. Where the DPP has decided not to bring proceedings for industrial manslaughter under clause 30A, paragraph 232(4)(c) permits proceedings for another offence to be brought within 6 months of the DPP's decision. This ensures that proceedings may commence where the limitation period might otherwise have expired under subclause 232(1).

731. Subclause 232(5) clarifies that a person charged with an industrial manslaughter offence under clause 30A may be convicted of an industrial manslaughter offence under clause 30B irrespective of the statutory limitation for proceedings.

Clause 232A – Admission of evidence obtained unlawfully

732. Clause 232A permits a court to consider admitting evidence into proceedings that was obtained as a result of unlawful conduct. This might occur, for example, where an inspector inadvertently exceeds the parameters of an entry warrant.

733. The court must be satisfied the desirability of admitting the evidence outweighs the undesirability of admitting the evidence, taking into account the matters provided in paragraphs 232A(3)(a)-(f).

Clause 234 – Application of this Division

734. 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

735. 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. The order forms part of the offender's sentence.

Clause 236 – Adverse publicity orders

736. 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.

737. 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.

738. Subclause 236(2) allows the court to make an adverse publicity order on its own initiative or at the prosecutor's request.

739. 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.

740. 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 as a debt due to the State.

Clause 237 – Orders for restoration

741. 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.

742. 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

743. Subclause 238(1) allows the court to make an order requiring an offender to undertake a specified project for the general improvement of WHS within a certain period.

744. Subclause 238(2) provides that a WHS 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

745. 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.

746. Court-ordered WHS undertakings must be distinguished from WHS undertakings. WHS undertakings are given to the regulator and are voluntary in nature.

747. 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.

748. 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.

749. 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 241 – Training orders

750. Training orders enable a court to make an offender take action to develop skills that are necessary to manage WHS 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

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

752. Subclause 242(3) provides that the clause does not apply to an order under clause 239. If a person does not comply with a court-ordered undertaking they may be prosecuted for the original offence to which the undertaking related. If a person fails to comply with a court ordered sanction the person may be prosecuted and charged with contempt of court.

Division 4 – Offences by bodies corporate

Clause 244 – Imputing conduct to bodies corporate

753. A body corporate is an artificial entity that can only act and make decisions through individuals. Therefore, subclause 244(2) 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.

754. Subclause 244(3) provides that if an offence requires proof or knowledge or intention, it is sufficient for an employee, agent or officer of a body corporate to prove they had the relevant knowledge or intention in proceedings against a body corporate concerning that offence.

755. Subclause 244(4) provides that if for an offence against the Bill 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

Subdivision 1 - Prosecutions

Clause 244A – Crown may be prosecuted

756. Clause 244A provides that the Crown may be prosecuted for offence against the Bill.

Clause 244B – Prosecution against agent of Crown that is a body corporate

757. Clause 244B requires that, where an act or omission constituting an offence is alleged against a body corporate that is an agent of the Crown, proceedings must be taken against the body corporate. This includes circumstances where the body corporate is a successor in law to a Crown agency or where the Minister has made a determination where an agency has ceased to exist. This might include circumstances where machinery of government changes have moved the functions of agency to another agency that is a body corporate.

Clause 244C – Prosecution of Crown in other cases

758. The Bill defines a ***Crown agency*** as:

(a) a department of the Public Service; or

(b) WA Police; or

(c) any other agency of the Crown that is not a body corporate.

759. Clause 244C requires that prosecutions for a Crown agency are brought against the Crown under the title 'State of Western Australia'. Within Division 5, the ***Crown agency*** is referred to as the ***responsible agency***.

Clause 244D – Provision applicable to responsible agency

760. Clause 244D establishes requirements in relation to proceedings against a responsible agency, including that the responsible agency must be specified in the prosecution notice or indictment, and requirements related to service of documents.

Clause 244E – Proceedings where agency has ceased to exist

761. Agencies can cease to exist due to machinery of government or legislative changes. Clause 244E determines who the successor at law is for the purpose of commencing this proceedings. This includes a power provided to the Minister to determine the successor at law, where there is no apparent successor at law, and there is doubt as to which agent of the Crown has the relevant functions.

Clause 244F – Penalties for proceedings against the Crown

762. Clause 244F establishes that penalties for proceedings against the Crown are the penalties that apply to bodies corporate.

Subdivision 2 – Other matters

Clause 244G – Issue of notices to the Crown

763. Clause 244G specifies to whom notices (improvement, prohibition and non-disturbance notices) are to be issued. For a Crown agent that is a body corporate, they are issued to the body corporate. Otherwise, they must be issued to the the Crown under the title 'State of Western Australia' and must show the name of the responsible agency.

244H – Imputing conduct to Crown

764. The Crown is an artificial entity that acts and makes decisions through individuals. Clause 244H 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.

765. Subclause244H(5) provides that in proceedings against the Crown requiring proof of knowledge or intention, it is sufficient to prove that the person referred to in subclause 244H(2) possessed the relevant knowledge or intention.

766. Similarly, subclause 244H(6) provides that if a 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 244H(2) made that mistake of fact.

Division 8 – Civil liability not affected by this Bill

Clause 267 – Civil liability not affected by this Bill

767. Clause 267 provides that except as provided in Part 6, 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.

Part 14 – General

768. This Part collates a number of miscellaneous provisions.

769. Division 1 contains provisions relating to the giving of false or misleading information, legal professional privilege, immunity from liability, confidentiality of information, contracting out, a prohibition against insurance or indemnification against fines, and levying workers.

770. Part 14 is divided as follows:

- Division 1 deals a range of general provisions including confidentiality, legal professional privilege and the prohibition on indemnities against fines;
- Division 2 deals with codes of practice;
- Division 3 sets out regulation making powers; and
- Division 4 provides for a 5 yearly review of the Act.

Division 1 – General provisions

771. This Division contains provisions relating to the giving of false or misleading information, legal professional privilege, immunity from liability, confidentiality of information, contracting out, a prohibition against insurance or indemnification against fines, and levying workers.

Clause 268 – Offence to give false or misleading information

772. Clause 268 provides for the offence of giving false or misleading information.

773. 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 anything without which the information is false or misleading.

774. 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.

Clause 269 – Bill does not affect legal professional privilege

775. 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

776. Inspectors, in particular, have a crucial role to play in the promotion of WHS 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.

777. 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.

778. Subclause 270(1) provides that anything done, or omitted to be done, by a person acting in good faith as a WHS authority has no personal civil liability for those actions or omissions. This protection applies to the regulator and other positions appointed under the Bill, inspectors, persons using powers and functions delegated by the regulator, persons appointed to conduct proceedings for offences and others engaged in the administration of the Bill. This protection applies 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.

779. Subclause 270(2) states that any civil liability that would otherwise attach to the person instead applies to the State.

Clause 271 – Confidentiality of information

780. 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.

781. Clause 271 applies where a person obtains information or gains access to a document in exercising a power or function under the Bill.

782. 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).

783. Prohibited disclosures are an offence.

784. Subclause 271(3) provides a list of circumstances in which subclause 271(2) does not apply. These include where disclosure is necessary to exercise a powers or perform a function 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 of powers or perform functions under different Bills. Personal information can be disclosed with the relevant person's consent.

785. The specific prohibition on disclosing information or evidence regarding a union's status as an eligible person (subclauses 223A(3) and 223A(4)) apply irrespective to the exceptions provided under paragraphs 271(3)(b) and (c).

