EXPLANATORY MEMORANDUM – MODEL WORK HEALTH AND SAFETY BILL

OUTLINE

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

The harmonisation of WHS laws is part of the COAG National Reform Agenda aiming to reduce regulatory burdens and create a seamless national economy.

The objects of harmonising WHS laws through a model WHS framework are as follows:

- improving safety outcomes.
- reducing compliance costs for business, and
- improving efficiency for regulator agencies.

The Bill includes the following key elements:

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

FINANCIAL IMPACT STATEMENT

[*To be completed by each jurisdiction.]*

REGULATORY ANALYSIS

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

NOTES ON CLAUSES

The following abbreviations are used in this Explanatory Memorandum: **[Not exhaustive - to be completed]**

Fair Work Act	*Fair Work Act 2008* (Cth)
HSC	Health and safety committee
HSR	Health and safety representative
ILO	International Labour Organisation
Model Work Health and Safety Bill	The/this Bill
Model Work Health and Safety Regulations	Model WHS regulations
National review into OHS laws	*National Review into Model Occupational Health and Safety Laws*, First Report, October 2008
	National Review into Model Occupational Health and Safety Laws, Second Report, January 2009
OHS	Occupational health and safety
PCBU	Person conducting a business or undertaking
PCBU duties	Health and safety duties and obligations owed by a PCBU under the Bill
Vic OHS Act	*Occupational Health and Safety Act 2000* (Vic)
WHS	Work health and safety
WHS inspector	Inspector appointed as such under Part 9 of the Act

Cross-references to the First and Second Reports

These notes cross-reference relevant discussions that influenced drafting in the First and Second Reports. Although many of the Reports' recommendations were accepted by the Workplace Relations Ministers' Council and are reflected in the drafting of the Bill, some were not adopted and others have been modified following consultative processes. For that reason, the First and Second reports should only be used as a guide to the policy underpinning the provisions in the Bill.

Part 1 – Preliminary

Division 1 – Introduction

Clause 1 – Citation

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

Note
This clause may be amended consistent with the applicable drafting protocol.

Clause 2 – Commencement

3. Clause 2 provides for the commencement of the Act on 1 January 2012, consistent with the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*.

4. Transitional and consequential legislation will be set out [*in separate legislation*].

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. Subclause 3(2) extends the object of risk management set out in subclause (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.

Second Report: para 22.34

Division 3 – Interpretation

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

Second Report: paras 23.1 – 23.9

Subdivision 1 – Definitions

Clause 4 – Definitions

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

Authorising authority

Note
The term 'authorising authority' is not defined in the model provisions. Each jurisdiction will nominate the regulator or Court or tribunal as an authorising authority to perform all, or some, of the functions associated with administering the WHS permit scheme.

In some cases a tribunal will only have responsibility for administering part of the WHS permit scheme (e.g. reviews and appeals etc.) while the regulator will retain more routine functions (e.g. issuing permits). This may mean that the term 'authorising authority' is not required and can be deleted.

Compliance powers

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

Employee record

10. The term ‘employee record’ takes its meaning from the *Privacy Act 1988* (Cth) (Privacy Act).

11. Although the Privacy Act uses the term to create an ‘employee records’ exemption, the term is used differently in this context to qualify the rights of WHS permit holders to inspect ‘employee records’ (See Part 7 of the Bill).

Health

12. The term ‘health’ is defined to clarify that it is used in its broadest sense and covers both physical and psychological health. The reference to psychological health is intended to cover the concept of welfare or wellbeing.

Second Report: paras 2.91 – 23.114

Import

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

Medical treatment

Note
The term ‘medical treatment’ means treatment by a registered medical practitioner. Jurisdictions will specify the relevant registration laws.

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 not other things unconnected with the installation or operation of the plant (e.g. floor or building housing the plant).

Second Report: paras 23.221 – 23.222

Officer

16. The term ‘officer’ is defined by reference to the ‘officer’ definitions in the *Corporations Act 2001* (Cth), section 9, but does not include a partner in a partnership. It also includes ‘officers’ of the Crown within the meaning of clause 245 and ‘officers’ of public authorities within the meaning of clause 252. All of these ‘officers’ owe the officers’ duty provided for in clause 27, subject to the volunteers’ exemption in clause 34.

First Report: paras 8.32 – 8.34
Second Report: paras 23.115 – 23.147

Public authority

Note
Each jurisdiction will define this term separately, which will allow jurisdictional differences to be accommodated.

Regulator

Note
The regulator is the person or body responsible for administering the Act and appointing WHS inspectors.

This Act

17. 'This Act' is shorthand for 'this Act and the regulations' unless a particular provision provides otherwise.

Volunteer

18. The term 'volunteer' is defined to mean a person who acts on a voluntary basis, which means without any kind of remuneration other than out-of-pocket expenses. Whether an individual is a 'volunteer' for purposes of the Bill is a question of fact that will depend on the circumstances of each case.

19. '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*

20. The principal duty holder under the Bill is a 'person conducting a business or undertaking' (PCBU). To fall within the definition, there must be an identifiable 'person' and that person must conduct a 'business or undertaking'.

21. 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) (subclause 5(1)(a)), or
- the business or undertaking is conducted for profit or gain or not (subclause 5(1)(b)).

22. The term 'person' is not defined but should be read broadly to cover individuals, body corporates, government agencies and other kinds of bodies legally recognised as 'persons'.

23. Clause 5(2) extends the term person to include a partnership and unincorporated association.

24. Clause 5(3) clarifies that PCBU duties and obligations under the Act 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?

25. The phrase 'business or undertaking' should be read broadly to cover activities that are conducted with a sufficient degree of organisation and systematic and repetitive activity.

26. Employers, principals, head contractors and franchises are examples of persons who are PCBUs for purposes of the Bill.

Running a household

27. All kinds of employers are PCBUs for purposes of the Bill, including individual householders who hire employees to help around the home (e.g. part-time or full-time nannies, housekeepers or gardeners).

