2011

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

WORK HEALTH AND SAFETY BILL 2011

EXPLANATORY STATEMENT

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GENERAL OUTLINE

The Work Health and Safety Bill 2011 (the Bill) has been developed under the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (IGA) to underpin the new harmonised work health and safety (WHS) framework in Australia. The harmonisation of work health and safety laws is part of the Council of Australian Governments' National Reform Agenda aiming to reduce regulatory burdens and create a seamless national economy.

The ACT Government intends that the Bill will replace the *Work Safety Act 2008* with effect from 1 January 2012. It will then become the principal law which provides for the health, safety and wellbeing at work of workers in the Territory.

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

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

The Bill includes the following key elements:

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

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

The PCC drafted the model Bill to be national 'model' legislation in non-jurisdictional specific terms. This means that it used terms like 'the court', 'the regulator' and 'the tribunal'. As such a small number of local variations have been made where that is necessary to achieve the agreed national policy when the legislation forms part of the local law of the Territory.

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

Use of jurisdictional notes
Jurisdictional notes were used in the model Bill to indicate the matters that may be taken into account by each jurisdiction when implementing the legislation or to provide necessary information about the operation of the harmonised legislation.

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

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

Because the model Bill requires a high level of uniformity, 'penalty units' have not been used, although that is usual Territory practice. That is because it was agreed at a national level that future changes in the value of penalty units would result in different applicable monetary fines applying across jurisdictions. The intention is to regularly review monetary fines and, if necessary, adjust them to be consistent with Safe Work Australia's future determinations.

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

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

An overview of the Bill is as follows:

Part 1 Preliminary

This Part (clauses 1–12B) contains standard preliminary matters, such as by providing for the commencement of the legislation. Definitions located at Subdivision 1, Division 3 of Part 1of the model Bill have been relocated to the end of the ACT Bill to ensure consistency with other ACT laws.

Part 2 Health and safety duties

This Part (clauses 13-34) contains the principal health and safety duties of persons under the Bill, including penalties if those duties are not complied with.

Part 3 Incident notification

This Part (clauses 35–39) creates an offence that applies if a person conducting a business or undertaking fails to notify the regulator of certain incidents (including the death, serious injury or illness of a person or a dangerous incident) arising out of the conduct of the business or undertaking.

The Part also provides that the person with the management or control of a workplace at which such an incident occurs must, so far as is reasonably practicable, ensure that the site where the incident occurred is not disturbed before an inspector arrives or otherwise directs.

Part 4 Authorisations

This Part (clauses 40–45) creates various offences which apply if:

- a workplace, plant or substance, the design of plant or a substance or a person must be authorised by a licence, permit or other authority under the regulations and is not;
- work must be carried out (or supervised) by a person who has certain qualifications and the person does not have the qualifications (or is not supervised by a person who has the qualifications); and
- conditions apply to an authorisation given under the regulations and a person fails to comply with those conditions.

Part 5 Consultation, representation and participation

This Part (clauses 46–103) provides for consultation with workers as well as between duty holders in respect of specific matters under the Bill. In part, this may involve arrangements for the election of health and safety representatives, health and safety committees and the resolution of any dispute that may arise under the Bill. This Part also deals with the right to cease work (or direct the cessation of unsafe work) and with provisional improvement notices.

Part 6 Discriminatory, coercive and misleading conduct

This Part (clauses 104-115) creates offences that apply where a duty holder engages in discriminatory conduct, or encourages, authorises or assists this conduct, for a prohibited reason. The terms *discriminatory conduct* and *prohibited reason* are defined for this purpose. It creates offences relating to coercing or inducing a person to exercise or not exercise a power under the Bill and to knowingly or recklessly misrepresenting a person's right or obligation. Latter provisions also deal with criminal and civil proceedings and orders which may be made by a court.

Part 7 Workplace entry by WHS entry permit-holders

This Part (clauses 116-151) establishes the role of WHS entry permit-holders under the Bill, including providing for the circumstances in which this class of persons can enter a workplace and exercise other related powers. Definitions of key terms associated with this role, such as *official of a union*, *relevant person conducting a business or undertaking*, *relevant union* and *relevant worker* are also established. Further provisions provide for relevant offences, WHS entry permits, dispute resolution and related administrative matters.

Part 8 The regulator

This Part (clauses 152-155) sets out the functions and powers of WorkSafe ACT as the regulator under the Bill. Other functions and powers are also provided for elsewhere in the Bill. This Part also grants the regulator power to compel a person to provide any information, documents or other evidence that the person may have in relation to a possible contravention of the Bill.

Part 9 Securing compliance

This Part (clauses 156-190) deals with inspectors – it provides for their appointment, identification, accountability, suspension, functions, powers and the ending of appointments. The powers of an inspector are subject to the conditions specified in the inspector's instrument of appointment and directions from the regulator as well as protections specified in the Bill (including derivative use immunity). Further provisions provide for specific, limited powers of entry (including under a search warrant) and associated inspector powers (such as seizure of documents and things). This Part also deals with damage and compensation in relation to compliance activities and provides for offences that protect the role of inspectors under the Bill.

Part 10 Enforcement measures

This Part (clauses 191-215) provides for the issue of improvement, prohibition and non-disturbance notices by inspectors in certain circumstances and their effective use and enforcement under the Bill. It also provides general requirements that apply to notices (such as how they are cancelled, issued and displayed) and remedial action that can be taken by the regulator in the event of non-compliance with a notice.

Part 11 Enforceable undertakings

This Part (clauses 216-222) authorises the regulator to accept undertakings given by a person in connection with a matter relating to a contravention of the Bill. If the regulator accepts an undertaking, proceedings cannot be brought against a person in relation to an offence under the Bill relating to a matter covered by that undertaking. If a person contravenes such an

undertaking the regulator may apply to a court for an order directing compliance with, or discharging, the undertaking.

Part 12 Review of decisions

This Part (clauses 223-229) provides for the review of certain decisions made under the Bill and specifies who is entitled to seek a review. It also provides for internal and external review of specific decisions under the Bill.

Part 13 Legal proceedings

This Part (clauses 230-267) deals with a range of technical matters associated with proceedings initiated under, or in relation to, the Bill (including procedural matters, double jeopardy, limitation periods, recovery, sentencing and infringement notices). It also establishes the application of the Bill to bodies corporate, the Crown in right of the Territory and public authorities. Clauses also provide for proceedings for the contravention of a provision of the Bill that is designated as a WHS civil penalty provision and clarifies that the Bill does not confer a right of action or defence in civil proceedings, or otherwise affect a right of action, in respect of duties or obligations under the Bill.

Part 14 General

This Part (clauses 268-278) deals with the general application of the Bill including matters such as legal professional privilege, immunity, confidentiality and the giving of false or misleading information in purported compliance with the Bill. These clauses also provide for the approval of codes of practice, their use in proceedings for offences under the Bill and a regulation-making power.

Part 20 Transitional

This Part provides transitional arrangements to facilitate implementation of the Bill in the Territory.

Schedules

Schedules to the Bill provide for:

- the adoption of Schedule 1 of the model Bill (application to dangerous goods and high risk plant where not at a workplace);
- maintenance of Territory arrangements for WorkSafe ACT, the ACT Work Safety Commissioner and the ACT Work Safety Council;
- regulation-making powers;
- savings and transitional provisions; and
- amendment of other laws (noting that other Territory laws will require consequential amendment before the commencement of the Bill).

NOTES ON CLAUSES

The following abbreviations are used in this Explanatory Statement:

Acts Interpretation Act	*Acts Interpretation Act 1901 (Cth)*
DPP	Director of Public Prosecutions
Fair Work Act	*Fair Work Act 2009 (Cth)*
Fair Work (Registered Organisations) Act	*Fair Work (Registered Organisations) Act 2009(Cth)*
HSR	Health and safety representative
ILO	International Labour Organisation
IGA	*Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*
The Bill/this Bill	Work Health and Safety Bill
Model WHS regulations	Model Work Health and Safety 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
PCBU	Person conducting a business or undertaking
PCBU duties	Health and safety duties and obligations owed by a PCBU under the Bill
PCC	Parliamentary Counsel's Committee
Privacy Act	*Privacy Act 1988 (Cth)*
WHS	Work health and safety
WHS inspector	Inspector appointed under Part 9 of the Bill

GENERAL CONCEPTS

Employment

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

Altering the onus of proof

Evidential burden

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

Two specific provisions in Part 6 of the Bill have defences which require a defendant to bear a legal burden of proof – in other words, to prove the existence of the circumstances of the defence. For clause 110 of the Bill the defendant must prove, on the balance of probabilities that the reason alleged by the prosecution (*prohibited reason*) was not the dominant reason for their conduct. Similarly, in subclause 113(3) it is a defence to a proceeding under clause 112(2) (a) or (b) if a defendant proves:

- the conduct was reasonable in the circumstances; and
- a substantial reason for the conduct was to comply with the requirements of this Bill or a corresponding WHS law.

Imposing a legal burden of proof on the defence *prima facie* infringes the presumption of innocence, which is protected by section 22(1) of the *Human Rights Act 2004* (HRA). In assessing whether such burdens are a justifiable limit in accordance with section 28 of the HRA, the objective of the offence and whether the burden is proportionate to the objective served by the offence provision must be carefully considered.

Other provisions of the Bill impose an evidential burden (the defendant will need to point to evidence that suggest a reasonable possibility that the matter in question exists): clauses 118(4), 144(2), 155(6), 165(3), 171(7), 177(7), 185(5), 200(2) and 242(2).

The purpose of the provisions imposing a legal burden

Clauses 110 and 113 each require the defendant to bear a legal burden of proof – in the first instance, to establish that the dominant motivation for their conduct was not prohibited and, in the second, that their conduct was reasonable in the circumstances and a substantial reason for it was to comply with the requirements of the Bill or a corresponding WHS law. These offences are integral to Part 6 of the Bill, which seeks to improve protection for individuals who act to improve safety at their workplace (directly or through their representative), or, otherwise act to raise safety issues or facilitate compliance. They are new to the ACT and will ensure protections are of the standard provided for in other jurisdictions.

The object of the Bill, with respect to these offences, is to ensure that individual workers are not disadvantaged by providing for appropriate remedies and mechanisms for effective

compliance and enforcement. It is accepted that workplace safety relies on every person, not just inspectors, playing a proactive role that must be encouraged and supported. Workers cannot be proactive about safety if they risk disadvantage for acting or assisting their representative or the regulator. Given the importance of continually improving the safety of workers it is essential that duty holders take proactive measures to identify and control all hazards and risks. The need to safeguard the safety of all individuals at workplaces is a substantial and pressing need in light of the damaging effect of deaths, serious injuries and illnesses to individuals, their families and the community.