786. 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

787. This clause deems any term of any agreement or contract to have no effect 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 WHS matters.

Clause 272A – No insurance or indemnities against fines

788. This clause deems an insurance policy to be of no effect to the extent that it purports to indemnify a person against their liability to pay a fine under the Bill. Elements of an insurance policy that do not relate to insurance or indemnification against fines will continue to apply.

Clause 273 – Person not to levy workers

789. This clause prohibits a PCBU from charging workers for anything done or provided relating to WHS.

Division 2 – Codes of practice

790. Codes of practice play an important role in assisting duty holders to meet the required standard of WHS. 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

791. 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.

792. Subclause 274(2) provides that consultation between unions and employer organisations is a prerequisite for approving, varying or revoking a code of practice.

793. 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.

794. Subclause 274(4) provides that an approval, variation or revocation of a code of practice takes effect when a notice is published in the Gazette or on a later date that is specified.

795. 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 Gazette and a newspaper circulating generally throughout the jurisdiction.

796. 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

797. 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.

798. 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.

799. 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.

800. 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.

801. 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

802. 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

803. Subclause 276(1) contains broad regulation making powers that allow for the making of regulations for or with respect to any matter relating to WHS and any matter or thing required or permitted by the Bill, or necessary or convenient to give effect to the Bill.

804. Without limiting the broad power in subclause 276(1), subclause 276(2) contains more specific regulation making power in relation to Schedule 3.

805. 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
- provide for offences against the regulations and prescribe penalties for those offences.

Clause 277 – Operation of Bill to be reviewed every 5 years

806. This clause requires the Minister to review the effectiveness and operation of the Bill, and prepare a report as soon as practicable on the fifth anniversary of the Bill commencing, and every five years thereafter. The report must be laid before each House of Parliament no later than 12 months after each five year interval.

807. A note under subclause 277(1) advises that a review must include consideration of the most recent review of the Bill, consistent with the object of providing a nationally consistent framework to secure the health and safety of workers.

Part 15 – Repeals and consequential amendments

808. The Bill will cover workplace participants within the jurisdiction of Western Australia, including mines, petroleum and general workplaces. This requires repeal of, and amendments to, a range of legislation that deals with safety and health in workplaces.

Division 1 – Occupational health and safety legislation

Clause 278 – *Occupational Safety and Health Act 1984* repealed

Clause 279 – Occupational Safety and Health Regulations 1996 repealed

809. Division 1 repeals the *Occupational Safety and Health Act 1984* (OSH Act) and the Occupational Safety and Health Regulations 1996 (OSH Regulations).

Division 2 – Mines safety and inspection legislation

Subdivision 1 – *Mines Safety and Inspection Act 1994* amended

Clause 280 – Act amended

810. Elements of the *Mines Safety and Inspection Act 1994* (MSIA) that deal with WHS at mines will be repealed. Provisions that are necessary to continue the operation of the Mines Safety and Inspection Levy Regulations 2010 will be retained. The intent is to ensure the mines safety and inspection levy (MSIL) continues to be collected without altering liability to pay the MSIL and without disruption to its administration.

811. The Safety Levies Amendment Bill 2019 will be tabled as a cognate bill to ensure the levy is reimposed.

Clause 281 – Section 3 deleted

Section 3 provided the objects of the MSIA and none of these are related to the MSIL.

Clause 282 – Section 4 amended

812. Section 4 provides terms used for the MSIA. Only certain key terms are required for the continued operation of the MSIL and the terms that are no longer required will be deleted by this clause.

Clause 283 – Section 4A deleted

813. Section 4A (Penalty levels defined state the penalties for offences under the MSIA. These offences are for contraventions of the WHS elements of the MSIA, and do not relate to the MSIL.

Clause 284 – Section 6A deleted

814. Section 6A provides for the application of the MSIA to workplaces under the OSH Act and establishes a scheme whereby an instrument signed by the responsible Minister or Ministers may exclude the operation of the OSH Act in certain matters. A corresponding provision exists in the OSH Act.

815. No similar scheme is required under the Bill as it covers all workplaces, including mines, petroleum and general workplaces. This section does not relate to the MSIL.

Clause 285 – Section 7 amended

816. Section 7 of the MSIA establishes the relationship between the MSIA, the *Radiation Safety Act 1975* and the *Rail Safety National Law (WA) Act 2015*.

817. Subsection 7(1) is no longer required as provisions of the MSIA that might be prevailed over by the *Radiation Safety Act 1975* related to WHS and are to be deleted.

818. Subsection 7(2) is to be retained to ensure railways under the *Rail Safety National Law (WA) Act 2015* that form part of a mining operation are excluded in relation to the collection of the MSIL.

Clause 286 – Parts 2 to 8 deleted

819. Parts 2 to 8 of the MSIA relate to WHS and are to be deleted as these matters will now come under the Bill or the regulations for mines. These are:

- Part 2 – General duties relating to OSH;
- Part 3 – Administration of Act;
- Part 4 – Management of mines;
- Part 5 – Safety and health representatives and committees;
- Part 6 – Resolution of safety and health issues;
- Part 7 – Specific duties relating to OSH; and
- Part 8 – Ministerial safety and health powers.

Clause 287 – Sections 94 and 95 deleted

820. These sections relate to the general penalty (section 94) and the penalty for continuing offences (section 95). These offences are for contraventions of the WHS elements of the MSIA, and do not relate to the MSIL.

Clause 288 – Section 96A replaced

821. Prosecutions that are to be conducted in relation to the MSIL will be heard by the Health and Safety Magistrate established under the Bill.

Clause 289 – Sections 98 to 99A deleted

822. These sections relate to evidentiary provisions establishing certain matters, the liability of specified persons for offences generally, and the liability of specified persons for offences involving gross negligence. All of these matters relate to contraventions of the WHS provisions of the MSIA and will be deleted.

Clause 290 – Section 100 amended

823. Section 100 relates to the liability of directors etc. for offences by corporations and has continuing application to the MSIL. This section has been refined for greater consistency with its ongoing application to the MSIL.

Clause 291 – Sections 100A and 101 deleted

824. Section 100A provides for the liability of directors etc. for offences by corporation involving gross negligence. Section 101 creates and offence for providing false or misleading information. Both these offences relating solely to WHS matters and are to be deleted.

Clause 292 – Part 9 Divisions 2 and 3 deleted

825. Division 2 relates to and undertaking that may be entered into in lieu of paying a fine. Division 3 provides the jurisdiction of the Occupational Health and Safety Tribunal. As both of these division apply solely to WHS matters, they are to be deleted.

Clause 293 – Sections 102A and 103 deleted

826. Section 102A provides requirements for visitors to mines and creates an offence for non-compliance with a direction, and section 103 provides an exemption from personal liability for specified officers and boards. These matters are covered under the Bill.

Clause 294 – Section 104 amended

827. Section 104 is a provision establishing the regulations that may be made by the Governor under the MSIA and provides a list of specific matters that may be the subject of regulation. These specific matters relate to WHS and are to be deleted. The other amendments in this clause seek to refine the provision such that it will permit regulations to be made in relation to the MSIL including the offence provision in section 104(4).

Clause 295 – Section 105A amended

828. Section 105A permits regulations to be made for the MSIL. Amendments to this section apply only to changing references to 'this Act to make reference to the WHS Act where the references relate to the purpose of the levy. The intent is to ensure the MSIL continues to be collected without altering liability to pay the MSIL and without disruption to its administration.