28. However, the following kinds of persons are not intended to be PCBUs:

- individuals who carryout domestic work in and around their own home (e.g. domestic chores etc.)
- individual householders who engage contractors on an ad hoc basis (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'

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

First Report: paras 6.58 – 6.62

PCBU duties do not apply to members of local authorities

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

Exclusions

31. Subclause 5(6) allows the regulations to exclude prescribed persons from application of the Act, or part of the Act.

'Volunteer associations' not covered by Bill

Subclause 5(7) excludes 'volunteer associations' from PCBU duties and obligations under the Bill. Volunteer associations are only excluded if they have one or more community purposes and they do not have any employees (i.e. employed by one or more of the volunteers) carrying out work for the association (subclause 5(8)). Hiring a contractor (e.g. to audit accounts, drive a bus on a day trip etc.) would not, however, jeopardise exempt status under this provision.

32. Volunteer associations with one or more employees owe duties and obligations under the Bill to those employees and also to any volunteers who carry out work for the association.

33. The term 'community purposes' is not defined 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 any sporting or recreational club or association.

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 or sale of shares 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 (subclause 6(3)(a))
- any other kind of supply excluded by the regulations (subclause 6(3)(b)).

Supply involving '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.

Second Report: paras 23.223 – 23.237

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 is illustrative only and is 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. student on clinical placement, bailee taxi driver).

41. The term 'work' is not defined but is intended to include work:

- 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
- undertaken 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 and clarifies that a police officer is a 'worker' for purposes of the Bill, while on duty or lawfully performing duties as a police officer. It would not cover periods while the police officer was not on active duty.

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

First Report: paras 2.21 – 2.42, 6.89 – 6.93, 9.17

Second Report: paras 23.249 – 23.261

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 gives extensive powers to WHS inspectors to conduct a inspections, to require production of documents and answers to questions (clause 171)), to seize certain things at workplaces for examination and testing or as evidence (clause 175) and to direct that a workplace not be disturbed (clause 198).

47. Subclause 8(2) is an avoidance of doubt provision that clarifies that a 'place' should be read broadly to include things like ships, off-shore units and platforms.

48. 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

49. 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.

50. 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.

51. 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.

Second Report: paras 23.262 – 23.280

Clause 9 – Examples and notes

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

Division 4 – Application of Act

53. This Division deals broadly with the application of the Act to the Crown and also beyond the territorial boundaries of the relevant jurisdiction.

54. It also allows for provisions to deal with the relationship between this Bill and other Acts.

Clause 10 – Act binds the Crown

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

First Report: paras 15.4 – 15.7

Clause 11 – Extraterritorial application

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

57. For example, it is intended that the Bill applies to all PCBUs that operate state or territory-registered ships out of the relevant jurisdiction, subject to Commonwealth maritime WHS laws. To the extent that there is overlap between the laws of jurisdiction (e.g. where a South Australian ship is in the coastal waters of another State or the Northern Territory), the principles of double jeopardy would preclude conviction for a criminal offence in respect of conduct for which a person had already been convicted of an offence.

58. Importantly, inspection powers (Parts 9 and 10) and powers of inquiry (Part 7) would ***not*** have any extra-territorial application to workplaces outside the jurisdiction.

59. Other relevant extraterritorial rules may be included in general criminal laws, 'crimes at sea' laws, federal maritime laws and acts interpretation laws.

Clause 12 – Scope

Note

The jurisdictional note sets out provision that may be made in relation to the scope of the Bill.

Second Report: 20.62 – 20.78

Application to public health and safety

60. The primary purpose of the Bill is to protect persons from work-related harm. The status of such persons is irrelevant. It does not matter whether they are employees or have some other work-related status or are members of the wider public. They are entitled to that protection. At the same time, the Bill is not intended to extend such protection in circumstances that are not related to work. There are other laws, including the common law, that require such protection and provide remedies where it is not supplied.

61. The duties under the Bill are intended to operate in a work context and will apply where work is performed or processes or things are used for work.

62. The Bill is not intended to ordinarily have an operation beyond the protection of the health and safety of any person—including the wider public—from exposure to hazards and risks that are inherent in, or emanate from:

- the carrying out of work
- anything that is provided or used for or in the performance of work or intended to be so provided or used, or
- a workplace, in its capacity as a workplace.

63. These elements are reflected in the model Bill by the careful drafting of obligations and the terms used in the Act and also by suitably articulated objects.

64. The intention is that further, nationally consistent guidance about the application of the work health and safety laws to public safety be provided by the regulator.

Second Report: 20.111 – 20.121

Part 2 – Health and safety duties

Division 1 – Introductory

Subdivision 1 – Principles that apply to duties

65. 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 and codes of practice.

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

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

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

- all duty holders must at all times accept their responsibility for work health and safety and ensure that the duties of care are met, and
- where a duty holder has a very limited involvement or very limited ability to take relevant steps in relation to managing risks, those factors will assist in determining what is ‘reasonably practicable’ for them in complying with their duty of care.

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

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

First Report: paras 4.2, 4.9, 6.71 – 6.88, 6.106 – 6.108

Clause 17 – Management of risks

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

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

71. Duty holders must provide the highest level of protection that is reasonably practicable. Priority must be given to eliminating risks at the source through safe design of workplaces, systems and items used for work. If it is not reasonably practicable to do so, then risks must be minimised as far as is reasonably practicable.

Subdivision 2 – What is reasonably practicable

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

72. 'Reasonably practicable' is enshrined in the ILO's *Occupational Safety and Health Convention No. 155*. Article 4, Clause 2 of this Convention provides that the aim of national policy on occupational safety, occupational health and the working environment 'shall be to prevent accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as is reasonably practicable, the causes of hazards inherent in the working environment'.

73. 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 consider the following factors:

- seriousness of the risk, including the likelihood of the risk occurring and the seriousness of harm that might result
- what the person knows, or ought reasonably know, about the hazard or the risk and ways of eliminating or minimising the risk, and
- the availability and suitability of ways to eliminate or minimise the risk.