While the HRA does not explicitly protect the right to act to safeguard the safety of oneself and others without fear of discrimination or victimisation, protection of this right arguably goes to protecting those rights enumerated at sections 8, 16 and 17 of the HRA. As such, while the provisions limit section 22(1) of the HRA, they contribute to ensuring that other rights protected by that Act can be meaningfully protected in practice.

Proportionality of the provisions imposing a legal burden

These offences require a high standard of care and each duty holder must take proactive, preventative steps to ensure that they do not engage in discriminatory conduct in relation to their workers, prospective workers or in relation to other commercial arrangements. The scope of this conduct has been carefully framed to capture all workers, rather than limiting the Bill's protections to those within a traditional employment relationship. This standard of care is proportionate to the objectives of Part 6 of the Bill as:

- the duty holder can avoid liability by taking reasonable steps in the management of their business or undertaking to ensure that any action taken that would be captured by clause 105 is not engaged in for a prohibited reason as set out in clause 106;
- the duty holder is required only to prove an exception, proviso or excuse rather than an essential element of the offence for clause 113;
- the burden in clause 110 only applies if the prosecution proves matters about the relevant conduct and circumstances, and, adduces evidence that the conduct was engaged in for a prohibited reason;
- the intention of the duty holder, and their reasoning for taking a course of action, is a matter peculiarly within their own knowledge and it is significantly more difficult and costly for the prosecution to prove (where possible at all); and
- in each instance, the burden will not have a disproportionately severe effect on the duty holder (in part, for those reasons noted above).

Further, a legal burden is the least restrictive means of ensuring that the objective of the provision is met in the context of the objectives of the Bill. It is essential to ensure that duty holders have regard to the provision and that it can be effectively enforced in practice (for example, that the regulator and inspectors are cooperated with and that individual workers and their representatives are willing and able to raise safety concerns in individual instances). This will ensure that justice is not frustrated and that the Bill provisions can be effectively upheld in accordance with the objects of the Bill.

In reaching the above conclusions, the National review into OHS laws has been taken into account. The Review panel considered the importance of ensuring duty holders do not engage in inappropriate conduct that deters, or may deter, individuals from being involved in activities or exercising rights that are important to achieving safety outcomes. Recognising

that there is a need to fairly and effectively balance protections and rights, the Review also noted that the intention of the person who engages in relevant conduct will be known to that person and, as there will be many other reasons why conduct may occur, it will be excessively difficult, if not impossible, for a prosecutor to prove the reason for the conduct. Further, if the person engaging in the conduct did so for a proper reason, they should be able to demonstrate it so that there is not any unfairness in requiring them to do so.

Changing the legal burden to an evidential burden for these provisions would be a lesser limitation on the presumption of innocence. However, such an alteration would not provide for the same high standard of care required where a legal burden is required. Given the importance of these provisions to the objectives of the Bill, a higher standard of care has been retained to emphasise the requirement of maintaining a proactive approach by duty holders in engaging in the specified conduct which may discriminate against, or victimise, an individual. This protection is an important objective of the Bill and is fundamental to ensuring the overall objectives of the Bill are met in practice.

The purpose of the provisions imposing an evidential burden

The remaining provisions of the Bill that involve a reverse onus of proof each require the defendant to bear an evidential burden to establish a defence of reasonable excuse. These offences relate to non-compliance with orders of a court, directions made or notices issued by an inspector to provide documents, answer questions or take other action to assist in the enforcement of the Bill. In addition, clause 118 protects the role of a WHS entry permit holder in obtaining access to, or copies, of documents to which they are entitled. In the case of each offence the object of the Bill is to protect the role of key persons and bodies entrusted with the performance of functions and exercise of powers which are essential to ensuring that the law is complied with, and, that the health, safety and welfare of workers and others is safeguarded at all times. This objective is of critical importance to the Territory community.

Proportionality of the provisions imposing an evidential burden

Each offence provision in the Bill that imposes an evidential burden is proportionate to achieving the objectives outlined above. These offences require a reasonably high standard of care to ensure that persons who are required to take action to comply, or facilitate compliance, with the Bill take proactive, preventative steps to ensure that they do so wherever possible. This standard of care is proportionate to the objectives of the Bill as: the provisions require the defendant in each case to prove an exception, proviso or excuse rather than an essential element of the offence, and, in each instance, the burden will not have a disproportionately severe effect on the duty holder.

The legal (or evidential) burden in the above provisions are appropriate because:

- the objective of the provisions, the protection of work health and safety, is a legitimate purpose; and
- the use of the requisite burden is a proportionate measure to achieve this purpose.

Strict Liability Offences

Clause 12A of the Bill establishes that strict liability applies to each physical element of each offence under the Bill unless otherwise stated in the clause containing the offence. A note refers the reader to clause 12A at each of these clauses.

The offences incorporating strict liability elements have been carefully considered during the Bill's development. The strict liability offences arise in a regulatory context where, for reasons such as public safety, the public interest in ensuring that regulatory schemes are observed, requires the sanction of criminal penalties.

In particular, where a defendant can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental (or fault) element can justifiably be excluded. The rationale is that people who owe work safety duties such as persons conducting a business or undertaking, persons in control of aspects of work and designers and manufacturers of work structures and products, as opposed to members of the general public, can be expected to be aware of their duties and obligations to workers and the wider public.

Unless some knowledge or intention ought to be required to commit a particular offence (in which case a specific defence is provided), the defendant's frame of mind at the time of committing the strict liability offence is irrelevant.

Regulatory Powers

Subclause 276(1) of the Bill contains broad regulation-making powers that allow for the making of regulations for or with respect to any matter relating to work health and safety and any matter or thing required or permitted by the Bill, or necessary or convenient to give effect to the Bill. Subclause 276(2) then contains more specific regulation-making powers, with reference to a range of more specific powers set out at Schedule 3. Subclause 276(3) then provides for the nature of some regulations which may be made.

It is essential that a complex, national legislative scheme such as that implemented by the Bill, is supported by strong regulation-making powers. These powers will be exercised in accordance with the usual requirements of the *Legislation Act 2001*. National model regulations to accompany the model Bill are being framed through national consultative processes as set out in the Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety, to which the Territory is a party. This process includes provision for national public consultation periods on draft model regulations as well as more specific, tripartite consultation with relevant industry stakeholders and all Australian jurisdictions, and, approval by the Workplace Relations Ministers' Council. In addition, the Bill retains existing local tripartite consultation arrangements such as the Work Safety Council, a tripartite body representing the interests of workers, business and the community that (in part) advises the Minister for Industrial Relations on work safety matters.

Civil Penalty Provisions

The Bill features a number of civil penalty provisions. Modern legislation has created many contraventions that are not punishable by a criminal process but are nonetheless dealt with by action taken by a government agency in a court seeking a penalty. The court process closely follows the procedures used in private civil actions. These are what referred to as 'civil penalties'. They are not private remedies, but are invoked by the state.

A civil penalty provision is set out in a similar way to an offence and is subject to proceedings in court. However, it is enforced by civil proceedings that are subject to the procedures and rules of evidence in civil cases. A civil penalty provision only carries a

financial penalty, not an imprisonment penalty. The imposition of a civil penalty does not constitute a criminal conviction.

Part 1 – Preliminary

Part 1 sets out preliminary matters for the Bill and contains provisions that are standard across all ACT legislation.

Division 1.1 – Introduction

Clause 1 – Name of Act

This clause provides that the name of the proposed legislation is the *Work Health and Safety Act 2011*.

Clause 2 – Commencement

This clause provides that the legislation will commence on a day fixed by the Minister by written notice (whilst it is intended that the Bill will commence on 1 January 2012, allowing for written notice makes provision for any unforseen delays in the harmonisation process).

Division 1.2 – Object

Clause 3 – Object

This clause 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.

Subclause 3(2) extends the object of risk management set out in subclause 3(1)(a) by applying the overriding principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of substances or plant as is reasonably practicable.

Division 1.3 – Interpretation

This Division defines important terms for the Bill, including *person conducting a business or undertaking*, *supply*, *worker* and *workplace*. It also establishes that the dictionary at the end of the Bill as well as examples and notes at the foot of a provision, are part of the Bill.

Consistently with all other Territory laws, definitions for terms used throughout the Bill are set out in a dictionary at the end of the Bill.

Subdivision 1.3.1 – Definitions

Clause 4 – Definitions

This clause clarifies that the dictionary at the end of the Bill is part of the Bill. This dictionary includes definitions which were set out at clause 4 of the model Bill.

Subdivision 1.3.2 – Other important terms

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

The principal duty holder under the Bill is a 'person conducting a business or undertaking' (PCBU).

This clause 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)).

The term 'person' is not defined but will take its meaning from Acts interpretation laws. It will cover persons including individuals and bodies corporate.

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

Subclause 5(3) clarifies that PCBU duties and obligations under the Bill fall on each partner of a partnership. This means they could be prosecuted in their capacity as a PCBU and the relevant penalty for individuals would apply.

Who is a PCBU?

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

Running a household

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

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

- individuals who carry out domestic work in and around their own home (e.g. domestic chores etc);
- individual householders who engage persons other than employees for home maintenance and repairs in that capacity (e.g. tradespersons to undertake repairs); and
- individual householders who organise one-off events such as dinner parties, garage sales, lemonade stalls etc.

PCBU duties do not apply to workers or 'officers'

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

Exclusions

Subclause 5(5) of the model Bill has been omitted in the Bill as it has no application in the Territory.

Subclause 5(6) allows the regulations to specify the circumstances in which a person may be taken not to be a person who conducts a business or undertaking for the purposes of the Bill or any provision of the Bill.

The duties and obligations under the Bill are placed on 'persons conducting a business or undertaking'. An exemption contemplated by subclause 5(6) may be required to remove unintended consequences associated with the new concept and to ensure that the scope of the Bill does not inappropriately extend beyond work health and safety matters.

'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 (e.g. employed by one or more of the volunteers) carrying out work for the association (subclause 5(8)). Hiring a contractor (e.g. to audit accounts, drive a bus on a day trip etc) would not, however, jeopardise exempt status under this provision.

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

The term 'community purposes' is not defined in the Bill but is intended to cover purposes including:

- philanthropic or benevolent purposes, including the promotion of art, culture, science, religion, education, medicine or charity; and
- sporting or recreational purposes, including the benefiting of sporting or recreational clubs or associations.

Clause 6 – Meaning of *supply*

This clause defines the term 'supply' broadly to cover both direct and indirect forms of supply, such as the sale, re-sale, transfer, lease or hire of goods in a company that owns the relevant goods. A 'supply' is defined to occur on the passing of possession of a thing from either a principal or agent to the person being supplied.

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.

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)); and

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

Supply involving a 'financier'

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).