829. The Safety Levies Amendment Bill 2019 will be tabled as a cognate bill to ensure the levy is reimposed.

Clause 296 – Section 105AB amended

830. Section 105AB creates the Mines Safety Account for the administration of the MSIL. An amendment to subclause 105AB(3) will ensure the MSIL is only to be used in relation to mines and mining operations.

Clause 297 – Sections 105 to 110 deleted

831. Sections 105 to 110 are miscellaneous provisions related to display of regulations at a mine, application of the regulations to self-employed persons, repeals and the review of the Bill. These provisions are not required for the MSIL.

Clause 298 – Mines Safety and Inspection Regulations 1995 repealed

832. The Mines Safety and Inspection Regulations 1995 will be repealed. Regulations for mine safety will be provided under the Bill.

Division 3 – Petroleum and geothermal energy legislation

833. Division 3 amends petroleum legislation with the intent of removing WHS matters that will be covered by this Bill. Other amendments are intended to streamline the operation of these laws.

Subdivision 1 – Petroleum and Geothermal Energy Resources Act 1967 amended

Clause 299 – Act amended

Clause 300 - Section 5 amended

834. The definitions to be deleted relate to WHS matters which will be covered by the Bill.

Clause 301 – Section 7AA deleted

835. Section 7AA ensures that OSH laws do not apply in relation to petroleum operations or geothermal energy operations. This is no longer required as petroleum regulations related to WHS will be made under this Bill.

Clause 302 – Section 112A amended

836. Consistent with the removal of WHS matters from the *Petroleum and Geothermal Energy Resources Act 1967* (PGERA), the concept of 'safety zones' will be replaced with the concept of 'exclusion zones' without alteration to the substantive provisions to which they refer.

Clause 303 - Section 119 amended

837. Section 119 provides the powers of inspectors and makes reference to Schedule 1 – Occupational safety and health which is to be deleted.

Clause 304 – Section 126A amended

838. Section 126 relates to evidentiary matters, and the paragraphs to be deleted make reference to a ***listed OSH law***. These references are no longer required as proceedings for WHS matters will be authorised under this Bill.

Clause 305 – Part IIIA deleted

839. Part IIIA makes provision for OSH matters which will be covered under the Bill.

Clause 306 – Section 153 amended

840. The reference to 'safety' is to be deleted to as WHS matters will be covered by regulations made under the Bill.

Clause 307 – Schedule 1 deleted

841. Schedule 1 makes provision for OSH matters which will be covered under the Bill

Subdivision 2 - Petroleum and Geothermal Energy Safety Levies Act 2011 amended

842. The *Petroleum and Geothermal Energy Safety Levies Act 2011* (PGESLA) is being amended for consistency with the approach proposed for regulations proposed petroleum safety cases under the Bill which reduces the number and type of safety cases that need to be completed for various different operations. The intent is to simplify and refine the safety case approach without changing liability of parties to the respective levies.

Clause 308 – Act amended

Clause 309 – Long title amended

843. The long title of the PGESLA will be amended to reflect the simplified approach to collecting the respective levies. This approach does not change the liability for the respective levies.

Clause 310 – Section 3 amended

844. Definitions have been amended for consistency with the streamlined safety case approach. The definition of ***CEO*** has been deleted as this role will be undertaking by the Chief Inspector of Petroleum Safety.

Clause 311 – Sections 3A to 3E inserted

845. The PGESLA refers to a range of definitions that are provided in sections or regulations that are to be repealed. To maintain consistency, these definitions will be incorporated as:

- 3A – Diving operation
- 3B – DSMS
- 3C – Geothermal energy operations
- 3D – Petroleum operation
- 3E – Safety case

Clause 312 – Part 2 replaced

846. Part 2 is replaced to reflect the streamlined approach to petroleum levies.

Clause 313 – Section 10 amended

847. Section 10 provides for assessment of the safety levy and makes reference to information obtained or provided under specified Acts. This amendment includes the Bill into the list of specified Acts and replaces the term 'CEO' with the new term 'CIPS' which is the Chief Inspector of Petroleum Safety.

Clause 314 – Section 11 amended

Clause 315 – Section 12 amended

Clause 316 – Section 13 amended

Clause 317 – Section 14 amended

Clause 318 – Section 15 amended

Clause 319 – Section 16 amended

Clause 320 – Section 18 amended

848. Clauses 314 to 319 make amendments to replace the term 'CEO' with the new term 'CIPS' which is the Chief Inspector of Petroleum Safety.

Clause 321 – Section 21 amended

849. Amended to change the references to ***listed OSH law*** to a reference to the Bill (see clauses 300, 324 and 344 which deleted the definition of listed OSH law in their respective Acts).

Clause 322 – Section 22 amended

850. Clause 321 amends section 22 to replace the term 'CEO' with the new term 'CIPS' which is the Chief Inspector of Petroleum Safety.

Clause 323 – Section 26 amended

851. Amends the regulation making powers for consistency with the streamlined safety case approach and replaces the term 'CEO' with the new term 'CIPS' which is the Chief Inspector of Petroleum Safety.

Subdivision 3 – Petroleum Pipelines Act 1969 amended

Clause 324 – Act amended

Clause 325 – Section 4 amended

852. The definitions to be deleted related to WHS matters which will be covered by the Bill.

Clause 326 – Section 5AA deleted

853. Section 5AA dis-applies State OSH laws in relation to pipeline operations. This is no longer required as WHS matters are to be removed from the *Petroleum Pipelines Act 1969* (PPA).

Clause 327 – Section 32 replaced

854. Section 6 of the *Dangerous Goods Safety Act 2004* (DGSA) dis-applies itself from pipelines regulated by other Acts, including the PPA. The reference to the DGSA in section 32(b) is redundant and will be removed by clause 326.

Clause 328 – Section 36 amended

855. Section 36 relates to the requirements to be provided with consent to commence or resume operation of a *pipeline*, including a requirement that it may be operated with safety. This element is to be removed as WHS matters will now be covered by the Bill.

Clause 329 – Part IVA deleted

856. Part IVA relates to OSH and will not be required as these matters will be covered by regulations made under the Bill.

Clause 330 – Section 63 amended

857. Schedule 1 relates to WHS matters and is to be deleted by clause 332, so the reference to the powers of an inspector under schedule 1 is to be removed.

Clause 331 – Section 66BB amended

858. Section 66BB relates to evidentiary matters, and the paragraphs to be deleted make reference to a listed OSH law. These references are no longer required as proceedings for WHS matters will be authorised under this Bill.

Clause 332 – Section 67 amended

859. The paragraph to be deleted includes a reference to 'safety measures'. WHS matters will be covered by regulations made under the Bill, so the reference to safety measures is no longer required.

Clause 333 – Schedule 1 deleted

860. Schedule 1 makes provision for OSH matters which will be covered under the Bill.

Subdivision 4 – *Petroleum (Submerged Lands) Act 1982* amended

Clause 334 – Act amended

Clause 335 – Section 4 amended

861. The definition of listed OSH law is to be deleted as it is used under other clauses to be deleted. The definitions of ***facility*** and ***offshore petroleum operation*** are to be deleted from section 4 as they will be included in new clause 4A.

Clause 336 – Section 4A inserted

862. WHS matters will now be covered by regulations made under the Bill. In the *Petroleum (Submerged Lands) Act 1982* (PSLA) this requires amendments to be made to some definitions. In addition, certain definitions are to be amended to better align with other petroleum acts. For example, the definitions of ***place***, ***plant***, ***structure*** and ***worker*** will be aligned with the Bill.