After assessing these matters, the person may also consider whether the cost associated with eliminating or minimising the risk is grossly disproportionate to the risk.

74. As noted above, 'reasonably practicable' represents what can reasonably be done in the circumstances. An inability to control relevant matters must necessarily imply that it is either not possible for duty holders to do anything, or it is not reasonable to expect them to do so.

First Report: paras 5.2 – 5.10, 5.27 – 5.71, 5.47, 5.50 – 5.56, 5.60

Division 2 – Primary duty of care

75. This Division specifies the work health and safety duties for the Bill. Generally the provisions identify the duty holder, the duty owed by them and how they must comply with the duty.

76. Using the employment relationship to determine the scope of primary duties under WHS laws is no longer valid. 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 a direct employment relationship with any person (e.g. share farming or share fishing; or as a contractor working under a contract for services, who may be carrying out work for only one principal)
- may be employed by someone who is simply organising the provision of labour (e.g. a labour hire or placement organisation) with the effective control and direction of the work being by another (commonly known as the 'host employer' or principal), and
- their employer may have limited ability to exercise discretion as to work systems and methods, because of the direction and requirements of another party (as may be found in some transport arrangements with the requirements of the consignor).

77. For these reasons, the Bill provides a broader scope for the primary duty of care, to require those in effective control or influencing the way work is done to protect the health and safety of those carrying out the work.

First Report: para 6.46 – 6.48

'Reasonably practicable' is used to qualify the duty of care

78. 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.

79. The inclusion of this qualifier also assists the duty holder in understanding what is required to comply with the duty of care.

First Report: paras 5.24, 5.40 – 5.42

Clause 19 – Primary duty of care

80. Clause 19 sets out the primary work health and safety duty which applies to PCBUs.

81. The person has a duty to ensure, so far as is reasonably practicable, the health and safety of workers the person:

- directly engages to carry out work for their business or undertaking
- places with another person to carry out work for that person, or
- influences or directs in carrying out work activities,

while the workers are at work in the business or undertaking.

82. Duties of care are imposed on duty holders because they influence one or more of the elements that go to the performance of work and in doing so may affect the health and safety of themselves or others. Duties of care require duty holders to ensure that, in their role and by their conduct, they do not adversely affect health and safety.

First Report: para 4.6 – 4.7, 6.63 – 6.70, 6.80 – 6.88

Primary duty of care not limited to physical 'workplaces'

83. 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.

First Report: paras 6.98 – 6.106

Duty extends to 'others'

84. Subclause 19(2) extends who the primary duty of care is owed to beyond the PCBUs workers to other persons all 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.

85. 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'. This difference particularly splitting the primary duty of care in this way is intended to emphasise the primacy of the duty owed to workers, as reflected in the objects of the Bill.

86. 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). In either case, the duty is triggered by a possibility of danger rather than actual danger: see *R v Board of Trustees of the Science Museum* [1993] ICR 876.

First Report: paras 6.94 – 6.97

Specific elements of the primary duty

87. Subclause 19(3) outlines the key things a person must do in order to satisfy the primary duty of care. The list is not exhaustive and further guidance will be provided through regulations, codes of practice and other guidance materials.

88. PCBUs must comply with the primary duty by ensuring, so far as is reasonably practicable, the provision of the specific matters, 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.

89. 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 by another person.

90. 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

91. 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.

First Report: paras 6.116 – 6.123

Self-employed persons

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

93. The term 'self-employed person' is not defined, but is intended to cover any self-employed person whether or not they engage any other persons.

Division 3 – Further duties of persons conducting businesses or undertakings

94. This Division sets out the work health and safety duties of person who in the course of conducting businesses or undertakings, undertake activities that may materially affect the health and safety of other persons.

95. 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' of the product lifecycle. In the early phases of the lifecycle of the product, there is greater scope to incorporate risk control measures and remove foreseeable hazards or predictable health and safety risks.

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

96. Clause 20 sets out the health and safety duty for a person conducting a business or undertaking that involves in whole or in part the management or control of a workplace. Workplace is defined in clause 8. The duty requires that 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 safe and without risks to health and safety of any person.

97. 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.

98. 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 safe and 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 workers' facilities. 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

99. Clause 21 sets out the health and safety duty for a person conducting a business or undertaking that 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 that the person with management or control of fixtures, fittings or plant at a workplace ensures, so far as is reasonably practicable, that those things are safe and without risks to health and safety of any person.

100. For example, a person who manages or controls workplace fixtures, fittings or plant has a duty to ensure that torn carpets are repaired or replaced if they pose risks to the health and safety of any person.

101. 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 the conduct of the 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, substance or structures

102. Clause 22 sets out the duty for a person conducting a business or undertaking which designs 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.

103. For example, the designer of call centre workstations must ensure that they are designed without risks to the health and safety of the persons who use, construct, manufacture, assemble, demolish or dispose of the workstations. This would include designing workstations to be adjustable and supportive of ergonomic needs.

104. 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 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.

105. 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).

Clause 23 – Duties of persons conducting businesses or undertakings that manufacture plant, substance or structures

106. Clause 23 sets out the duty for a person conducting a business or undertaking which 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 this duty also applies if these things are used or to be used as a workplace.

107. 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 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.

For example, a manufacturer of a commercial cleaning substance must ensure 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 instructions for safe use.

108. 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, substance or structures

109. Clause 24 sets out the duty for a person conducting a business or undertaking which 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 this duty also applies if these things are used or to be used as a workplace.

110. 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.

111. For example, a person who imports machinery must ensure 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.

112. 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

113. Clause 25 sets out the duty for a person conducting a business or undertaking which supply 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.

114. 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 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.

115. 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).

116. 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 – Duties of persons conducting businesses or undertakings that install, construct or commission plant or structures

117. This clause sets out the duty of a person conducting a business or undertaking that installs, constructs or commissions plant or substances.

118. 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).