If the exemption applies, subclause 6(5) provides that the suppliers' duty instead applies to the person (other than the financier) who had possession of the goods immediately before the financier's customer.

Clause 7 – Meaning of *worker*

The Bill adopts a broad definition of 'worker' to recognise the changing nature of work relationships and to ensure health and safety protection applies to all types of workers. This is consistent with the approach taken in the *Work Safety Act 2008* in the Territory.

This clause defines the term 'worker' as a person who carries out work in any capacity for a PCBU, including work in any of the capacities listed in the provision. The examples of workers in the provision are illustrative only and are not intended to be exhaustive. That means that there will be other kinds of workers covered under the Bill that are not specifically listed in this clause (e.g. students on clinical placement and bailee taxi drivers).

The term 'work' is not defined in the Bill but is intended to include work, for example, that is carried out:

- under a contract of employment, contract of apprenticeship or contract for services;
- in a leadership role in a religious institution, as part of the duties of a religious vocation or in any other capacity for the purposes of a religious institution;
- as an officer of a body corporate, member of the committee of management of an unincorporated body or association or member of a partnership; and
- as practical training as part of a course of education or vocational training.

Subclause 7(2) is included for the avoidance of doubt only. This subclause clarifies that a police officer is a 'worker' for purposes of the Bill, while on duty or lawfully performing duties as a police officer. It would not cover periods while the police officer was not on active duty.

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

Clause 8 – Meaning of *workplace*

This clause 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).

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

For example, the term 'workplace' is used in the primary duty under the Bill and extensively throughout the Bill. Parts 9 and 10 of the Bill give extensive powers to WHS inspectors to conduct inspections, to require production of documents and answers to questions (clause 171), to seize certain things at workplaces for examination and testing or as evidence (clause 175) and to direct that a workplace not be disturbed (clause 198).

Subclause 8(2) is an avoidance of doubt provision that clarifies that a 'place' should be read broadly to include things like vehicles, vessels, aircraft or other mobile structures.

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

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.

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.

This means, for example, that a department store does not cease to be a workplace when it is closed overnight.

Clause 9 – Examples and notes

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

Division 1.4 – Application of Act

This Division deals broadly with the application of the Bill to the Crown in right of the Territory. It also clarifies those circumstances in which the application of the Bill extends beyond the territorial limits of the Australian Capital Territory.

This Division also allows for provisions to deal with the relationship between this Bill and other legislation.

Clause 10 – Act binds the Crown

This clause provides for the Crown in right of the Territory to be bound by the Bill and, in so far as the legislative power of the Legislative Assembly permits, the Crown in all its other capacities. It also clarifies that the Crown is liable for an offence against the Bill. This clause makes it clear that the 'Crown shield' that would otherwise provide immunity against

prosecution for the Crown does not apply. It also clarifies that the Territory is also liable for a contravention of a WHS civil penalty provision.

Clause 11 – Extraterritorial application

This clause clarifies that Part 2.7 of the *Criminal Code 2002* (Geographical application) extends the application of a Territory law that creates an offence beyond the territorial limits of the ACT (and Australia) if the required geographical nexus exists for the offence.

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

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

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.

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

This clause provides that the duties under the Bill in relation to hazardous chemicals are in addition to duties in relation to them under any other law in force in the ACT. This clause also provides that a duty or power under another Territory law in relation to a work health and safety matter has no effect to the extent that it is inconsistent with a duty under this Act in relation to the same matter. However, subclause 12(3) provides that a duty or power under another territory law in relation to a work health and safety matter must not be taken to be inconsistent with a duty under this Act to the extent that they can operate concurrently.

Clause 12A – Offences are offences of strict liability

This clause provides that strict liability applies to each physical element of each offence under this Bill unless otherwise stated in the clause containing the offence. This clause has been added to the model Bill to ensure compliance with the *Criminal Code*.

Clause 12B – Offences against Act – application of Criminal Code etc

This clause clarifies that other legislation applies in relation to offences against the Bill. As set out in the note to this provision, Chapter 2 of the *Criminal Code* applies to all offences against this Bill.

Part 2 – Health and safety duties

Division 2.1 – Introductory

Subdivision 2.1.1 – Principles that apply to duties

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 respective duties to consult in Divisions 5.1 and 5.2 of Part 5. They also apply to the health and safety duties that apply under the regulations.

Clause 13 – Principles that apply to duties

This clause provides that this subdivision sets out the principles that apply to all duties that persons have under the Bill.

A note clarifies that the principles will apply to duties under this part and other parts of this Act such as duties relating to incident notification and consultation. A further note clarifies that, due to the effect of section 104 of the *Legislation Act 2001*, a reference to an Act (such as the reference set out in this clause) includes a reference to statutory instruments made or in force under the Act, including a regulation and any law or instrument applied, adopted or incorporated by the Act.

Clause 14 – Duties not transferable

This clause establishes that duties under the Bill are non-transferable.

Clause 15 – Person may have more than one duty

This clause establishes that a person can have more than one duty by virtue of being in more than one class of duty holder.

Clause 16 – More than one person can have a duty

This clause establishes that 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 under the Bill even if another duty holder has the same duty. A note then clarifies that, due to the effect of section 104 of the *Legislation Act 2001*, a reference to an Act (such as the reference set out in this clause) includes a reference to statutory instruments made or in force under the Act, including a regulation and any law or instrument applied, adopted or incorporated by the Act.

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)).

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

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

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

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

Clause 17 – Management of risks

This clause 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 that is not reasonably practicable—to minimise the risks, so far as is reasonably practicable.

Subdivision 2.1.2 – What is *reasonably practicable*

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

This clause establishes what, in the Bill, is *reasonably practicable*, in relation to a duty to ensure health and safety, under the Bill, regulations and codes of practice.

Reasonably practicable means what is, (or was at a particular time) reasonably able to be done in the circumstances in relation to relation to ensuring health and safety, taking into account and weighing up all relevant matters, including:

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

After taking into account these matters, only then can the person consider the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk.

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.

Division 2.2 – Primary duty of care

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.

The changing nature of work organisation and relationships means that many who perform work activities do so under the effective direction or influence of someone other than a person employing them under an employment contract. The person carrying out the work:

- may not be in an employment relationship with any person (e.g. share farming or share fishing or as a contractor working under a contract for services); or
- may work under the direction and requirements of a person other than their employer (as may be found in some transport arrangements with the requirements of the consignor).

For these reasons, the Bill provides a broad scope for the primary duty of care, to require those who control or influence the way work is done to protect the health and safety of those carrying out the work.

Clause 19 – Primary duty of care

This clause sets out the primary work health and safety duty which applies to persons conducting a business or undertaking (PCBUs).

The PCBU has a duty to ensure, so far as is reasonably practicable, the health and safety of workers that are:

- directly engaged to carry out work for their business or undertaking;
- placed with another person to carry out work for that person; or
- influenced or directed in carrying out their work activities by the person, while the workers are at work in the business or undertaking.

Duties of care are imposed on duty holders because they influence one or more of the elements in the performance of work and in doing so may affect the health and safety of themselves or others. Duties of care require duty holders—in the capacity of their role and by their conduct—to ensure, so far as is reasonably practicable, the health and safety of any workers that they have the capacity to influence or direct in carrying out work.

Primary duty of care not limited to physical 'workplaces'

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

Duty extends to 'others'

Subclause 19(2) extends to whom the primary duty of care is owed to beyond the PCBU's workers to cover all other persons affected by the carrying out of work. It requires PCBUs to ensure, so far as is reasonably practicable, that the health and safety of all persons is not put at risk from work carried out as part of the business or undertaking.

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 are 'not [be] put at risk'.

However, the general aim of both subclauses 19(1) and (2) is preventative and both require the primary duty of care to be discharged by managing risks (see clause 17).

Specific elements of the primary duty

Subclause 19(3) outlines the key things a person must do in order to satisfy the primary duty of care. The list does not limit the scope of the duties in subclauses 19(1) and (2).

PCBUs must comply with the primary duty by ensuring, so far as is reasonably practicable, the provision and maintenance of the specific matters listed in the subclause, or that the relevant steps are taken. This means that compliance activities can be undertaken by someone else, but the PCBU must actively verify that the necessary steps have been taken to meet the duty.

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.

For example, a PCBU may not have to provide 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

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

Self-employed persons

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

Division 2.3 – Further duties of persons conducting businesses or undertakings

This Division sets out the work health and safety duties of a person conducting a business or undertaking who is involved in specific activities that may have a significant effect on work health and safety. These activities include the management or control of workplaces, fixtures, fittings and plant, as well as the design, manufacture, import, supply of plant, substances and structures used for work.

Designers, manufacturers, installers, constructors, importers and suppliers of plant, structures or substances can influence the safety of these products before they are used in the workplace. These people are known as 'upstream' duty holders.

'Upstream' duty holders are required to ensure, so far as is reasonably practicable, that products are made without risks to the health and safety of the people who use them 'downstream' in the product lifecycle. In the early phases of the lifecycle of the product, there may be greater scope to remove foreseeable hazards and incorporate risk control measures.

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

This clause sets out additional health and safety duties a person conducting a business or undertaking has if that business or undertaking involves, in whole or in part, the management or control of a workplace. 'Workplace' is defined in clause 8. The duty requires the person with management or control of a workplace to ensure, so far as is reasonably practicable, that the workplace and the means of entering and leaving the workplace are without risks to the health and safety of any person.

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.

The duties of a person who owns and controls a workplace and the duties of a person who occupies and manages that workplace differ. For example, the owner of an office building has a duty as a person who controls the operations of the building, to ensure it is without risks to the health and safety of any person. The owner is required to ensure people can enter and exit the building and that anything arising from the workplace is without risk to others.

Concurrently, a tenant who manages an office premises in the building has a duty to ensure people can enter and exit those parts of the premises. For example, this could include entry into facilities for workers. A tenant also has the duty to ensure that anything arising in that office is without risks to the health and safety of any person. For example, this could include ensuring the safe maintenance of kitchen appliances.

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

This clause sets out additional health and safety duties a person conducting a business or undertaking has if, and to the extent that, that business or undertaking involves the management or control of fixtures, fittings or plant at a workplace. 'Plant' is defined in clause 4 and 'workplace' is defined in clause 8. The duty requires the person with management or control of fixtures, fittings or plant at a workplace to ensure, so far as is reasonably practicable, that those things are without risks to health and safety of any person.

For example, a person who manages or controls workplace fixtures, fittings or plant has a duty to ensure, so far as reasonably practicable, that torn carpets are repaired or replaced in

that workplace to eliminate or, if that is not reasonably practicable, minimise the risk of a person tripping or falling.