Clause 337 – Part IIA deleted

863. Part IIA dis-applies specified occupational health and safety laws from applying to the PSLA. WHS matters will be covered by regulations made under the Bill so this Part is no longer required.

Clause 338 – Section 97 amended

864. Section 97 applies to work practices and includes a reference to an infrastructure licensee carrying out operations in a safe manner. For clarity, general references to safety are to be removed as WHS matters will be covered by regulations made under the Bill. The word 'safe' will be replaced with the phrase 'proper and workmanlike'.

Clause 339 – Section 119 amended

865. Consistent with the removal of WHS matters from the PSLA, the concept of 'safety zones' will be replaced with the concept of 'exclusion zones' without alteration to the substantive provisions to which they refer.

Clause 340 – Section 137A amended

866. Section 137A relates to evidentiary matters, and the paragraphs to be deleted make reference to a ***listed OSH law***. These references are no longer required as proceedings for WHS matters will be authorised under this Bill.

Clause 341 – Part IIIA deleted

867. Part IIA relates to OSH which will now be covered under this Bill.

Clause 342 – Section 152 amended

868. The reference to 'safety' in section 152 is to be removed as health and safety matters will be covered by the Bill.

Clause 343 – Schedule 3 amended

869. Deletes a transitional schedule that is no longer required.

Clause 344 – Schedule 5 deleted

870. Schedule 5 relates to OSH which will now be covered under this Bill.

Subdivision 5 – Various regulations repealed

Clause 345 - Regulations under Petroleum and Geothermal Energy Resources Act 1967 repealed

Clause 346 - Regulations under Petroleum and Geothermal Energy Safety Levies Act 2011 repealed

Clause 347 - Regulations under Petroleum Pipelines Act 1969 repealed

Clause 348 - Regulations under Petroleum (Submerged Lands) Act 1982 repealed

871. Subdivision 5 repeals various regulations that are no longer required, will be replaced by regulations made under the Bill, or that will be otherwise amended or modified.

Division 4 – Other consequential amendments

Subdivision 1 – *Building and Construction Industry Training Fund and Levy Collection Act 1990* amended

Clause 349 – Act amended

Clause 350 – Section 8 amended

872. Section 8 of the *Building and Construction Industry Training Fund and Levy Collection Act 1990* requires the Building and Construction Industry Training Board to formulate and prepare an Annual Operational Plan which is required to support a range of activities, including in paragraph 8(1)(c) '…training in technology used in the industry and in the occupational safety and health requirements of the industry…'

873. The generic reference to 'occupational safety and health' will be amended to 'work health and safety' consistent with the title of the Bill.

Subdivision 2 – *Constitution Acts Amendment Act 1899* amended

Clause 351 – Act amended

Clause 352 – Schedule V amended

874. Schedule V of the *Constitution Acts Amendment Act 1899* makes reference to the Board of Examiners, the Mines Occupational Safety and Health Advisory Board, and the Mines Survey Board in relation to certain matters, such as vacation of an office by a person elected to the legislature. These boards are to be removed from the MSIA.

Subdivision 3 – Fair Trading Act 2010 amended

Clause 353 – Act amended

Clause 354 – Schedule 1 amended

875. The reference to the OSH Act in Schedule 1 — Acts that override the *Australian Consumer Law (WA)* will be replaced with a reference to the Bill and the alphabetical order of the list will be retained by ensuring the reference to the Bill follows the reference to the *Veterinary Chemical Control and Animal Feedings Stuffs Act 1976*.

Subdivision 4 – *Health (Miscellaneous Provisions) Act 1911* amended

Clause 355 – Act amended

Clause 356 – Section 246B amended

876. Section 246B continues the Pesticides Advisory Committee and establishes its membership. Paragraph 264B(2)(f) requires that one member shall be the chief executive officer of the department within the meaning of the OSH Act, or an officer of that department nominated by the chief executive officer. Clause 343 amends sections 246B to make the references consistent with the Bill.

Subdivision 5 – *Industrial Relations Act 1979* amended

Clause 357 – Act amended

Clause 358 – Section 7 amended

877. Subsection 7(3) specifies that matters or claims referred to the Tribunal in the specified legislation are not industrial matters. As the specified matters or claims refer to WHS, subsection 7(3) has been simplified to refer to the Bill.

Clause 359 – Section 8 amended

878. Section 8 requires that at least one Tribunal commissioner must have knowledge of OSH, and of the relevant legislation. Section 8 will be amended to refer, WHS and the Bill.

879. The Bill also allows a Senior Commissioner or the Chief Commissioner to be appointed to the Tribunal. To ensure this can occur, the reference to a commissioner appointed under paragraph 8(2)(d) has been removed.

Clause 360 – Section 16 amended

880. Section 16 specifies the functions of the Chief Commissioner. The function provided under section 16(2A) is the appointment of a commissioner to exercise jurisdiction at the Occupational Health and Safety Tribunal. The reference to the OSH Act and to section 51G has been replaced with references to the Bill, and to clause 27(1) of Schedule 2 of the Bill.

881. New subsection 16(2AA) has been added as an avoidance of doubt provision, to specify the Chief Commissioner can be appointed to the Tribunal.

Clause 361 – Section 49I amended

882. Section 49I relates to entry by an authorised representative of an organisation to investigate suspected breaches of the specified laws. The references to the OSH Act and the MSIA have been replaced with a reference to the Bill.

Clause 362 – Section 113 amended

883. Section 113 is a miscellaneous provision establishing the purposed for which the Court may make regulations. Section 113(1)(d)(ii) specifies the laws that may have regulations made regarding to the referral, bringing, hearing and determination of matters, claims and appeals.

884. With the exception of the *Owner-Drivers (Contracts and Disputes) Act 2007*, the laws in this section are being repealed or amended (in relation to WHS matters that can be referred) and replaced with the Bill. Section 113(1)(d)(ii) will be amended to reflect this.

Subdivision 6 – *Local Government Act 1995* amended

Clause 363 – Act amended

Clause 364 – Section 5.40 amended

885. Section 5.40 provides for the principles affecting employment by local government and includes paragraph 5.40(e) that employees are to be provided with safe and healthy working conditions in accordance with the OSH. The reference to the OSH Act is to be amended to refer to the Bill.

Subdivision 7 – *Public Sector Management Act 1994* amended

Clause 365 – Act amended

Clause 366 – Section 8 amended

886. Section 8 specifies human resources management principles for the Public Sector. Paragraph 8(1)(e) requires that employees are to be provided with safe and healthy working conditions in accordance with the OSH Act. The reference to the OSH Act is to be amended to refer to the Bill.

Clause 367 – Section 29 amended

887. Section 29 provides the functions of Chief Executive Officers and chief employees, and includes a requirement to implement any health and safety standards and programmes adopted with respect to employment in the Public Sector subject to the OSH Act. The reference to the OSH Act is to be amended to refer to the Bill.

Subdivision 8 – Workers' Compensation and Injury Management Act 1981 amended

Clause 368 – Act amended

Clause 369 – Section 47 deleted

888. Section 47 provides the circumstances under which some workers are not entitled to workers' compensation in relation to regulations made under the MSIA which are to be repealed. Regulations for mines under the Bill are still in development.