119. For example, a person who installs neon business signs must ensure that they are installed without risks to the health and safety of themselves as well as people who will use, decommission, dismantle and work within the vicinity of the sign. This would involve ensuring the equipment is correctly installed, connected and grounded.

Division 4 – Officers, workers and other persons

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

Clause 27 – Duty of officers

121. 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 Act.

122. Subclause 27(3) sets the maximum penalties for offences by officers against the health and safety duties imposed under Division 2, 3 or 4 of Part 2. These are the only offence provisions that set specific maximum penalty levels for offences by officers.

123. Subclause 27(4) sets the maximum penalties for offences by officers in relation to any other duties or obligations imposed under the Bill. In that case, the maximum penalty is the maximum penalty for officers (acting in that capacity) that would otherwise apply to individuals for failing to comply with the relevant duty or obligation.

124. Subclause 27(4) clarifies that an officer may be convicted or found guilty even if their PCBU has not been convicted or found guilty of an offence under the Bill.

125. These provisions reflect a deliberate policy shift way from applying ‘accessorial’ or ‘attributed’ liability to officers, which is an approach currently adopted by several jurisdictions. Casting the duty in this way means that officers owe a continuous duty to ensure compliance with duties and obligations under the Act. 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.

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

127. Subclause 27(5) lists the kinds of steps an officer must take to discharge their duties under this provision, including acquiring and keeping up-to-date knowledge of work health and safety matters and ensuring the PCBU has and implements processes for complying with any duty or obligation the PCBU has under the Bill.

128. The standard of due diligence by an officer must be high, but achievable. It should be directly related to the role and influence of the officer within the PCBU.

129. As the role of the officer is the governance of the PCBU and making decisions for its management, what is required of the officer should be directly associated with that. The standard should be a high one, requiring ongoing enquiry and vigilance, to ensure that the resources and systems of the PCBU are adequate to comply with the duty of care of the PCBU – and are operating 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.

First Report: paras 8.39 – 8.43

Second Report: paras 23.148 – 23.177

Clause 28 – Duties of workers

130. 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 take reasonable care so that their acts or omissions do not adversely affect the health and safety of other persons at the workplace.

131. 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.

132. 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 Act and regulations.

133. 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.

134. 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 Act and regulations, whether it is clear and whether affected workers are able to cooperate.

First Report: paras 9.12 – 9.21

Clause 29 – Duties of other persons at the workplace

135. Clause 29 sets out the health and safety duties of all persons while at workplaces, including officers, customers and visitors to a workplace.

136. 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.

137. Other persons at a workplace must also 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 Act.

First Report: paras 9.24 – 9.27

Division 5 – Offences and penalties

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

139. Offences against the Act and regulations are generally criminal offences, although a civil penalties regime applies in relation to right of entry under Part 7. This generally reflects the community's view that any person who has a work-related duty of care but does not observe it should be liable to a criminal sanction for placing another person's health and safety at risk. Such an approach is also in line with international practice.

140. The Bill divides offences against health and safety duties into three categories ranging from Category 1 for the most serious offences through to Category 3 offences for the least serious offences.

141. The offences have been structured around non-compliance with a duty (Categories 2 and 3 only), the culpability of the offender and the level of risk, not merely the actual consequences of the breach (e.g. a fatality). This is consistent with the overall aims of OHS regulation to provide for the sanction to relate to the culpability of the offender, not to the seriousness of the consequences.

First Report: paras 10.10 – 10.15, 10.18 –10.19, 11.10 – 11.12, 11.31—11.33

Note

Offence provisions in the model WHS Act may be modified to comply with local drafting protocols that apply in the relevant jurisdiction. In practice, this means that the offence provisions in the Commonwealth, the Australian Capital Territory and the Northern Territory may designate strict liability elements. These jurisdictions are commonly referred to as 'code' jurisdictions as they have adopted (either wholly or in part) the model criminal code. This requires those jurisdictions to take a different approach to drafting offence provisions.

Penalties under the Bill

142. There is a considerable disparity in the maximum fines and periods of imprisonment that can be imposed under current Australian work health and safety laws.

143. It is considered that fines are a key part of achieving the deterrence required to give credibility to a process of graduated enforcement under the Bill. Relatively higher maximum fines are included in the Bill and complemented by a range of other sentencing options.

144. Penalties have been determined for the Bill with the overall objective of increasing compliance and decreasing the resort to prosecution to achieve that aim. The higher penalties are intended to have a salutary effect in raising commitment to good work health and safety. It is also intended, however, that the application of the highest levels of fines would, for a variety of legal and practical reasons, continue to be rare.

First Report: paras 12.22

Custodial sentences

145. Custodial sentences are only available as a sentencing option for Category 1 offences. A maximum period of five years' imprisonment may be imposed for these kinds of offences, which involve the highest levels of culpability.

First Report: paras 12.26

Clause 30 – Health and safety duty

Clause 31 – Reckless conduct—Category 1

146. Category 1 offences cover cases involving very high culpability involving recklessness where there was a risk of death or serious injury or illness (whether or not that risk eventuated). The highest of the penalties under the Act apply, including imprisonment for up to five years.

147. An element of the offence is that the person commits an offence if the person engages in conduct that exposes an individual to whom the duty is owed to a risk of death or serious illness or injury. The prosecution does not have to prove breach of the relevant health and safety duty. However, there is no offence if the person had a 'reasonable excuse'.

148. Another element of the offence provides that a person only commits an offence if the person is reckless as to the risk of death or serious injury or illness to the person. This introduces a fault element into the offence that the prosecution would be required to prove.

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

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

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

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

151. 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. It would be necessary for the prosecutor to particularise the nature of any particular charge: see *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1.

152. In proving to the court that a person failed to comply with a health and safety duty, the prosecution must prove beyond all reasonable doubt that the duty holder failed to ensure work health and safety by failing to manage risk. This includes failing to take reasonably practicable steps to eliminate or, where appropriate, to minimise the risk.

153. Category 2 offences have a third element which provides that a person would only commit an offence if the failure to comply with the work health and safety duty exposed an individual to a risk of death or serious injury or illness.