Paragraph 21(1)(a) excludes the application of the duty to an occupier of a residence if that residence is not occupied for the purpose of conducting a business or undertaking. The exclusion does not apply if the residence is partially used to conduct the business or undertaking. Paragraph 21(1)(b) allows for the exclusion of a person prescribed by the regulations.

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

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

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

Designers of structures have a duty to ensure, as far as is reasonably practicable, that the design does not create health and safety risks for those who construct the structure, as well as those who will later work in it.

The duty is for the designer to ensure, so far as is reasonably practicable that the plant, substance or structure is without risks to the health and safety of the persons listed in paragraphs (2)(a)–(f). The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose listed in paragraph (2)(e), such as storage, decommissioning, dismantling, demolition or disposal.

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).

The duty to provide current, relevant information is based on what the designer knows, or ought reasonably to know, at the time of the request in relation to their original design. If another person modifies or changes the original design of the plant or structure, this person then has the responsibility of providing information in relation to the redesign or modification, not the original designer.

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

This clause sets out the duties for a PCBU who manufactures plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures these duties also apply if these things are used or could reasonably be expected to be used, as a workplace.

The duty is for the manufacturer to ensure, so far as is reasonably practicable, that the plant, substance or structure is without risks to the health and safety of the persons listed in paragraphs (2)(a)–(f). The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose listed in paragraph (2)(e), such as assembly, storage, decommissioning, dismantling, demolition or disposal.

For example, a manufacturer of a commercial cleaning substance must ensure, so far as reasonably practicable, that the substance is without risks to the health and safety of the persons who handle, store and use the substance at a workplace. This may involve ensuring the substance is packaged to reduce the risk of spills and that the container is correctly labelled with appropriate warnings and a Safety Data Sheet is prepared for safe use.

Subclauses 23(3)–(5) outline further matters that a manufacturer must do in order to satisfy the duty including ensuring the carrying out of testing and the provision of information. Subclause 23(5) limits the duty to provide current relevant information, on request, only to persons who do or will carry out one of the activities listed in paragraphs (2)(a)–(f). The type of information that must be provided is limited by subclause 23(4).

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

This clause sets out the duties for a PCBU who imports plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures these duties also apply if these things are used or could reasonably be expected to be used, as a workplace.

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.

For example, a person who imports machinery must ensure, so far as reasonably practicable, that the imported product is without risks to the health and safety of the persons who assemble, use, maintain, decommission or dispose the machinery at a workplace. This would involve ensuring the machinery is designed and manufactured to meet relevant safety standards.

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

This clause sets out the duties for a PCBU which supplies plant, substances or structures that are to be used or could reasonably be expected to be used at a workplace. In the case of plant or structures these duties also apply if these things are used or could reasonably be expected to be used, as a workplace.

The duty is for the supplier to ensure, so far as is reasonably practicable that the plant, substance or structure is without risks to the health and safety of the persons listed in paragraphs (2)(a)–(f).The list captures those persons who use the plant, substance or structure for its primary intended purpose as well as those persons involved in carrying out other reasonably foreseeable activities related to the intended purpose listed in paragraph (2)(e), such as storage, decommissioning, dismantling, demolition or disposal.

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).

For example, a person who supplies chemicals to a workplace must ensure that the chemicals are properly labelled and packaged and that current Safety Data Sheets are provided at the time of supply.

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

This clause sets out the duty of a PCBU who installs, constructs or commissions plant or structures. This applies to plant or a structure that is to be used, or could reasonably be expected to be used, as, or at, a workplace.

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).

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

Division 2.4 – Duty of officers, workers and other persons

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

This clause casts a positive duty on officers (as defined in clause 4) of a PCBU to exercise 'due diligence' to ensure that the PCBU complies with any duty or obligation under the Bill. This duty exists if the PCBU has a duty or obligation under the Act, a regulation or a code of practice.

Subclause 27(2) applies if officers fail to exercise due diligence to ensure that the PCBU complies with its health and safety duties under Part 2. Maximum penalties for these offences by officers are specified in clauses 31–33.

Subclause 27(3) sets the maximum penalties if an officer fails to exercise due diligence to ensure the PCBU complies with other duties and obligations under the Bill. In that case, the maximum penalty is the penalty that would apply to individuals for failing to comply with the relevant duty or obligation.

Subclause 27(4) clarifies that an officer may be convicted or found guilty whether or not the PCBU was convicted or found guilty of an offence under the Bill relating to the duty or obligation.

These provisions reflect a deliberate national policy shift way from applying 'accessorial' or 'attributed' liability to officers, which is an approach currently adopted by several jurisdictions (although not in the Territory).

The positive duty requires officers to be proactive and means that officers owe a continuous duty to ensure compliance with duties and obligations under the Bill. There is no need to tie an officer's failure to any failure or breach of the relevant PCBU for the officer to be prosecuted under this clause.

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

Subclause 27(5) contains a non-exhaustive list of those reasonable steps an officer must take to discharge their duties to undertake due diligence 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.

This clause reflects the policy position that an officer must have high, yet attainable, standards of due diligence, and, that these standards should relate to the position and influence of the officer within the PCBU. Further, what is required of an officer should be directly related to the influential nature of their position. This is because the officer governs the PCBU and makes decisions for management. A high standard requires persistent examination and care, to ensure that the resources and systems of the PCBU are adequate to

comply with the duty of care required by the PCBU. This also requires ensuring that they are performing effectively. Where the officer relies on the expertise of a manager or other person, that expertise must be verified and the reliance must be reasonable.

Clause 28 – Duties of workers

This clause sets out the health and safety duties of workers. Workers have a duty to take reasonable care for their own health and safety while at work and also to take reasonable care so that their acts or omissions do not adversely affect the health and safety of other persons at the workplace.

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.

Paragraph 28(c) makes it clear that workers must comply so far as they are able with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the Bill and regulations.

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.

Whether an instruction, policy or procedure is 'reasonable' will be a question of fact in each case. It will depend on all relevant factors, including whether the instruction, policy or procedure is lawful, whether it complies with the Bill and regulations, whether it is clear and whether affected workers are able to co-operate.

Clause 29 – Duties of other persons at the workplace

This clause sets out the health and safety duties applicable to all persons while at a workplace, whether or not those persons have another duty under Part 2 of the Bill. This includes customers and visitors to a workplace.

Similarly 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 other persons at the workplace.

Other persons at a workplace must also comply, so far as they are reasonably able to, with any reasonable instruction that is given by the PCBU to allow the PCBU to comply with the Bill.

Division 2.5 – Offences and penalties

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

Contraventions of the Bill and regulations are generally criminal offences, although a civil penalty regime applies in relation to right of entry under Part 7. This generally reflects the

community's view that any person who has a work-related duty of care but does not observe it should be liable to a criminal sanction for placing another person's health and safety at risk. Such an approach is also in line with international practice.

The Bill provides for three categories of offences against health and safety duties. Category 1 offences are for breach of health and safety duties that involve reckless conduct and carry the highest maximum penalty under the Bill.

Penalties under the Bill

There is considerable disparity in the maximum fines and periods of imprisonment that can be imposed under current Australian work health and safety laws. In the Territory, the Bill reflects increased maximum fines and decreased maximum periods of imprisonment (as compared to the *Work Safety Act 2008*) This adjustment must be assessed in the context of a new legislative scheme with different offences and reflects a combination of related factors. In part, this includes recommendations of the National review into OHS laws to strengthen the deterrent effect of certain penalties, extend the ability of the court to impose meaningful penalties and emphasise the seriousness of some offences.

Penalties and the possibility of imprisonment in the most serious cases are a key part of achieving and maintaining a credible level of deterrence to complement other types of enforcement action, for example, the issuing of inspector notices. The maximum penalties set in the Bill reflect the level of seriousness of the offences and have been set at levels high enough to cover the most egregious examples of offence.

Clause 30 – Health and safety duty

This clause establishes that, in this Division, *health and safety duty* means a duty imposed under Divisions 2.2, 2.3 or 2.4 of the Bill.

Clause 31 – Reckless conduct—Category 1

Category 1 offences are offences involving recklessness. The highest penalties under the Bill apply, including imprisonment for up to five years.

Category 1 offences involve reckless conduct that exposes an individual to a risk of death or serious injury or serious illness without reasonable excuse. The prosecution will be required to prove the fault element of recklessness in addition to proving the physical elements of the offence. For a Category 1 offence this means that the person is reckless as to the risk to an individual of death or serious injury or illness.

As set out in the note at the foot of subclause 31(1) of the Bill, strict liability applies to subclause 31(1)(a). The prosecution bears the burden of proving that the conduct was engaged in without reasonable excuse.

The maximum penalty for this offence is:

- $3 000 000 if committed by a body corporate;

- $600 000, imprisonment for 5 years or both, if committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking; or
- $300 000, imprisonment for 5 years or both, if committed by another category of individual.

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

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

For such an offence a person is required to comply with a health and safety duty. This is the first element of the offence. 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.

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

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

As set out in the note at the foot of this clause, strict liability applies to each physical element of this offence.

The maximum penalty for this offence is

- $1 500 000 if committed by a body corporate;
- $300 000 if committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking; or
- $150 000 if committed by another category of individual.

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

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

For such an offence a person is required to comply with a health and safety duty. This is the first element of the offence.

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.

As set out in the note at the foot of this clause, strict liability applies to each physical element of this offence.

The maximum penalty for this offence is:

- $500 000 if committed by a body corporate;
- $100 000 if committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking; or

- $50 000 if committed by another category of individual.

Burden of proof

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

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

Clause 34 – Exceptions

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).

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

Part 3 – Incident notification

All Australian work health and safety laws currently require all workplace deaths and certain workplace incidents, injuries and illnesses to be reported to a relevant authority. Most laws also require workplace incident sites to be preserved by the relevant person (including the *Work Safety Act 2008*).

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

The duty to report incidents in clause 38 is linked to the duty to preserve an incident site until an inspector arrives or otherwise directs so that evidence is not compromised.

Clause 35 – What is a *notifiable incident*

This clause defines the kinds of workplace incidents that must be notified to the regulator and that also require the incident site to be preserved. A 'notifiable incident' is an incident involving the death of a person, 'serious injury or illness' of a person or a 'dangerous incident'. Each of these terms is defined in subsequent clauses of the Bill.

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

This clause defines a 'serious injury or illness' as an injury or illness requiring a person to have treatment of a kind specified in paragraphs (a)–(d), including:

- immediate treatment as an in-patient in a hospital;
- immediate treatment for a serious injury of a kind listed in paragraph (b); or
- medical treatment within 48 hours of exposure to a substance at a workplace.

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

The above 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*

This clause defines a 'dangerous incident' as an incident in relation to a workplace that exposes a worker or any other person to a serious risk to his or her health or safety arising from an immediate or imminent exposure to the matters listed in paragraphs 37(a)–(l). These matters include (for example) an uncontrolled escape, spillage or leakage of a substance, an uncontrolled implosion, explosion or fire and an uncontrolled escape of gas or steam.