Clause 370 – Section 48 amended

889. Section 48 relates to diseases the must be notified to WorkCover WA by the employer. References to the OSH Act in sections 48(2) and 48(3) will be replaced by references to the Bill.

Clause 371 – Section 95 amended

890. Section 95 establishes the membership of WorkCover WA's governing body and includes under section 95(1)(b) the chief executive officer of the department of the Public Service of the State principally assisting the Minister charged with the administration of the *Occupational Safety and Health Act 1984*. The reference to the OSH Act is to be amended to refer to the Bill.

Clause 372 Section 100B amended

891. Section 100B permits the WorkCover WA to release information to the department principally assisting the Minister in the administration of the OSH Act if requested in writing by the chief executive. The reference to the OSH Act is to be amended to refer to the Bill, and the generic reference to OSH is to be replaced with a reference to WHS.

Part 16- Transitional provisions

892. The transitional provisions in Part 16 were based on the *Transitional Principles for implementing the model WHS Bill prepared by Safe Work Australia*. The model transitional principles were adapted and approved by the MAP for use in Western Australia.

893. The transitional provisions in the Bill are intended to ensure continuity of a broad range of matters covered by the legislation amended or repealed under **Part 15 – Repeals and consequential amendments** and may impose a transition period to provide duty holders with time to adapt their processes to any new or modified requirements that may be imposed due to commencement of the Bill. Office holders that are continued under the Bill, such as the WorkSafe Commissioner, will continue in their appointments under the Bill.

Division 1 - Preliminary

Clause 373 – Terms used

Clause 374 – Application of Interpretation Act 1984 not affected

Clause 375 – Continued application of enactments

Clause 376 – Transitional regulations

894. Division 1 provides the general principles governing continuing enactments and transitional regulations Part 16.

Division 2 – General saving in relation to certain matters

Clause 377 – Enactments continue to apply in relation to certain matters occurring before commencement day

895. This clause ensures the repealed provisions of the acts specified in clause 364(1)(a) to (e) continue to apply in relation to the specified matters that occurred before commencement day, including:

- an offence or other contravention;
- an accident, incident, death, injury or illness in relation to the notification and record-keeping requirements (or other steps to be taken; and
- Issues of a PIN, improvement notice, or prohibition notice.

Division 3 – Office holders and bodies

Clause 378 – WorkSafe Commissioner

896. The role of WorkSafe Western Australia Commissioner will transition to the role of WorkSafe Commissioner, who is the regulator for the purpose of the Bill.

Clause 379 – Chief Inspector of Mines

897. The role of State Mining Engineer will transition to the Chief Inspector of Mines.

Clause 380 – Members of Work Health and Safety Commission

Clause 381 – First annual report of Work Health and Safety Commission

898. The membership of the Commission for Occupational Safety and Health will transition to the WHSC on commencement day. Clause 368 requires that the first annual report of the WHSC will include information regarding residual activities of the Commission for Occupational Safety and Health that had not otherwise been reported prior to commencement day.

Clause 382 – Continuation of Mining Industry Advisory Committee

899. The role of the Mining Industry Advisory Committee will be replaced, on commencement day, by the MAPAC. The MIAC will continue until the MAPAC has been established, or for a period no longer than 6 months.

Clause 383 – Continuation of other advisory committees

900. Other advisory committees established under section 15 of the OSH Act will continue as if they had been established under Schedule 2 Clause 19 of the Bill.

Division 4 – Health and safety duties

Subdivision 1 - Designers

Clause 384 – Section 22 applies only if designing starts on or after commencement day

Clause 385 – Continue application of repealed enactments relating to designers

901. Subdivision 1 provides a two-year grace period for designs that were started prior to commencement day to be continued under the repealed enactments. A design that is not completed before the two-year anniversary of commencement is required to comply with section 22.

Subdivision 2 – Manufacturers

Clause 386 – Plant, substance or structure manufactured in batch

Clause 387 – Section 23 only applies if manufacturing starts on or after commencement day

Clause 388 – Continued application of repealed amendments to manufacturers

902. Subdivision 2 provides a one-year grace period for where manufacture of plant, substance or structures started prior to commencement day. Manufactured products that are not completed prior to the one-year anniversary are required to comply with section 23.

903. Special provision (clause 373) is made for plant, substances or structures manufacture in batches. For the purpose of the transitional provisions, manufacture is not taken to be completed until the batch is completed.

Subdivision 3 – Importers

Clause 389 – Section 24 not to apply if importation process starts before commencement day

Clause 390 – Continued application of repealed enactments relating to importers

904. Subdivision 3 provides a grace period for imported plant, substance or structures where importation started prior to commencement day, but where the item is still in transit. Subdivision 3 distinguishes between non-petroleum repealed enactments and petroleum repealed enactments and deal with them in different ways.

905. For non-Petroleum repealed enactments, the grace period is one year. The definition of ***import*** in the Bill (which includes importation into Western Australia from elsewhere in Australia) applies for non-petroleum repealed enactments.

906. For petroleum repealed enactments, the grace period applies until the plant, substance or structure ceases to be in transit but only applies to these things if they are imported into Australia.

Subdivision 4 – Suppliers

Clause 391 – Start of supply

Clause 392 – Section 25 not to apply if supply started before commencement day

Clause 393 – Continued application of repealed enactments

907. Subdivision 4 provides a one-year grace period for suppliers if any process associated with the supply is started prior to commencement day. If the supply is not completed by the end of the grace period, section 25 will apply.

Subdivision 5 – Person who install, construct or commission plant or structures

Clause 394 – Section 26 not to apply if installing, constructing or commissioning occurs before commencement day

Clause 395 – Continued application of repealed enactments relating to person who install or construct plant or structures

908. Subdivision 5 provides a two-year grace period where the installation or construction of plant or structures started prior to commencement day. For commissioning of plant or structures, the grace period is one-year. In either case, if the installation, construction or commissioning of plant or structures is not completed by the end of the grace period, section 26 will apply.

Division 5 – Health and safety representatives

909. Division 5 applies to both HSRs and their deputies.

Clause 396 – Terms used

Clause 397 – Safety and health representative elected before commencement day

910. Clause 384 ensures that safety and health representatives elected under repealed enactments (whether or not they have taken office) are appointed as HSRs under the Bill. The term of a HSR appointed due to this clause is either the balance of their term under the repealed enactment, one year or sooner if a new request for an election is made under the Bill. This also applies to deputy health and safety representatives elected under repealed enactments (whether or not they have taken office).

Clause 398 – Elections in process before commencement day

911. If an election was in process prior to commencement date, the election continues under the repealed enactment. The election must be complete within 3 months of commencement day. A person elected under this clause hold office for a period of 1 year or sooner if a new request for an election is made under the Bill.

Clause 399 – Disqualifications

912. Disqualifications that are in effect under repealed enactments are continued in force under the Bill.

Clause 400 – Functions and powers under repealed enactments

913. A safety and health representative, for a work group established under a repealed enactment is taken to be a HSR for the work group under any repealed enactment and may use the functions and powers provided under the repealed enactments in relation to that work group.

Division 6 – Health and safety committees

Clause 401 – Terms used

Clause 402 – Safety and health committee in place before commencement day

Clause 403 – Process to establish safety and health committee started before commencement day

914. A Safety and Health Committee established under a repealed enactment is transitioned to a HSC under the Bill. If the process of establishing an SHC started prior to commencement day, it must be continued and completed within the period of 3 months starting on commencement day.