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

Burden of proof

155. The burden of proof (beyond reasonable doubt) is entirely upon the prosecution in matters relating to non-compliance with duties of care. 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.

156. This reflects the generally accepted principle that in a criminal prosecution, the onus of proof beyond reasonable doubt normally rests on the prosecution.

First Report: paras 13.14 – 13.20

Clause 34 – Exceptions

157. 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).

158. Subclause 34(2) creates an exception for unincorporated associations. Although unincorporated associations may be PCBUs for purposes of the Bill, their failure to comply with a duty or obligation under the Bill does not constitute an offence and cannot attract a civil penalty. Instead, subclause 34(3) makes it clear that liability may rest with either an officer of the unincorporated association under clause 27 (subject to the exception above), or a member of the association under clause 28 or 29.

Part 3 – Incident notification

159. All Australian WHS laws currently require certain workplace incidents, deaths, injuries and illnesses to be reported to a relevant authority. Most laws also require workplace incident sites to be preserved by the relevant person.

160. The primary purpose of incident notification is to enable the regulator to investigate serous incidents and potential WHS contraventions in a timely matter.

161. 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.

Second Report: paras 33.8 – 33.24, 33.31 – 33.36

Clause 35 – What is a *notifiable incident*

162. 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 'notificable 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*

163. Clause 36 defines a 'serious injury or illness' as an injury or illness requiring a person to have treatment of a kind specified in paragraphs (a) – (d), including immediate treatment as an in-patient in a hospital, or immediate treatment for a serious injury of a kind listed in paragraph (b) or medical treatment within 48 hours of exposure to a substance at a workplace. The regulations may prescribe additional injuries or illnesses for this purpose, and may also prescribe exceptions to the list in this clause.

164. 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*

165. 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 36(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.

166. 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

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

168. Subclause 38(1) requires the PCBU to notify the regulator 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)).

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

170. 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.

171. 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)).

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

173. Subclause 38(7) requires the PCBU to keep a record of each notifiable incident for 5 years from the date that notice is given to the regulator.

Clause 39 – Duty to preserve incident sites

174. 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.

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

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

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

Part 4 – Authorisations

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

179. Authorisations such as licences, permits and registrations are a regulatory tool to control activities that are of such high risk to require demonstrated competency or a specific standard of safety.

180. 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.

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

Second Report: paras 34.22 – 34.37

Clause 40 – Meaning of *authorised*

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

183. It is intended to capture all kinds of authorisations that are required:

- before work can be carried out by a person (e.g. high-risk work)
- for work to be carried out at a particular place (e.g. major hazard facility), or
- before certain plant or substances can be used at a workplace.

184. 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

185. The regulations may require certain kinds of workplaces to be authorised (e.g. major hazard facilities).

186. 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

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

188. 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 know to be unauthorised use.

189. 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.

190. 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

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

192. 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 under the regulations.

193. 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. A PCBU would 'allow' a worker to carry out such work if the PCBU did not take steps to prevent the work being carried out, knowing that it is unauthorised.

Clause 44 – Requirements for prescribed qualifications or experience

194. The regulations may require certain kinds of work, or classes of work, to be carried out by or under the supervision of a person who is appropriately qualified or experienced.

195. 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.

196. 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`

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

Part 5 – Consultation, representation and participation

198. This part establishes the consultation mechanisms that apply under the Bill, including the duties to consult and provision for health and safety representatives (HSRs) and Health and Safety Committees.

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

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

Clause 46 – Duty to consult with other duty holders

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

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

Second Report: paras 24.27 – 24.28

Division 2 – Consultation with workers

Clause 47 – Duty to consult workers

202. 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 Act and regulations, and also with any procedures agreed between the PCBU and its workers (subclause 47(2)). Agreed procedures cannot be inconsistent with requirements about the nature of consultation in clause 48.

203. The Bill provides choice and flexibility regarding how consultation can occur to enable a person conducting a business or undertaking and their workers to adopt the consultative arrangement which they believe will best ensure effective and meaningful consultation without being too onerous on the business.

Duty not absolute

204. The duty to consult is not absolute, but is required ‘so far as is reasonably practicable’. This requires the level of consultation to be proportionate to the circumstances, including the significance of the workplace health or safety issue in question. This quantifying phrase is not defined in this context, so its ordinary meaning applies.

205. The degree or extent of consultation which is reasonable 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 attract more extensive consultation requirements.

206. What is reasonably practicable must depend on the circumstances. This may include 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.

207. 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

and respect 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.

Second Report: paras 24.20 – 24.26

Clause 48 – Nature of consultation

208. 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; to give workers a reasonable opportunity to express their views; and to 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.

209. Subclause 48(2) provides that consultation must involve any HSR that represents the workers.

210. Consulting with HSRs alone may be sufficient to meet the consultation duty, depending on work health or safety issue in question. However, a PCBU may for example find it necessary to consult more broadly with workers if the HSR lacks skill or knowledge relevant to the issue or does not have the confidence of a proportion of the workers in their work group.

Second Report: para 24.24

Clause 49 – When consultation is required

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

Second Report: para 24.32

Division 3 – Health and safety representatives

212. There is considerable evidence that the effective participation of workers and the representation of their interests in work health and safety are crucial elements in improving health and safety performance at the workplace. Under the Bill this representation occurs in part through HSRs who are elected by workers to represent them in relation to health and safety matters at work.

213. This Division provides for the establishment, functions and powers and entitlements of HSRs and their deputies under the Bill.

Second Report: paras 25.19 – 25.20

Subdivision 1 – Request for election of health and safety representatives

214. This Subdivision sets out the process for establishing 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.

Second Report: paras 25.31 – 25.32, 24.32

Clause 50 – Request for election of health and safety representative

215. The process for establishing HSRs is initiated by a worker's request.

216. Clause 50 provides that a worker may ask a PCBU for whom they carry out work to facilitate elections for one or more health or safety representatives.