This clause also 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

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

Subclause 38(1) requires the PCBU to ensure that the regulator is notified immediately after becoming aware that a 'notifiable incident' arising out of the conduct of the business or undertaking has occurred. The requirement for 'immediate' notification would not however prevent a person from assisting an injured person or taking steps that were essential to making the site safe or from minimising the risk of a further notifiable incident (see subclause 39(3)).

Failure to notify is an offence. The maximum penalty for this offence is $10 000 in the case of an individual, or, $50 000 in the case of a body corporate.

As set out in the note at the foot of subclause 38(1), strict liability applies to each physical element of this offence.

Subclause 38(2) requires the notice to be given in accordance with this clause, and, by the fastest possible means.

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 or email under Part 19.5 of the *Legislation Act 2001*.

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)).

Written notice must be in a form, or contain the details, approved by the regulator (subclause 38(5)). A note clarifies that, if a form is approved under s.277 for a written notice, the form must be used.

Subclause 38(7) requires the PCBU to keep a record of each notifiable incident for at least five years from the day that notice is given to the regulator. Failure to do so is an offence. The maximum penalty for this offence is $5 000 in the case of an individual or $25 000 in the case of a body corporate.

As set out in the note at the foot of subclause 38(7), strict liability applies to each physical element of this offence.

Subclause 38(8) establishes that, despite anything else in this clause, if a notifiable incident for which notice is required to be given is reported in accordance with the *Dangerous Substances Act 2004*, the reporting under that Act is taken to be adequate notice of the incident for the purposes of this Act.

Clause 39 – Duty to preserve incident sites

Subclause 39(1) requires the person with management or control of a workplace where a notifiable incident has occurred to ensure, so far as is reasonably practicable, that the incident site is preserved until an inspector arrives or until such earlier time as directed by an inspector. Failure to do so is an offence. The maximum penalty for this offence is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

As set out in the note at the foot of subclause 39(1), strict liability applies to each physical element of this offence.

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

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

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

Part 4 – Authorisations

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

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

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.

Authorisations are issued to control high risk activities. As such, it is the Bill rather than the regulations that includes the relevant offence provisions.

Clause 40 – Meaning of *authorised* – pt 4

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

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

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

This clause 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.

The maximum penalty for this offence is $50 000 in the case of an individual or $250 000 in the case of a body corporate.

As set out in the note at the foot of this clause, strict liability applies to each physical element of this offence.

Clause 42 – Requirements for authorisation of plant or substance

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

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. The maximum penalty for this offence is $20 000 in the case of an individual or $100 000 in the case of a body corporate.

As set out in the note at the foot of subclause 42(1), strict liability applies to each physical element of this offence.

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.

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).

As set out in the note at the foot of subclause 42(2), strict liability applies to each physical element of this offence.

Clause 43 – Requirements for authorisation of work

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

Subclause 43(1) makes it an offence for a person to carry out such work at a workplace if the person, or the person on whose behalf the work is being carried out, is not authorised in accordance with the regulations. The maximum penalty for this offence is $20 000 in the case of an individual or $100 000 in the case of a body corporate.

As set out in the note at the foot of subclause 43(1), strict liability applies to each physical element of this offence.

Subclause 43(2) makes it an offence for a PCBU to direct or allow a worker to carry out such work if the person, or the person on whose behalf the work is being carried out, is not authorised in accordance with the regulations. The maximum penalty for this offence is $20 000 in the case of an individual or $100 000 in the case of a body corporate.

As set out in the note at the foot of subclause 43(2), strict liability applies to each physical element of this offence.

Clause 44 – Requirements for prescribed qualifications or experience

The regulations may require certain kinds of work, or classes of work, to be carried out only by (or under the supervision of) a person who is qualified or experienced as prescribed in those regulations.

Subclause 44(1) makes it an offence for a person to carry out work at a workplace if these requirements under the regulations are not met. The maximum penalty for this offence is $20 000 in the case of an individual or $100 000 in the case of a body corporate.

As set out in the note at the foot of subclause 44(1), strict liability applies to each physical element of this offence.

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 under the regulations are not met. The maximum penalty for this offence is $20 000 in the case of an individual or $100 000 in the case of a body corporate.

As set out in the note at the foot of subclause 44(2), strict liability applies to each physical element of this offence.

Clause 45 – Requirement to comply with conditions of authorisation

This clause makes it an offence for a person to contravene any conditions attaching to an authorisation given to that person under a regulation.

The maximum penalty for this offence is $20 000 in the case of an individual or $100 000 in the case of a body corporate.

As set out in the note at the foot of this clause, strict liability applies to each physical element of this offence.

Part 5 – Consultation, representation and participation

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

Division 5.1 – Consultation, cooperation and coordination between duty holders

Part 5 establishes comprehensive duties to consult in relation to specified work health and safety matters under the Bill. Division 5.1 deals with consultation between duty holders, while Division 5.2 deals with consultation with workers.

Clause 46 – Duty to consult with other duty holders

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

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. Cooperating with other duty holders and co-ordinating activities is particularly important for workplaces where there are multiple PCBUs.

Failure to comply with this due is an offence. As set out in the note at the foot of this clause, strict liability applies to each physical element of this offence.

The maximum penalty for this offence is $20 000 in the case of an individual or $100 000 in the case of a body corporate.

Division 5.2 – Consultation with workers

Clause 47 – Duty to consult workers

This clause requires PCBUs to, so far as is reasonably practicable, consult with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety, in accordance with this Division of the Bill and the regulations.

Consultation must comply with any procedures agreed between the PCBU and its workers (subclause 47(2)). Agreed procedures must be consistent with requirements about the nature of consultation in clause 48.

Failure to comply with this due is an offence. As set out in the note at the foot of subclause 47(1), strict liability applies to each physical element of this offence.

The maximum penalty for this offence is $20 000 in the case of an individual or $100 000 in the case of a body corporate.

Scope of duty to consult

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

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

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

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

Clause 48 – Nature of consultation

Subclause 48(1) establishes the requirements for meaningful consultation. It requires PCBUs to:

- share relevant information about work health or safety matters (listed in clause 49) with their workers;

- give workers a reasonable opportunity to express their views and to raise work health and safety issues in relation to the matter; and
- contribute to the decision processes relating to those matters.

It also requires PCBUs to take workers' views into account and advise workers of the outcome of the consultation in a timely manner.

Subclause 48(2) provides that consultation must involve any HSR that represents the workers. Consulting with HSRs alone may be sufficient to meet the consultation duty, depending on the work health or safety issue in question.

Clause 49 – When consultation is required

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

Division 5.3 – Health and safety representatives

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.

This Division provides for the election, functions and powers and entitlements of HSRs and their deputies (if any) under the Bill.

Subdivision 5.3.1 – Request for election of health and safety representative

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

Clause 50 – Request for election of health and safety representative

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

This clause provides that a worker may ask a PCBU for whom they carry out work to facilitate the conduct of an election for one or more HSRs to represent workers who carry out work for the business or undertaking.

This clause does not require the request to be in any particular form. The worker's request will trigger the PCBU's obligation to facilitate the determination of one or more work groups providing the worker's request is sufficiently clear.

A PCBU is required to facilitate the election of HSRs. Facilitating the election process requires a PCBU to adopt a supportive role during the election process rather than a directive one (see subclause 52(1) below for more information).

Subdivision 5.3.2 – Determination of work groups

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

Clause 51 – Determination of work groups

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

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

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

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

Clause 52 – Negotiations for agreement for work group

This clause sets some parameters around negotiations for work groups.

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).

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

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

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

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

As set out in the note at the foot of subclause 52(5), strict liability applies to each physical element of this offence.

The maximum penalty for this offence is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

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

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

Clause 53 – Notice to workers

Subclause 53(1) requires the PCBU to notify workers of the outcome of negotiations and determination of any work groups, as soon as practicable after the negotiations are completed. Failure to notify is an offence. The maximum penalty for this offence is $2 000 in the case of an individual or $10 000 in the case of a body corporate.

As set out in the note at the foot of subclause 53(1), strict liability applies to each physical element of this offence.

Subclause 53(2) requires a PCBU who is negotiating to vary an agreement for the determination of a work group or work groups to notify workers of the outcome of those negotiations (if any) as soon as it is practicable after negotiations are complete. Failure to notify workers is an offence. The maximum penalty for this offence is $2 000 in the case of an individual or $10 000 in the case of a body corporate.

As set out in the note at the foot of subclause 53(2), strict liability applies to each physical element of this offence.

Clause 54 – Failure of negotiations

This clause sets out the process for determining work groups if negotiations under clause 52 fail.

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

Subclause 54(1) allows any person who is, or would be, a party to the negotiations to ask the regulator to appoint an inspector to decide the matter. This includes negotiations for a variation of a work group agreement.

Subclause 54(2) empowers the inspector to decide on the relevant matters (referred to in subclause 52(3) or any matter that is the subject of the proposed variation (as the case requires)) or to decide that work groups should not be established or that the agreement

should not be varied (as the case requires). In exercising this discretion, the inspector must have regard to the relevant parts of the Bill, including the objects of the Part and the Bill overall.

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 5.3.3 – Multiple-business work groups

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

Clause 55 – Determination of work groups of multiple businesses

This clause allows work groups to be determined in relation to two or more PCBUs (multiple-business work groups).

Subclause 55(2) requires multiple-business work groups to be determined by negotiation and agreement between the relevant parties (e.g. each of the PCBUs and the workers proposed to be included in the work groups) in accordance with clause 56 of the Bill.

Subclause 55(3) provides that any party involved in determining an agreement for a work group or work groups, can negotiate a variation to that agreement at any time.

Subclause 55(4) clarifies that the determination of one or more multiple-business work groups does not affect pre-existing work groups determined under this Subdivision or Subdivision 5.3.2, or, prevent the formation of additional work groups under Subdivision 5.3.2 of any other work group of the workers concerned.

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

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.

Subclause 56(2) establishes representation rights for relevant workers, which mirror the rights explained in relation to subclause 52(4) above. A breach of these requirements is an offence. The maximum penalty for this offence is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

As set out in the note at the foot of subclause 56(2), strict liability applies to each physical element of this offence.

Subclause 56(3) allows an inspector to assist negotiations in relation to a matter, if agreement cannot be reached on a relevant matter within a reasonable time after negotiations have

commenced and any party to the negotiations has asked the regulator to appoint that inspector.

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

Clause 57 – Notice to workers

Subclause 57(1) sets out the matters that must be notified by a PCBU to workers as soon as practicable after the completion of negotiations - that is, the outcome of negotiations and determination of any work groups. A breach of these requirements is an offence. The maximum penalty for this offence is $2 000 in the case of an individual or $10 000 in the case of a body corporate.