915. In both cases, The HSC continues for a period of 1 year after commencement, or sooner if replaced by a new HSC established under the Bill.

Division 7 – Issue resolution

Clause 404 – Part 5 Division 5 to apply to unresolved issues arising before commencement day

Clause 405 – Continued application of enactments relating to issue resolution

916. Sections 24 and 25 of the OSH Act, and sections 70 and 71 of the MSIA provide similar duties for the resolution of occupational safety and health issues at the workplace, and for an inspector to be requested to assist in resolving the issue.

917. Division 7 ensures that, if a repealed enactment applies to resolution of the issue, it will continue to apply if the relevant procedure was invoked prior to commencement day. Otherwise, Division 5 of Part 5 will apply.

Division 8 – The regulator

Clause 406 – Continuing powers and functions under OSHA

Clause 407 – Continuing powers and functions under MSIA

Clause 408 – Continuing powers and functions under petroleum and geothermal energy legislation

Clause 409 - Delegation

918. Powers and functions in the acts cited under Division 8 are to be exercised and performed by the regulator. This includes the powers and functions of the WorkSafe Western Australia Commissioner, the State Coal Mining Engineer, the State Mining Engineer, and (for the petroleum acts) the Minister. These powers and functions are delegable under section 154 of the Bill.

Division 9 - Inspectors

Clause 410 – Inspectors under OSHA

Clause 411 – Inspectors under MSIA

Clause 412 – Inspectors under PGERA

Clause 413 – Inspectors under PPA

Clause 414 – Inspectors under P(SL)A

Clause 415 – Application of sections 161 and 162

919. Inspectors appointed under the cited repealed or amended enactments are appointed as inspectors under section 156 of the Bill beginning on commencement day. Where matters arise under the repealed enactments (e.g. an offence that occurred prior to commencement) the Inspectors appointed under the Bill (including due to these transitional provisions) may exercise or perform any powers under the repealed or amended acts. This includes the use of compliance powers.

920. The conditions on an inspector's compliance powers (section 161), and inspectors being subject to direction by the regulator (section 162) apply to inspectors transitioned under Division 8.

Division 10 – Legal proceedings

Clause 416 – Jurisdiction of the Occupational Safety and Health Tribunal to be exercised by Tribunal

921. The jurisdiction held prior to commencement by the Occupational Safety and Health Tribunal will be exercised by the Tribunal on and after commencement day.

Clause 417 – Jurisdiction of safety and health magistrate to be exercised by health and safety magistrates

922. The jurisdiction held prior to commencement by safety and health magistrates will be exercised by health and safety magistrates on and after commencement day.

Division 11 – Other matters

Clause 418 – Notifiable incidents

923. Sections 38 and 39 do not apply to notifiable incidents that occurred before commencement day. The requirements of the repealed enactments will apply.

Clause 419 – Independent studies at mines

924. Section 45 of the MSIA permits the State Mining Engineer to require the principal employer or manager of a mine to procure and provide an independent study into specified matters. An independent study required under section 45 must be prepared by a professionally qualified engineer or some other qualified professional person who is approved for the purpose by the State mining engineer.

925. Under the Bill, the power to request an independent study is provided to the regulator (clause 155B).

926. Where the request for an independent study has been made prior to commencement day, but the State Mining Engineer had not approved a professionally qualified engineer or some other qualified professional person, clause requires the regulator to make this appointment.

Clause 420 – Codes of practice

927. Codes of practice approved under the OSH Act or the MSIA, will continue in effect as if approved under Clause 274 of the Bill and may be varied or revoked under that section.

928. While this ensures the continuity of codes of practice currently in place, a separate transitional process will be undertaken to approve new codes of practice that are consistent with the provisions of the Bill, and to revoke the codes they replace.

Clause 421 – Protections from personal liability

929. Protections from personal liability under the OSH Act and the MSIA will continue to apply in relation to any matter or thing done, or omitted to be done, prior to commencement day.

Division 12 - Levies

Subdivision 1 – Mines safety and inspection levy

Clause 422 – Administration costs

Clause 423 – Mines Safety and Inspection Levy Regulations 2010

Subdivision 2 – Petroleum and geothermal energy safety levies

Clause 424 – Administration costs

Clause 425 – Petroleum and Geothermal Energy Safety Levies Act 2011 to apply to past levy periods

930. Division 12 provides measures for continuation of levies raised under the specified legislation.

Schedule 1 – Application of Bill to dangerous goods and high risk plant

931. 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.

932. The potential to include dangerous goods legislation under the Bill will be considered after the Bill commences. The first stage of this process will rationalise dangerous goods regulations (while retaining them under the DGSA), and the second stage will review whether it is possible to bring dangerous goods laws under the Bill.

933. The inclusion of Schedule 1 in the Bill should not be taken to pre-empt the outcome of the second stage review of the dangerous goods legislation. Schedule 1 will not be operational at commencement as the terms 'dangerous goods' and 'high risk plant' will not be defined in the regulations.

Schedule 2 – Various offices and bodies

934. Schedule 2 establishes the statutory roles and bodies necessary for achieving the objects of the Bill and for its effective administration. These are:

- **statutory roles:**
  - the WorkSafe Commissioner;
  - the Chief Inspector of Mines; and
  - the Chief Inspector of Petroleum Safety;
- **advisory bodies:**
  - the WHSC; and
  - the MAPAC;
- **Tribunal and courts:**
  - the Work Health and Safety Tribunal; and
  - Health and Safety Magistrates.

935. Functions, powers and administrative arrangements for the various offices and bodies are provided in their respective Divisions.

Division 1 – WorkSafe Commissioner

1. Appointment of WorkSafe Commissioner

936. Clause 1 provides requirements for the appointment of the WorkSafe Commissioner.

937. Subclauses (1) to (3) provide that the appointment of the WorkSafe Commissioner is by the Governor for a term not exceeding 5 years and with remuneration and allowances determined by the Minister on the recommendation of the Public Sector Commissioner.

938. Subclause (4) preserves the continuity of existing and accruing rights if the person appointed as the WorkSafe Commissioner was a public service officer immediately prior to appointment. Subclause (5) ensures the person who was previously a public service officer, on ceasing to be the WorkSafe Commissioner, must be appointed to an office of the Public Service of the same or higher status as their previous office.

939. Subclause (6) prevents the WorkSafe Commissioner from paid employment outside their role without the Minister's approval.

2. Functions of WorkSafe Commissioner and relationship with Minister and WHS Department

940. Clause 2 establishes the WorkSafe Commissioner as the regulator for the Bill. The WorkSafe Commissioner is responsible to the Minister for the administration of the Bill and any other law relating to WHS administered by the Minister. The WorkSafe Commissioner is subject to the Minister's direction and control.

941. Persons may be appointed or made available under the PSM Act Part 3 to assist in the performance of the WorkSafe Commissioner's functions. The WorkSafe Commissioner may also appoint other persons to assist in the performance of their functions.

942. Subclause 6 provides clarification that the office of WorkSafe Commissioner and the office of chief executive officer of the WHS Department may be held by the same person.

3. Vacation of office of WorkSafe Commissioner

943. Clause 3 provides the conditions under which the office of WorkSafe Commissioner is vacated including expiry of the person's term, death, permanent incapacity to perform the functions of the office, resignation, and bankruptcy or insolvency. The WorkSafe Commissioner may also be removed from office by the Governor on the grounds of neglect of duty, incompetence or behaviour, and can also be removed if absent from 3 consecutive meetings of the WHSC without leave from the Minister.