217. This clause does not require the request to be in any particular form. The 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.

218. A PCBU is required to facilitate the election of health and safety representatives. Facilitating the election process requires a PCBU to adopt a passive role—which involves enabling the election process rather than directing it.

Subdivision 2 – Determination of work groups

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

Clause 51 – Determination of work groups

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

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

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

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

Clause 52 – Negotiations for agreement for work group

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

225. 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).

226. 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.

227. Subclause 52(3) sets out the matters that must be negotiated, including the number and composition of work groups and the number of HSRs and deputy health and safety representives (if any) that will represent them.

228. Subclause 52(4) prohibits the PCBU from, if asked by a worker, refusing to negotiate with the worker's representative or excluding the representative from negotiations.

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

230. Subclause 52(5) allows the regulations to prescribe the matters that must be taken into account in negotiations for and variations of work groups.

Clause 53 – Notice to workers

231. Clause 53 sets out the matters that must be notified upon the completion of negotiation, that is the outcome of negotiations and determination of any work groups.

Clause 54 – Failure of negotiations

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

233. Negotiations are taken to have failed if, after 14 days of a request being made under clause 50, the PCBU has failed to take all reasonable steps to commence negotiations, or agreement cannot be reached on a relevant matter within a reasonable time (subclause 54(3)).

234. Subclause 54(1) allows any person who is, or would be, a party to negotiations to ask the regulator to appoint an inspector to determine work groups.

235. Subclause 54(2) empowers the inspector to decide on the relevant matters (referred to in subclause 52(3)), or refuse to determine any work groups at all. In exercising this discretion, the inspector must have regard to the objects of the Part and the Bill overall.

236. 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

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

Clause 55 – Determination of work groups of multiple businesses

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

239. Subclause 55(2) requires multiple-business work groups to be determined by negotiation and agreement between the relevant parties (i.e. each of the PCBUs and the workers proposed to be included in the work groups).

240. Subclause 55(3) clarifies that the determination of multiple-business work groups would not affect, or prevent the formation of, single-PCBU work groups under Subdivision 2.

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

241. 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.

242. Subclause 56(2) establishes representation rights for relevant workers, which mirror the rights explained in relation to subclause 52(4) above.

243. 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. An inspector is not empowered to make a determination in this situation.

244. Subclause 56(4) allows the regulations to prescribe the matters that must be taken into account in negotiations for (and variations of) work groups.

Clause 57 – Notice to workers

245. Clause 57 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.

Clause 58 – Withdrawal from negotiations or agreement involving multiple employers

246. Clause 58 establishes a process that allows a party to withdraw for 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.

247. Withdrawal of one party from 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

248. 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

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

Clause 60 – Eligibility to be elected

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

251. 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

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

253. The procedures for the election of HSRs are generally 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)).

254. Subclause 61(3) allows elections to be conducted with the assistance of a union or other person or organisation, providing that a majority of affected workers agree. The Australian Electoral Commission is an example of an 'other organisation'.

255. 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.

Clause 62 – Eligibility to vote

256. 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

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

258. 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

259. Clause 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 (subclause 64(2)(a))
- the person ceasing to be part of the work group they represent (subclause 64(2)(b))
- the person being disqualified under clause 65 (subclause 64(2)(c)), or

- the person being removed from office by a majority of the work group they represent in accordance with the regulations(subclause 64(2)(d)).

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

Clause 65 – Disqualification of health and safety representatives

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

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

262. 'Improper purpose' may for example relate to the intention to cause harm to a PCBU. An example in which a PCBU's interests could be harmed may be if an HSR issues a direction to cease work without reasonable cause and this creates a loss of production and loss of income for the PCBU.

263. Any person who has been adversely affected by these actions or the regulator may apply to the relevant court to have the HSR disqualified from office. If proven on the balance of probabilities, the court would have the discretion of disqualifying the HSR permanently or for a specified period of time. A person's disqualification would bar them from being eligible for election as an HSR during the period of disqualification.

Second Report: paras 25.168 – 25.177

Clause 66 – Immunity of health and safety representatives

264. 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 Act, or in the reasonable belief that they were doing so.

Second Report: paras 25.153 – 25.156

Clause 67 – Deputy health and safety representatives

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

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

267. 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 Act.

268. There may be more than one deputy HSR for a work group. In that case, the intention is that the powers and functions may only be exercised or performed by one of deputy HSRs, as agreed by the relevant work group.

269. Subclause 67(3) extends a number of relevant provisions so they apply equally to both HSRs and deputy HSRs.

Subdivision 5 – Powers and functions of health and safety representatives

270. This Subdivision sets out the powers and functions of 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.

Second Report: paras 25.80 – 25.85

Clause 68 – Powers and functions of health and safety representatives

271. Clause 68 confers the necessary powers and functions on HSRs to enable them to fulfil their representative role under the Bill.

272. 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).

273. 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 Act in relation to their work group members (paragraph 68(1)(b)), investigate complaints from work group members about work health and safety matters (paragraph 68(1)(c)) and inquire into anything that appears to be a risk to the health or safety of work group members, arising from the conduct of the business or undertaking (paragraph 68(1)(d)).

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

275. Subclause 68(4) makes it clear that none of these provisions impose or should be taken to 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.

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

277. Subclause 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.

278. In exercising this power, the HSR would need to comply with any reasonable request to comply with any work health and safety requirement that applies to the workplace and any other legislated requirement that applies to that type of workplace.

279. 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.

280. Paragraph 68(2)(c) entitles an HSR to be present at an interview concerning work health and safety between a worker 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 the worker being interviewed.

281. Paragraph 68(2)(d) entitles an HSR to be present at an interview concerning work health and safety between a group of workers and either an inspector, the PCBU at the workplace or the person's representative. This entitlement only applies if the HSR has the consent of at least one of their members being interviewed and regardless of whether non-work group members are present (or even object to the HSR's involvement).