As set out in the note at the foot of subclause 57(1), strict liability applies to each physical element of this offence.

Subclause 57(2) requires a PCBU who is negotiating to vary an agreement for the determination of a work group or work groups to notify workers of the outcome of those negotiations and variations (if any) as soon as it is practicable after negotiations are complete.

Failure to notify workers is an offence. The maximum penalty for this offence is $2 000 in the case of an individual or $10 000 in the case of a body corporate.

As set out in the note at the foot of subclause 57(2), strict liability applies to each physical element of this offence.

Clause 58 – Withdrawal from negotiations or agreement involving multiple businesses

This clause establishes a process that allows a party to withdraw from negotiations for multiple-employer work groups and also to withdraw from an agreement made under this Subdivision. This process is necessary as multiple-employer work groups are voluntary and are only available by agreement between all relevant parties.

This clause provides that a party to a negotiation for an agreement, or to an agreement, concerning a work group under this subdivision may withdraw from the negotiation or agreement at any time by giving reasonable notice (in writing) to the other parties.

Withdrawal by one party to an agreement (involving three or more PCBUs) would trigger the need to negotiate a variation to the agreement (in accordance with clause 56), but would not otherwise affect the validity of the agreement for other parties in the meantime (subclause 58(2)).

Clause 59 – Effect of subdivision on other arrangements

This clause clarifies that alternative representative agreements or other arrangements can always be made between two or more PCBUs and their workers, provided that the PCBUs comply with this subdivision.

Subdivision 5.3.4 – Election of health and safety representatives

This Subdivision sets out the procedures for electing HSRs.

Clause 60 – Eligibility to be elected

This clause sets out the eligibility rules for HSRs. It 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

This clause sets out the procedure for the election of HSRs.

The procedures for the election of HSRs are determined by the workers in the work group for which elections are being held. The regulations may prescribe minimum requirements for the conduct of elections (subclause 61(1)–(2)).

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

Subclause 61(4) requires the relevant PCBU to provide any resources, facilities and assistance that are reasonably necessary or are prescribed by the regulations to enable elections to be conducted. Failure to do so is an offence. The maximum penalty for this offence is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

As set out in the note at the foot of subclause 61(4), strict liability applies to each physical element of this offence.

Clause 62 – Eligibility to vote

This clause 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

This clause sets out the circumstances in which an election is not required and each candidate is taken to have been elected as a health and safety representative for the work group.

An election is not required if the number of candidates for election as a HSR equals the number of vacancies for that position (and the number of candidates for any deputy HSR equals the number of vacancies for that position).

Clause 64 – Term of office of health and safety representative

Clause 64 provides that an HSR holds office for a maximum term of three years, although that may be shortened upon:

- the person's resignation from office in writing to the PCBU (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)).

Subclause 64(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

This clause sets out a process for disqualifying HSRs from office for:

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

The regulator or any person who has been adversely affected by the relevant action taken by the HSR may apply to the Magistrates Court to have the HSR disqualified from office.

Subclause 65(3) provides that the Court may disqualify the HSR for a specified period or indefinitely if the Court is satisfied that a ground of disqualification in this clause is made out.

Clause 66 – Immunity of health and safety representatives

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

Clause 67 – Deputy health and safety representatives

This clause establishes the procedures for the election of deputy HSRs and establishes their powers and functions under the Bill.

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

Deputy HSRs for a work group may only take over the powers and functions of an HSR for the work group if the HSR ceases to hold office or is unable (because of absence or any other reason) to exercise their powers or perform their functions as HSR under the Bill. Paragraph 67(2)(b) makes it clear that the Bill applies to the deputy HSR accordingly. For example, this means that a deputy HSR can exercise the powers and functions of the HSR and the PCBU must comply with the general obligations under clause 70.

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

Subdivision 5.3.5 – Powers and functions of health and safety representatives

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

Clause 68 – Powers and functions of health and safety representatives

This clause confers the necessary powers and functions on HSRs to enable them to fulfil their representative role under the Bill. Clause 67 (above) sets out the circumstances in which a deputy HSR may take over the powers and functions of the HSR under this clause.

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). A note clarifies that, under section 196 of the *Legislation Act 2001*, a provision of a law that gives a person a function also gives the person powers necessary and convenient to exercise the function.

The primary function of HSRs is to represent workers in their work group in relation to health and safety matters at work (paragraph 68(1)(a)). As part of that function, HSRs may monitor the PCBU's compliance with the Bill in relation to their work group members (paragraph 68(1)(b)), investigate complaints from work group members about work health and safety matters (paragraph 68(1)(c)) and inquire into anything that appears to be a risk to the health or safety of work group members, arising from the conduct of the business or undertaking (paragraph 68(1)(d)).

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

Subclause 68(4) makes it clear that the Bill does not 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.

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

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.

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.

Paragraph 68(2)(c) entitles an HSR to be present at an interview concerning work health and safety between a worker who is a work group member and either an inspector, the PCBU at the workplace or the PCBU's representative. This entitlement only applies if the HSR has the consent of the worker being interviewed.

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).

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

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)).

Paragraph 68(2)(g) entitles HSR's to request the assistance of any person, whenever necessary.

A note clarifies that a HSR also has power under Division 5.6 to direct work to cease in certain circumstances and under Division 5.7 to issue provisional improvement notices.

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

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)).

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.

Subclause 69(3) establishes that, in this clause, *another work group* means another work group of workers carrying out work for a business or undertaking to which the work group that the health and safety representative represents relates.

Subdivision 5.3.6 – Obligations of person conducting business or undertaking to health and safety representatives

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

Clause 70 – General obligations of person conducting business or undertaking

This clause sets out the general obligations of PCBUs, many of which reflect the corresponding entitlements in clause 68 (which establishes HSRs' powers and functions).

These obligations will also apply in relation to deputy HSRs while they exercise the powers of HSRs (see subclause 67(2)).

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, a person assisting a HSR would need to meet any of the PCBU's policies or procedures that are applicable to workplace visitors 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 the HSR's work group members work (paragraph 70(1)(h)).

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

The maximum penalty for this offence is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

As set out in the note at the foot of subclause 70(1), strict liability applies to each physical element of this offence.

HSRs must be given such time as is reasonably necessary (e.g. during work hours) to exercise their powers and perform their functions under the Bill (subclause 70(2)). The maximum penalty for this offence is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

As set out in the note at the foot of subclause 70(2), strict liability applies to each physical element of this offence.

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)

This clause qualifies some of the PCBU's obligations under subclause 70(1).

Subclause 71(2) ensures that 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 without the worker's consent. The maximum penalty for this offence is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

As set out in the note at the foot of subclause 71(2), strict liability applies to each physical element of this offence.

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).

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

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.

Subclause 71(6) allows an inspector to assist in resolving any dispute over an assistant's proposed entry, upon the HSR's request. This request can be made if access is refused. In this situation, an inspector could provide advice or recommendations in relation to the dispute or exercise his or her compliance powers under the Bill. This provision is not intended to limit inspectors' compliance powers in any way.

Clause 72 – Obligation to train health and safety representatives

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

The entitlement allows the HSR (or deputy 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)).

An HSR or deputy HSR is also entitled to attend the course of their choice (e.g. in terms of when and where they propose to attend the course), although the course must be chosen in consultation with the PCBU. If the parties are unable to agree, subclauses 72(5)–(7) will apply.

Subclause 72 requires the PCBU to give the HSR or deputy HSR time off work to attend the agreed course of training as soon as practicable within three months of the request being made. The PCBU is also required to pay the course fees and any other reasonable costs associated with the HSR's or deputy HSR's attendance at the course of training.

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

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

Subclauses 72(5)–(7) establish a procedure for resolving a disagreement if an agreement cannot be reached—as soon as practicable within the period of three months—on the course the HSR or deputy HSR is to attend or the reasonable costs of attendance that will be met by the relevant PCBU. In that case, either party may ask the regulator to appoint an inspector to decide matters in dispute. The parties would be bound by the inspector's determination. It is an offence if a PCBU does not allow a HSR to attend a course decided by an inspector or pay the costs decided by the inspector under subclause 72(6).

The maximum penalty for this offence is $10 000 in the case of an individual or $50 000 in the case of a body corporate. As set out in the note at the foot of subclause 72(7), strict liability applies to each physical element of this offence.

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

This clause applies where HSRs or deputy HSRs represent multiple-business work groups and provides for the sharing of costs between relevant PCBUs. In general, costs of the HSR exercising powers under the Bill and training-related costs are shared equally, although the parties may come to alternative arrangements by agreement. An agreement to apportion the costs in another way may be varied at any time by negotiation and agreement between each of the persons conducting the businesses or undertakings.

Clause 74 – List of health and safety representatives

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

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. They must be displayed in a manner that is readily accessible to all workers in the relevant work group or work groups (PCBUs should select a prominent place to display the list that is accessible to all workers such as the workplace intranet).

The maximum penalty for this offence is $2 000 in the case of an individual or $10 000 in the case of a body corporate. As set out in the note at the foot of subclause 74(1), strict liability applies to each physical element of this offence.

Up-to-date lists must also be forwarded to the regulator as soon as practicable after being prepared.

Division 5.4 – Health and safety committees

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

Clause 75 – Health and safety committees

This clause sets out when a PCBU must establish a health and safety committee, including on the request of one of their HSRs, or, of five or more workers that carry out work for the PCBU at the workplace. 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)(a)).

The regulations may also require health and safety committees to be established in prescribed circumstances. If this applies, the PCBU must establish a committee within the time prescribed by the regulations.
The maximum penalty for this offence is $5 000 in the case of an individual or $25 000 in the case of a body corporate. As set out in the note at the foot of subclause 75(1), strict liability applies to each physical element of this offence.

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

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

Clause 76 – Constitution of committee

This clause sets out minimum requirements for establishing and running health and safety committees. The relevant PCBU and the workers for whom the committee is being established must negotiate on how the committee will be constituted (subclause 76(1)), subject to subclauses 76(2)-(4).

Unless they do not wish to participate, HSRs are automatically members of a relevant workplace's committee (subclause (76(2)). If there is more than one HSR, the HSRs may agree among themselves as to who will sit on the committee (that person or persons must consent) (subclause 76(3)).

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)).

Subclauses 76(5)–(7) establishes a dispute resolution procedure if the constitution of the committee cannot be agreed between all relevant parties. In that case, an inspector may decide the membership of the committee or that the committee should not be established. In exercising this discretion, the inspector must have regard to the relevant parts of the Bill including the objects of the Bill overall. Any decision on how the committee is to be constituted is then taken to be an agreement between the relevant parties.