4. Acting WorkSafe Commissioner

944. The Minister may appoint a person to act as the WorkSafe Commissioner if the office is vacant or if the person holding the office is unable to perform its functions due to sickness, absence, or other reasons.

945. The appointment may be terminated at any time by the Minister but must not exceed 3 months. The acting WorkSafe Commissioner has all the functions and entitlements of that office.

Division 2 – Chief Inspector of Mines and Chief Inspector of Petroleum Safety

5. Appointment of Chief Inspector of Mine and Chief Inspector of Petroleum Safety

946. The roles of Chief Inspector of Mines and Chief Inspector of Petroleum Safety are appointed by the Minister for periods not exceeding 5 years and the person may be reappointed. The instrument of appointment must be published in the Gazette.

947. If the person is a public service officer their remuneration and allowances will be made consistent with their current appointment. Otherwise, remuneration and allowances will be determined by the Minister on the recommendation of the Public Sector Commissioner

948. Subclause (5) prevents the Chief Inspector of Mines and Chief Inspector of Petroleum Safety from paid employment outside their roles without the Minister's approval.

6. Functions of the Chief Inspector of Mines and Chief Inspector of Petroleum Safety

949. The functions of these roles will be specified in the regulations appropriate to their respective industries.

7. Vacation of office of Chief Inspector of Mines or Chief Inspector of Petroleum Safety

950. Clause 7 specifies the circumstances under which these positions may become vacant. These are the same conditions for vacation of office as those provided under clause 3 for the WorkSafe Commissioner, with the following exceptions:

- removal from office on the grounds of neglect of duty, incompetence or the person's behaviour is done by the Minister; and
- there is no provision related to attendance at the Commission as these roles are not required to be members.

951. The WorkSafe Commissioner may delegate powers and functions to these positions, and they are subject to the direction and control of the Minister.

8. Acting Chief Inspector of Mines or Acting Chief Inspector of Petroleum Safety

952. The Minister may appoint a person to act in the specified roles if the office is vacant or if the person holding the office is unable to perform its functions due to sickness, absence, or other reasons.

953. The appointment must not exceed 3 months and may be terminated at any time by the Minister. The person acting in the specified office has all the functions and entitlements of that office.

Division 3 – Work Health and Safety Commission

9. Terms used

10. Establishment of the Work Health and Safety Commission

954. The WHSC will continue the work of the Commission for Occupational Safety and Health as the peak, tripartite advisory body on WHS matters in Western Australia.

955. Subclause 10(1) to 10(4) establishes the membership of the WHSC and the means by which persons are nominated and appointed. The WHSC is a tripartite body consisting of members representing unions, employer groups, and Government, and includes experts in WHS.

956. The WHSC consists of the following members:

- A person nominated by the Minister and appointed by the Governor as chairperson;
- The WorkSafe Commissioner;
- 2 persons employed in the Public Service nominated by the Minister, at least one of whom mush have knowledge of and experience in the mining industry in Western Australia.
- The following persons appointed by the Governor:
  - 2 persons nominated by the Chamber of Commerce and Industry of Western Australia Limited (CCIWA);
  - 3 persons nominated by UnionsWA, one of which must have knowledge and experience in the mining industry in Western Australia;
  - 3 persons nominated by the Minister after consultation with CCIWA and UnionsWA, who have knowledge of or experience in WHS; and
  - 1 person nominated by the Chamber of Minerals and Energy of Western Australia Inc (CME).

957. Subclause (3) permits the Governor to appoint a suitably qualified person nominated by the Minister if CCIWA, UnionsWA or CME do not respond to a request in writing to make a nomination within 60 days of being requested in writing by the Minister.

958. Subclause (4) provides parameters for the appointing members of the Public Service to the WHSC. For example, the appointment may be made by reference to the holder of a specified office, such as the Chief Inspector of Mines.

959. Subclause (6) specifies that the Commission may operate under the name 'WorkSafe WA' and subclause (7) makes it an offence for a person to operate under the name 'Work Health and Safety Commission' or 'WorkSafe WA' or any name that is so similar that it is likely to be misunderstood as referring to the Commission. This does not prevent the WHS department from operating as 'WorkSafe Western Australia' or a similar name.

11. Deputy chairperson

960. The Minister must appoint 1 of the WHSC's members as deputy chairperson, who must perform the functions of the chairperson if there the office is vacant, or if the chairperson is unable to act by reason of sickness, absence or other cause.

12. Vacation of office of appointed members

961. Clause 12 provides the circumstances by which an office of an appointed member becomes vacant. These circumstances are substantially the same as those applying to vacation of office by the WorkSafe Commissioner.

962. The specified circumstances include expiry of the person's term, death, permanent incapacity to perform the functions of the office, resignation, and bankruptcy or insolvency. An appointed member may also be removed from office by the Governor on the grounds of neglect of duty, incompetence or behaviour, and can also be removed if absent from 3 consecutive meetings of the WHSC without leave form the Minister.

963. Additionally, the office is vacated if the person's nomination from CCIWA, UnionsWA or CME is revoked.

13. Acting members

964. Clause 13 provides the circumstances under the Minister may appoint a person to act in place of an appointed member if the office is vacant due to sickness, absence or another cause. If the absent member was nominated by CCIWA, UnionsWA or CME, the person appointed to temporarily fill the vacancy must be nominated by the same body. If the absent person was appointed with knowledge of, or experience in, the mining industry, the person nominated to temporarily fill the position must meet the same requirements.

965. The appointment of a person as an acting member may be terminated by the Minister at any time.

14. Terms and conditions of appointed members

966. The term of an appointed member may not exceed 3 years and must be specified in their instrument of appointment. An appointed member who is not a public service officer is entitled to the remuneration and allowances determined by the Minister on the recommendation of the Public Sector Commissioner.

967. Members appointed to represent CCIWA, UnionsWA or CME may waive their entitlement to remuneration and allowances by providing written notice to the Minister. A member who waives their entitlement may elect for an amount equal to the waived entitlement, be paid instead to the body that nominated them as a fee.

15. Leave of absence

968. Leaves of absence may be granted by the Minister and may include terms and conditions.

16. Casual vacancies

969. Where an office of an appointed member becomes vacant before the expiry of their term, the person appointed to fill the vacancy only holds it for the balance of the previous member's term.

17. Meetings of Commission

970. Clause 17 sets out the requirements for the conduct of meetings of the Commission, including matters related to the timing and frequency of meetings, the number of members constituting a quorum, voting, and declaration of pecuniary interests and determination of procedures.

971. Meetings may be held at any time convene a meeting of the Commission. A meeting must also be held if requested by at least 5 of the members or by the Minister. The time and place of the meeting is determined by the chairperson. The Commission must meet at least 6 times each calendar year and intervals not exceeding 3 months.

972. The chairperson must preside at any meeting of the Commission. If the chairperson and deputy chairperson are absent, the members must select one of the members present to preside at the meeting. This selection is achieved by secret ballot. Seven members constitutes a quorum.

973. While the Commission must work for the attainment of the objects of the Bill by consensus, some questions may arise that require a vote. Only members appointed after nomination by the CCIWA, UnionsWA and CME, and the experts appointed after nominated by the Minister, may vote on a matter. The numbers required for a majority in different circumstance are specified.

974. Members with pecuniary interests must declare the nature of the interest at each meeting where the matter is considered. Unless a matter is specified elsewhere in the subdivision, the Commission may determine its own procedures.