282. Paragraph 68(2)(e) allows HSRs to request the establishment of a health and safety committee.

283. Paragraph 68(2)(f) entitles HSRs to receive information about the work health and safety of their work group members. However, there is *no* entitlement to access any personal or medical information about a worker without their consent, unless the information is in a form that does not identify the worker or that could not reasonably be expected to lead to the identification of the worker (subclause 68(3)).

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

284. HSRs' (and deputy HSRs') powers and functions under the Bill are generally limited to work health and safety matters that affect or may affect their work group members (subclause 69(1)).

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

- there is a serious risk to the health or safety emanating from an immediate or imminent exposure to a hazard that affects or may affect a member for the work group, or
- a member of the work group asks for the HSR's assistance.

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

286. 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.

Second Report: paras 25.91 – 25.94

Clause 70 – General obligations of person conducting business or undertaking

287. Clause 70 sets out the general obligations of PCBUs, many of which reflect the corresponding entitlements in clause 67, which establishes HSRs' powers and functions. It is an offence for a PCBU to fail to comply or refuse to comply with any of these obligations. PCBUs are required to:

- consult so far as is reasonably practicable with their HSRs on work health and safety matters at the workplace (paragraph 70(1)(a))
- confer with HSRs, whenever reasonably requested by the HSR, for the purpose of ensuring the health and safety of their work group members (paragraph 70(1)(b))
- give HSRs access to the information they are entitled to have, consistent with paragraph 68(2)(f) and subclause 68(3) (paragraph 70(1)(c) read together with subclause 70(1))
- allow their HSRs to attend the kinds of interviews they are entitled to attend under subclause 68(2)(c) (paragraphs 70(1)(d) and (e))
- provide their HSRs with any resources, facilities and assistance that are reasonably necessary or prescribed by the regulations to enable the HSR to exercise their powers and perform their functions under the Bill (paragraph 70(1)(f))
- allow persons assisting their HSRS (under subclause 68(2)(g)) to have access to the workplace, but only if access is necessary to enable the assistance to be provided. This obligation is subject to the qualifications in subclause 71(4). Although no notification requirements are prescribed, HSRs would need to meet any of the PCBU's policies or procedures regarding visitors to the workplace including any work health and safety requirements (paragraph 70(1)(g)), and
- allow their HSRs to accompany an inspector during an inspection of any part of the workplace where their work group members work (paragraph 70(1)(h)).

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

289. HSRs must be given such time as is reasonably necessary (i.e. during work hours) to exercise their powers and perform their functions under the Bill (subclause 70(2)). Any time an HSR spends exercising their powers and performing their functions at work must be paid time, paid at the rate that the HSR would receive had they not been exercising their powers or performing their functions (subclause 70(3)). Any underpayment of wages may be recovered under the applicable industrial laws.

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

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

291. Subclause 71(2) ensures that the personal or medical information HSRs receive under subclause 70(1)(c) excludes any information that identifies individual workers, or could reasonably be expected to identify individual workers. It would be an offence for a PCBU to release such information to an HSR.

292. Subclause 71(3) clarifies that PCBUs are not required to provide any financial assistance to help pay for HSRs' assistants that are referred to in subclause 70(1)(g).

293. Subclause 71(4) limits the access rights of assistants to HSRs who are or who have been WHS entry permit holders. PCBUs may refuse access to such persons if they have had their WHS entry permit revoked, or during any period that the person's WHS entry permit is suspended or the assistant is disqualified from holding a WHS permit.

294. Subclause 71(5) allows PCBUs to refuse an HSR's assistant access to a workplace on 'reasonable grounds'. 'Reasonable grounds' are not defined, but it is intended that access could be refused, for example, if the assistant had previously intentionally and unreasonably delayed, hindered or obstructed any person, disrupted any work at a workplace or otherwise acted in an improper matter.

295. Subclause 71(6) allows an inspector to assist in any dispute over an assistant's proposed entry, upon the HSR's request.

Clause 72 – Obligation to train health and safety representatives

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

297. The entitlement allows the HSR to attend an HSR training course that has been approved by the regulator (subclause 72(1)(a)) and that the HSR is entitled under the regulations to attend (subclause 72(1)(b)).

298. An HSR is also entitled to attend the course of their choice (i.e. in terms of when and where they propose to attend the course), although the course must be chosen in consultation with the PCBU and dispute resolution procedures apply if the parties are enable to agree (see subclause 72(5)).

299. Subclause 72 requires the PCBU to give the 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 attendance at the course of training.

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

301. Subclause 72(4) provides that any time an HSR is given off work to attend the course of training must be must be paid time, paid at the rate that the HSR would receive had they not been attending the course. Any underpayment of wages would be recoverable under the applicable industrial laws.

302. Subclauses 72(5) – (7) establish a dispute resolution procedure if agreement cannot be reached—as soon as practicable within the period of three months—on the course the HSR is to attend or the reasonable costs of attendance that will be met by the relevant PCBU. In that case, either party may ask the regulator to appoint an inspector to decide matters in dispute. The parties would be bound by the inspector's determination and non-compliance by the PCBU would constitute an offence.

Second Report: paras 25.140 – 25.151

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

303. Clause 73 applies where 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 Act 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

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

305. 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.

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

307. Up-to-date lists must also be forwarded to the regulator.

Division 4 – Health and safety committees

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

Second Report: paras 26.18 – 26.33

Clause 75 – Health and safety committees

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

310. A health and safety committee must be established within two months after the request is made and non-compliance constitutes an offence (subclause 75(1)).

311. A health and safety committee may also be established at any time on a PCBU's own initiative (subclause 75(2)).

312. Health and safety committees will usually be established for a physical workplace at one location. However, the provisions are not intended to be restrictive and it would be possible to establish a committee for workers who carry out work for a PCBU in two or more physical workplaces (i.e. at different locations) or for those who do not have a fixed place of work.

Clause 76 – Constitution of committee

313. Clause 76 sets out some of the minimum requirements for establishing and running health and safety committees. The relevant PCBU and the workers for whom the committee is being established must negotiate on how the committee will be constituted (subclause 76(1)).