Clause 77 – Functions of committee

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

Clause 78 – Meetings of committee

This clause 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

This clause sets out the general obligations of PCBUs in relation to their health and safety committees.

The PCBU must allow committee members to spend such time at work as is reasonably necessary to attend meetings of the committee or carry out functions as a committee member (subclause 79(1)).

Failure to do so is an offence and the maximum penalty for this offence is $10 000 in the case of an individual or $50 000 in the case of a body corporate. As set out in the note at the foot of subclause 79(1), strict liability applies to each physical element of this offence. Subclause 79(2) clarifies that such time must be paid time, paid at the rate that the committee member would have been entitled to receive had they not been attending meetings of the

committee or exercising powers or performing their functions as a committee member. Any underpayment of wages may be recovered under the applicable industrial laws.

Subclause 79(3) entitles committee members to access the information the relevant PCBU has relating to hazards and risks at the workplace and the work-related health and safety of workers at the workplace. However, there is *no* entitlement to access any personal or medical information about a worker without the worker's consent, unless the information is in a form that does not identify the worker or that could not reasonably be expected to lead to the identification of the worker (subclause 79(4)).

Failure to provide committee members with the entitlement prescribed under subclause 79(3) constitutes an offence and the maximum penalty is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

As set out in the note at the foot of subclause 79(3), strict liability applies to each physical element of this offence.

It is also an offence for a PCBU to provide personal or medical information about a worker contrary to subclause 79(4) and the maximum penalty is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

As set out in the note at the foot of subclause 79(4), strict liability applies to each physical element of this offence.

Division 5.5 – Issue resolution

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.

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 5.1 and 5.2 of this Part.

Clause 80 – Parties to an issue

This clause 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; or
- the HSRs for any of the affected workers or their representative, and if there are no HSRs—the affected workers or their representative.

If a PCBU is represented, subclause 80(2) requires the PCBU to ensure that the representative has, for purposes of issue resolution, sufficient seniority and competence to act as the person's representative. The subclause also prohibits the PCBU from being represented by an HSR. This latter restriction is necessary because HSRs are essentially workers representatives and representing both sides would constitute a conflict of interest.

Clause 81 – Resolution of health and safety issues

This clause establishes a process for the resolution of work health and safety issues.

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.

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 regulation.

Provision for default procedures in the Bill reflects the view that it is preferable that issue resolution procedures be agreed between the parties. Agreed procedures may accommodate the subtleties of the relationship between the parties, the workplace organisation and the types of hazards and risks that are likely to be the subject of issues.

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.

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

This clause 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 to achieve an effective resolution of the issue. 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.
Subclause 82(3) preserves the rights to cease unsafe work, or direct that unsafe work cease, under Division 5.6 of Part 5 when an inspector has been called in to assist with resolving a work health and safety issue under this clause.

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

Division 5.6 – Right to cease or direct cessation of unsafe work

This Division covers workers' rights to cease unsafe work and establishes HSRs' power to direct that unsafe work cease. These rights have been drafted in a way that maintains consistency with provisions dealing with the cessation of unsafe work under the *Fair Work Act 2009*. This is found in the exception to the definition of industrial action in section 19 of that Act.

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

This clause clarifies that 'ceasing work under this division' in this division includes ceasing or refusing to carry out work under clause 84, or, ceasing work on a direction under clause 85.

Clause 84 – Right of worker to cease unsafe work

This clause sets out the right of workers to cease unsafe work. A worker has the right to cease, or refuse to carry out, 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.

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

'Serious risk'

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

'Reasonable concern'

The requirement for the worker to have a 'reasonable concern' is intended to align with equivalent provisions under the *Fair Work Act*.
For this entitlement to apply, it will not be sufficient for a worker to simply assert that their action is based on a reasonable concern about a serious and immediate or imminent risk to his or her safety. A 'reasonable concern' for health or safety can only be a concern which is both reasonably held and which provides a reasonable or rational basis for the worker's action. A concern may be reasonable if it is not fanciful, illogical or irrational.

It is not necessary to establish an existing serious health or safety risk to the worker. The question is whether the worker's action was based on a reasonable concern for their health or safety arising from a serious and immediate risk, rather than the existence of such a risk.

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

This clause 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.

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.

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

Subclause 85(2) requires HSRs to consult with the relevant PCBU and attempt to resolve the work health or safety issue under Division 5.5 before giving a direction under this clause. However, these steps are not necessary if the risk is so serious and immediate or imminent that it is not reasonable to consult before giving the direction (subclause 85(3)). In that case, the consultation must be carried out as soon as possible after the direction is given (subclause 85(4)).

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

Subclause 85(6) provides that only an appropriately trained HSR may exercise the powers under this provision, that is, if the HSR has completed initial HSR training as set out under the regulations, whether for the HSR's current work group or another workgroup (including a work group of another PCBU), or, undertaken equivalent training in another jurisdiction under a corresponding WHS law.

Clause 86 – Worker to notify if ceases work

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

Clause 87 – Alternative work

This clause 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

This clause preserves workers' prescribed entitlements during any period for which work has ceased under this division. It does not apply if the worker has unreasonably failed to carry out

suitable alternative work as directed under clause 87 at the same or another workplace where that work was safe and appropriate for the worker to carry out.

Clause 89 – Request to regulator to appoint inspector to assist

This clause clarifies that inspectors may be called on to assist in resolving any issues arising in relation to a cessation of work by a HSR, PCBU or worker. A note to this clause clarifies that the issue resolution procedures in Division 5.5 can also be used to resolve an issue arising in relation to the cessation of work.

Division 5.7 – Provisional improvement notices

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

Clause 90 – Provisional improvement notices

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

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

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(2)). Subclause 69(2) provides that a HSR may also exercise powers and functions under the Bill in relation to another work group in some circumstances.

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

Subclause 90(3) requires HSRs to consult with the alleged contravenor or likely contravenor before issuing a provisional improvement notice.

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

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

Subclause 90(5) relates to the situation where an inspector may have already dealt with a matter by issuing or deciding not to issue an improvement notice or prohibition notice. In that case the HSR would have no power to issue a provisional improvement notice in relation to

the matter, unless the circumstances were materially different (e.g. the matter the HSR is proposing to remedy is no longer the same matter dealt with by the inspector).

Clause 91 – Provisional improvement notice to be in writing

This clause requires provisional improvement notices to be issued in writing.

Clause 92 – Contents of provisional improvement notice

This clause sets out the kind of information that must be contained in a provisional improvement notice, namely:

- that the HSR believes the person is contravening a provision of the Bill, or, has contravened a provision of the Bill in circumstances that make it likely that the contravention will continue or be repeated;
- the provision the HSR believes is being, or has been, contravened; and
- briefly, how the provision is being, or has been, contravened.

Importantly, a provisional improvement notice must also specify a date for compliance, which must be at least eight days after the notice is issued. The day on which the notice is issued does not count for this purpose.

Clause 93 – Provisional improvement notice may give directions to remedy contravention

This clause allows provisional improvement notices to specify certain kinds of directions about ways to remedy the contravention, or prevent the likely contravention, that is subject of the notice.

Clause 94 – Minor changes to provisional improvement notice

This clause enables HSRs to make minor changes to provisional improvement notices (for clarification, to correct errors or references, or, to reflect changes of address or other circumstances).

Clause 95 – Issue of provisional improvement notice

This clause requires provisional improvement notices to be served in the same way as improvement notices issued by inspectors (in accordance with s.209 of the Bill).

Clause 96 – Health and safety representative may cancel notice

This clause 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

This clause 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 (or part of the workplace) where work affected by the notice is carried out as soon as is practicable after being issued the notice.

The maximum penalty $5 000 in the case of an individual or $25 000 in the case of a body corporate. As set out in the note at the foot of subclause 97(1), strict liability applies to each physical element of this offence.

It is also an offence for a person to intentionally remove, destroy, damage or deface the notice while it is in force. Failing to do so is an offence and the maximum penalty $5 000 in the case of an individual or $25 000 in the case of a body corporate.

Although not specified, it is intended that there is *no* requirement to display notices that are stayed under the review proceedings set out in clause 100, as they would not be considered to be 'in force' for the period of the stay.

Clause 98 – Formal irregularities or defects in notice

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

This clause also ensures that provisional improvement notices are not invalid merely because of a failure to use the correct name of the person to whom the notice is issued if the notice sufficiently identifies the person.

Clause 99 – Offence to contravene a provisional improvement notice

This clause 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. Failure to comply with a provisional improvement notice within the time specified in the notice is an offence.

As set out in the note at the foot of subclause 99(2), strict liability applies to each physical element of this offence. The maximum penalty $50 000 in the case of an individual or $250 000 in the case of a body corporate.

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

This clause sets out a procedure to seek review by an inspector of provisional improvement notices. 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.

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)).

Clause 101 – Regulator to appoint inspector to review notice

This clause sets out the procedure that the regulator and the reviewing inspector must follow after a request for review is made.

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

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

This clause 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.

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

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

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)).

Subclause 102(2) requires the inspector to give a copy of their decision to the applicant for review and to the HSR who issued the notice.

Subclause 102(3) provides that a notice that has been confirmed (with or without modifications by an inspector) has the status of an improvement notice under the Bill.

Division 5.8 – Part not to apply to prisoners

Clause 103 – Part does not apply to prisoners

This clause provides that Part 5 of the Bill does not apply to a worker who is a prisoner in custody in a prison or police gaol.

A note to this clause clarifies that the work health and safety of detainees in correctional centres and elsewhere is dealt with in the *Corrections Management Act 2007*.

Part 6 – Discriminatory, coercive and misleading conduct

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

These provisions complement the remedies contained in other federal and state or territory laws that deal with discrimination including the General Protections in the *Fair Work Act*.

The purpose of these provisions is to encourage engagement in work health and safety activities and the proper exercise of roles and powers under the Bill by providing protection for those engaged in such roles and activities from being subject to discrimination or other forms of coercion because they are so engaged. They clearly signal that discrimination and other forms of coercion that may have the effect of deterring people from being involved in work health and safety activities or exercising work health and safety rights are unlawful and may attract penalties and other remedies.

Division 6.1 – Prohibition of discriminatory, coercive or misleading conduct

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

Clause 104 – Prohibition of discriminatory conduct

This clause provides that it is an offence for a person to engage in discriminatory conduct for a prohibited reason. What is *discriminatory conduct* is outlined in clause 105 and *prohibited reasons* are outlined in clause 106.

Subclause 104(2) provides that a person will only commit an offence if a reason referred to in clause 106 was the dominant reason for the discriminatory conduct. The Bill contains a rebuttable presumption that once a prohibited reason is proven it will be taken to be the dominant reason (see subclause 110(1)).

A note alerts the reader that civil proceedings relating to a breach of clause 104 may be brought under Division 6.3 of the Bill.