18. Functions of Commission

975. The Commission has a broad range of functions consistent with its role as the peak WHS advisory body in Western Australia. The Commission's functions are as follows —

(a) to inquire into, and report to the Minister upon, any matters referred to it by the Minister;

(b) to make recommendations to the Minister with respect to —

(i) this Bill; and

(ii) any law, or provision of a law, relating to WHS that is administered by the Minister and any law, or provision of a law, relating to WHS that is prescribed for the purposes of this paragraph; and

(iii) subsidiary legislation, guidelines and codes of practice proposed to be made under or for the purposes of any prescribed law;

(c) to examine, review and make recommendations to the Minister in relation to existing and proposed registration of licensing schemes relating to WHS;

(d) to provide advice to, and cooperate with, Government departments, public authorities, unions, employer organisations and other interested persons in relation to WHS;

(e) to formulate or recommend standards, specifications or other forms of guidance to assist PCBUs, and their workers, to maintain appropriate standards of WHS;

(f) to promote education and training 1 in WHS as widely as possible;

(g) in cooperation with educational authorities or bodies, to devise and approve courses in relation to WHS;

(h) having regard to any criteria laid down by Safe Work Australia, to advise persons on training in WHS and to formulate and accredit training courses in WHS;

(i) to recommend to the Minister the establishment of public inquiries into any matter relating to WHS;

(j) to collect, publish and disseminate information on WHS;

(k) to formulate reporting procedures and monitoring arrangements for identification of workplace hazards and incidents in which injury or death is likely to occur at a workplace; and

(l) to commission and sponsor research into WHS.

976. The Commission may also issue for public review and comment any regulations, codes of practice or guidelines with respect to which it proposes under subclause clause 18(1)(b) to make any recommendations to the Minister.

977. The Commission must ensure, so far as practicable, that any information it provides is in a language and form that is appropriate for the persons to whom the information is directed.

978. The Minister must, within 60 days after receiving a recommendation from the Commission under subclause (1), reply in writing to the Commission in relation to that recommendation.

19. Advisory committees

979. The Commission may establish advisory committees at any time, or when requested by the Minister, to assist in the performance of its functions. Members are appointed to the advisory committee by the Commission, who must so far as is practicable appoint persons representing PCBUs, persons representing workers, and persons with knowledge of, or experience in, matters relating to WHS. The Commission must have regard to diversity when makings its appointments and must specifically consider having a reasonable number of men and women, persons of differing ethnic backgrounds, and other groups with special needs.

980. A member of an advisory committee is entitled to remuneration and allowances determined by the Minister in consultation with the Public Sector Commission. Subject to the direction of the Commission, the advisory committee may establish its own procedures.

20. Annual report

981. The Commission must prepare and submit to the Minister a report of its operations, and the operation of the Bill during the year ending on the preceding 30 June. The report must be provided to the Minister no later than 31 October each year, and the Minister must submit the report before each House of Parliament no later than 12 sitting days after the day on which the report was received.

982. A report on the activities of the MAPAC is to be included in the Commission annual report (see clause 25).

983. This is not a report required under section 63 of the *Financial Management Act 2006* and does not need to meet the requirements of such a report.

21. Staff to assist the Commission

984. Public service officers may be made available to the Commission to assist in the performance of its functions. This is also available to the MAPAC (MAPAC) by the operation of clause 25.

Division 4 – Mining and Petroleum Advisory Committee

22. Terms used

23. Establishment of the Mining and Petroleum Advisory Committee

985. The MAPAC is an advisory committee to the Minister. Clause 23 sets out the minimum requirements for membership of the MAPAC and the consultation required for appointment. The Minister is required to consult with bodies prescribed in the regulations, which must include at least 1 body representing PCBUs, and 1 body representing workers, in the mining and petroleum industry.

986. The MAPAC must consist of minimum of 6 members:

- at least 2 members to represent PCBUs in the mining and petroleum industries;
- at least 2 members to represent workers in the mining and petroleum industries; and
- at least 2 members independent of the bodies the Minister must consult with.

987. One of the independent members must be appointed as Chairperson.

988. Members of the MAPAC are entitled to remuneration and allowances determined by the Minister on the recommendation of the Public Sector Commissioner. The MAPA may determine its own procedures, subject to directions given by the Minister.

24. Functions of Committee

989. The functions of the MAPAC will be prescribed in the regulations.

25. Annual report and staff

990. The MAPAC is not a sub-committee of the WHSC, but for administrative simplicity staff may be appointed to assist in its functions as if it was an advisory committee of the WHSC (clause 21). A report on the activities of the MAPAC is to be provided in the WHSC's annual report (clause 20).

Division 5 – Work Health and Safety Tribunal

26. Terms used

27. Establishment of the Work Health and Safety Tribunal

991. The Tribunal is the successor body to the Occupational Safety and Health Tribunal that operated under the OSH Act. The role of the Tribunal is to be the external review body for decisions of the regulator, and to otherwise review matters that may be directly referred to it under the Bill. The Western Australian Industrial Relations Commission has the jurisdiction given to the Tribunal under the Bill.

28. Jurisdiction to be exercised by commissioner with requisite qualifications

992. Clause 28 makes provisions for the appointment of a Commissioner, including:

- the jurisdiction of the Tribunal is to be exercised by a designated Commissioner (which may include the Senior Commissioner or Chief Commissioner);
- alternatives if the designated Commissioner is absent;
- the desirability of appointing a Commissioner with relevant knowledge in the field of WHS; and
- continuity of the Commissioner appointed to hear a particular matter in specified circumstances where that person's appointment ends.

29. Practice, procedure and appeals

993. Clause 29 specifies the provisions of the IR Act that apply to the exercise of the jurisdiction of the Tribunal. Section 31(1) of the IR Act applies has modified application – removing the parties referenced in 31(1)(c) (who are parties to industrial matters) while retaining the right to a legal practitioner. This does not constitute an amendment to the IR Act.

30. Conciliation

994. The Tribunal is able to conciliate certain matters that may be referred to it. This excludes compliance and enforcement activities by the regulator (such as prohibition notices or matters relating to seizure of things) but includes anything else that might be referred (such as a decision relating to a WHS dispute).

995. The Tribunal may make any suitable declarations, directions or orders that it thinks expedient in relation to conciliation, and these are enforceable under the IR Act.

996. The Tribunal can make determinations in relation to specified matters, but the determination must take into account to agreements reached between the parties.

31. Certain matters to be heard together

997. This clause provides that an employee who has a claim that he has been unfairly dismissed, and a WHS matter arising out of the same circumstances is before the Tribunal, the employee may request that those two matters be heard and determined by the same commissioner in the same hearing. This may allow the commissioner to have a broader picture of the underlying issues, rather than dealing with those matters separately.

Division 6 – Health and Safety Magistrates

32. Every magistrate to be health and safety magistrate

33. Jurisdiction of health and safety magistrate

34. Administrative arrangements

998. Unless specified otherwise, the jurisdiction for most offences under the Bill is the Magistrate's Court in summary jurisdiction. Clause 32 establishes that every Magistrate holds office as a Health and Safety Magistrate and may hear and determine proceedings for any offence other than industrial manslaughter – crime.

999. The Children's Court of Western Australia retains its exclusive jurisdiction to hear and determine a charge of an offence alleged to have been committed by a child

Schedule 3 – Regulation-making powers

1000. 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 and HSC. 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).