314. If one of the workers for whom the committee is established is represented by an HSR that representative may be a member of that 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)).

315. 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)).

316. Subclauses 76(5) – (7) establishes a dispute resolution procedure if the constitution of the committee cannot be agreed between all relevant parties. In that case, an inspector may decide the membership of the committee or that the committee should not be established. In exercising this discretion, the inspector must have regard to the objects of the Part and 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

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

Clause 78 – Meetings of committee

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

Clause 79 – Duties of person conducting business or undertaking

319. Clause 79 sets out the general obligations of PCBUs in relation to their health and safety committees.

320. Committee members are entitled 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)).

321. Subclause 79(2) clarifies that such time must be paid time, paid at the rate that the committee member would receive had they not been exercising their powers or performing their functions. Any underpayment of wages may be recovered under the applicable industrial laws.

322. 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 (subclause 79(3)). 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 79(4)).

323. Failure to provide committee members with the entitlements prescribed under subclauses 79(1) and (3) constitutes an offence. It is also an offence for a PCBU to provide personal or medical information about a worker contrary to subclause 79(4).

Division 5 – Issue resolution

324. This Division establishes a mandatory process for resolving work health and safety issues. It applies after a work health and safety matter is raised but not resolved to the satisfaction of any party after discussing the matter.

325. 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.

Second Report: paras 27.51 – 27.93

Clause 80 – Parties to an issue

326. 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.

327. Subclause 80(2) requires a PCBU to be represented by a person of sufficient seniority and competence to act as the person's representative and 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

328. Clause 81 establishes a process for the resolution of work health and safety issues.

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

330. 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.

331. 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 will be more likely than a generic default procedure to 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. The parties are also likely to undertake the process of issue resolution with greater comfort and confidence if they are familiar with and readily accept the process.

332. 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.

333. 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

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

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

336. Subclause 82(4) clarifies that the inspector's role is to assist in resolving the issue, which could involve the inspector exercising any of their compliance powers under the Bill (e.g. to issue a notice).

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

337. 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 the cessation of unsafe work under the Fair Work Act. This is found in the exception to the definition of industrial action in section 19 of that Act.

Second Report: paras 28.24 – 28.43

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

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

Clause 84 – Right of worker to cease unsafe work

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

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

340. 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.

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

First Report: paras 28.42 – 28.43

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

342. 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.

343. 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.

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

345. 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 giving the direction is given (subclause 85(4)).

346. Clause 85(5) provides that only appropriately qualified 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
- undertaken equivalent training in another jurisdiction.

Clause 86 – Worker to notify if ceases work

347. Clause 86 requires workers who cease work under this Division to notify the relevant PCBU that they have ceased unsafe work. 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

348. 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

349. 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 our suitable alternative work as directed under clause 87.

Clause 89 – Request to regulator to appoint inspector to assist

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

Division 7 – Provisional improvement notices

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

Second Report: paras 25.109 – 25.127

Clause 90 – Provisional improvement notices

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

- is contravening a provision of the Act, or

- has contravened such a provision in circumstances that make it likely that the contravention will continue or be repeated.

353. 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 clause 69).

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

355. Subclause 90(3) requires HSRs to consult with the alleged contravenor or likely contravenor.

356. Clause 90(4) provides that only appropriately qualified 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
- undertaken equivalent training in another jurisdiction.

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

358. Clause 91 requires provisional improvement notices to be issued in writing.

359. Clause 92 sets out the kind of information that must be contained in a provisional improvement notice. Importantly, a provisional improvement notice must specify a date for compliance, which must be at least 8 days after the notice is issued. The day on which the notice is issued does not count for this purpose.

360. Clause 93 allows provisional improvement notices to specify certain kinds of directions about ways to remedy the contravention or likely contravention subject to the notice.

361. Clause 94 enables HSRs to make minor changes to provisional improvement notices (e.g. for clarification or to correct errors or references).

362. Clause 95 requires provisional improvement notices to be served in the same way as improvement notices.

363. Clause 96 allows HSRs to cancel a provisional improvement notice at any time. This must be done by giving written notice to the person to whom it was issued.

Clause 97 – Display of provisional improvement notice

364. Clause 97 establishes the display requirements for provisional improvement notices. It requires a person who is issued with a notice to display it in a prominent place at or near the workplace where work affected by the notice is carried out.

365. 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.

366. Although not specified, it is intended that 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.

Clause 98 – Formal irregularities or defects in notice

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

Clause 99 – Offence to contravene a provisional improvement notice

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

Clause 100 Request for review of provisional improvement notice

Clause 101 – Regulator to appoint inspector to review notice

369. Clause 100 sets out a procedure for the review of provisional improvement notices by inspectors. Review may be sought within seven days after the notice has been issued by the person issued with the notice or—if that person is a worker—the PCBU for whom the worker carries out the work affected by the notice.

370. An application under this clause stays the operation of the provisional improvement notice until an inspector makes a decision on the review (subclause 100(2)).

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

372. The regulator must arrange for a review to be conducted by an inspector at the workplace as soon as possible after a request is made (subclause 101(1)).

373. 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

374. 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.

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

- confirm the provisional improvement notice, with or without modifications, or
- cancel the provisional improvement notice.

376. In some cases the provisional improvement notice under review may have expired before the inspector can make a decision. However, inspectors may still confirm such notices and modify the time for compliance (see subclause 101(3)).

377. 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.

378. Subclause 102(3) gives a notice that has been confirmed (without or without modifications) the status of an improvement notice under the Act.

Division 8 – Part not apply to prisoners

Clause 103 – Part does not apply to prisoners

379. Clause 103 provides that Part 5 does not apply to a worker who is a prisoner in custody in a prison or police gaol. This exclusion applies in relation to any work performed by such prisoners, whether inside or outside the prison or police gaol. It would also cover prisoners on weekend detention, during the period of the detention.

380. This exclusion does not extend to any persons who are not held in custody in a prison or police gaol including persons on community-based orders.