Subclause 104(3) provides that, for the purposes of the *Criminal Code 2002* in relation to an offence under subsection (1), intention is the fault element for the physical element of engaging in conduct.

Clause 105 – What is *discriminatory conduct*

Subclause 105(1) sets out what actions will be discriminatory conduct under the Bill. The actions include:

- certain actions that may be taken in relation to a worker (e.g. dismissing a worker or detrimentally altering the position of a worker (paragraph 105(1)(a)));
- certain actions that may be taken in relation to a prospective worker (e.g. a treating one job applicant less favourably than another (paragraph 105(1)(b)); and
- certain actions relating to commercial arrangements (e.g. refusing to enter or terminating a contract with a supplier of materials to a workplace (paragraphs 105(1)(c) and 105(1)(d))).

Subclause 105(2) provides that, for the purposes of this part, a person also engages in discriminatory conduct if the person organises to take any action referred to in subclause 105(1) or threatens to organise or take that action.

In view of the changing nature of work relationships, this clause is cast in wide terms to protect all those who carry out work, or would do so but for the discriminatory conduct, whether under employment-like arrangements or commercial arrangements.

Clause 106 – What is a *prohibited reason*

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

This clause sets out when discriminatory conduct will be engaged in for a prohibited reason. The prohibited reasons include discriminatory conduct engaged in because a worker, prospective worker or other person referred to in clause 105(1)(c) or (d):

- is, has been or proposes to be a HSR or a member of a health and safety committee;
- undertakes, has undertaken or proposes to undertake another role under the Bill;
- exercises a power or performs a function or has exercised a power or performed a function or proposes to exercise a power or perform a function as a HSR or as a member of a health and safety committee;
- exercises, has exercised or proposes to exercise a power under the Bill or exercises or proposes to exercise a power under the Bill in a particular way;
- performs, has performed or proposes to perform a function under the Bill or performs, has performed or proposes to perform a function under the Bill in a particular way;
- refrains from, has refrained from or proposes to refrain from exercising a power or performing a function under the Bill or refrains from, has refrained from or proposes to refrain from exercising a power or performing a function under the Bill in a particular way;
- assists or has assisted or proposes to assist, or gives or has given or proposes to give any information to any person exercising a power or performing a function under the Bill;
- raises or has raised or proposes to raise an issue or concern about work health and safety with a person listed at subclause 106(h)(i)-(viii);
- is involved in, has been involved in or proposes to be involved in resolving a work health and safety issue under the Bill; or
- is taking action, has taken action or proposes to take action to seek compliance by any person with any duty or obligation under this Bill.

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

This clause provides that it is an offence for a person to request, instruct, induce, encourage, authorise or assist another person to engage in discriminatory conduct in contravention of clause 104. The maximum penalty for this offence is $100 000 in the case of an individual or $500 000 in the case of a body corporate.

This clause ensures that a person who has organised or encouraged other persons to discriminate against a person cannot avoid being potentially penalised under the Bill because they have not directly engaged in the conduct themselves.

A note alerts the reader that civil proceedings relating to a breach of clause 107 may be brought under Division 6.3 of Part 6 in certain circumstances.

Subclause 107(2) provides that, for the purposes of the *Criminal Code 2002* in relation to an offence under subsection (1), intention is the fault element for the physical element of requesting, instructing, inducing, encouraging, authorising, or assisting another person to engage in conduct.

Clause 108 – Prohibition of coercion or inducement

This clause prohibits various forms of coercive conduct taken, or threatened to be taken, intentionally to intimidate, force, or cause a person to act or to fail to act in relation to a work health and safety role.

Subclause 108(1) provides that a person must not organise or take, or threaten to organise or take, any action against another person with the intention to coerce or induce that person or another (third) person to do, not do or propose to do the things described in paragraphs 108(1)(a)–(d). These things include: exercising or not exercising a power under the Bill; performing or not performing a function under the Bill; exercising or not exercising a power or perform a function in a particular way; and refraining from seeking, or continuing to undertake, a role under the Bill.

Failure to comply with this clause is an offence and the maximum penalty is $100 000 in the case of an individual or $500 000 in the case of a body corporate.

A note alerts the reader that civil proceedings relating to a breach of clause 108 may be brought under Division 6.3 of Part 6 of the Bill in certain circumstances.

Subclause 108(2) clarifies that a reference in the clause to taking action or threatening to take action against a person includes a reference to not taking a particular action or threatening not to take a particular action (e.g. threatening not to promote a person if they exercise a power under the Bill).

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

As set out in subclause 108(4) an *emergency services worker* means a police officer, or, a member of an emergency service (ambulance service, fire brigade, rural fire service or the SES).

Clause 109 – Misrepresentation

This clause provides that it is an offence for a person to knowingly or recklessly make a false or misleading representation to another person about their rights or obligations under the Bill, their ability to initiate or participate in a process or proceeding under the Bill, or, their ability to make a complaint or enquiry to a person or body empowered under the Bill to seek compliance with this Bill.

The maximum penalty for this offence is $100 000 in the case of an individual or $500 000 in the case of a body corporate.

Subclause 109(2) provides that subclause 109(1) does not apply if the person to whom the representation is made would not be expected to rely on it.

Division 6.2 – Criminal proceedings in relation to discriminatory conduct

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

Clause 110 – Proof of discriminatory conduct

This clause clarifies the way that the onus of proof works in criminal proceedings for discriminatory conduct. An offence is committed only where the prohibited reason for the discriminatory conduct is the dominant reason (see subclause 104(2)).

Subclause 110(1) provides that if, in a proceeding for an offence against clause 104 or clause 107, the prosecution provides that the discriminatory conduct was engaged in, that a circumstance referred to in clause 106(a) to (j) existed at the time that conduct was engaged in, and, adduces evidence that the discriminatory conduct was engaged in for a prohibited reason, subclause 110(2) applies. Subclause 110(2) then provides that the reason alleged for the discriminatory conduct is presumed to be the dominant reason for that conduct unless the accused proves, on the balance of probabilities, that the reason was not the dominant reason for the conduct.

This approach is a reversal of the onus of proof applicable to criminal proceedings. Generally, the prosecution is required to establish beyond reasonable doubt that the action complained of was carried out for a particular reason or with a particular intent. However, subclause 110(1) provides that once the prosecution has proven that a person's discriminatory conduct was motivated by a prohibited reason, to avoid conviction that person must then establish, on the balance of probabilities, that the prohibited reason was not the dominant reason for the discriminatory conduct. In the absence of such a provision it would be extremely difficult, if not impossible, to establish that a prohibited reason was the dominant reason as the intention of the person who engages in discriminatory conduct will be known to that person alone.

Subclause 110(3) is an avoidance of doubt provision stating that the burden of proof on the defendant outlined in subclause 110(2) is a legal, not an evidential, burden of proof. The legal burden means the burden of proving the existence of a matter.

Clause 111 – Order for compensation or reinstatement

This clause sets out the kind of orders a court may make in a proceeding where a person is convicted or found guilty of an offence under clause 104 or clause 107. In addition to imposing a penalty, a court may make an order:

- that the offender pay, within a specified period to the person who was the subject of the discriminatory conduct, compensation that the court considers appropriate;
- that the affected person be reinstated or re-employed in his or her former position or, if that is not available, in a similar position; or
- the affected person be employed in the position they applied for or in a similar position.

A court may make one or more of these orders.

Division 6.3 – Civil proceedings in relation to discriminatory or coercive conduct

Division 6.3 enables a person affected by discriminatory or other coercive conduct to seek a range of civil remedies. Civil proceedings under Division 6.3 are additional to criminal proceedings under Divisions 6.1 and 6.2 of the Bill.

Clause 112 – Civil proceedings in relation to engaging in or inducing discriminatory or coercive conduct

Subclause 112(1) provides that an eligible person may apply to the Supreme Court for an order provided for in subclause 112(3). 'Eligible person' is defined in subclause 112(6) as a person affected by the contravention or a person authorised to be their representative. The person's representative may be any person, including a union representative.

Subclause 112(2) outlines the persons against whom a civil order may be sought and states that the court may make one or more orders provided for in subclause 112(3) as set out.

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

Subclause 112(4) provides that, for the purposes of clause 112, a person may be found to have engaged in discriminatory conduct for a prohibited reason only if a reason referred to in clause 106 was a substantial reason for the conduct. This is a lower threshold than that applicable to criminal proceedings where the prohibited reason must be the dominant reason.

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

Clause 113 – Procedure for civil actions for discriminatory conduct

Subclause 113(1) imposes a time limit on civil proceedings brought under clause 112. A proceeding under clause 112 must be commenced no later than one year after the date on which the applicant knew or ought to have known that the cause of action accrued.

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

Subclause 113(2) provides that , in relation to conduct referred to in clause 112(2)(a) or (b), if the plaintiff alleges a prohibited reason for discriminatory conduct, that reason is presumed to be a substantial reason for that conduct unless the defendant proves otherwise on the balance of probabilities.

Subclause 113(3) provides that it is a defence to a civil proceeding in respect of engaging in or encouraging discriminatory conduct if the defendant proves that the conduct was reasonable in the circumstances and a substantial reason for the conduct was to comply with the requirements of the Bill or a corresponding work health and safety law.

Subclauses 113(2)–(4) reverse the onus of proof applicable to civil proceedings. Generally, the plaintiff is required to establish on the balance of probabilities that the action complained of was carried out for a particular reason or with a particular intent. However, subclause 113(2) provides that once the plaintiff has proven that a person's discriminatory conduct is motivated by a prohibited reason, to avoid civil consequences that person (the defendant) must then establish, on the balance of probabilities, that the prohibited reason was not a substantial reason for the discriminatory conduct.

Subclause 113(4) is an avoidance of doubt provision and provides that the burden of proof on the defendant outlined in subclauses 113(2) and 113(3) is a legal, not an evidential, burden of proof. The legal burden of proof means the burden of proving the existence of a matter.

Division 6.4 – General

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

Clause 114 – General provisions relating to orders

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

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

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

Clause 115 – Prohibition of multiple actions

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

- commence a proceeding under Division 6.3 of Part 6 if the person has commenced a proceeding or made an application or complaint in relation to the same matter under a law of the Commonwealth or a State and the action is still on foot;
- recover any compensation under Division 6.3 if the person has received compensation for the matter under a law of the Commonwealth or a State; or
- commence or continue with an application under Division 6.3 if the person has failed in a proceeding, application or complaint in relation to the same matter under another law. This does not include proceedings, applications or complaints relating to workers' compensation.

Part 7 – Workplace entry by WHS entry permit holders

This Part confers rights on a person who holds an office in, or is an employee of, a union (WHS entry permit holders) to enter workplaces and exercise certain powers while at those workplaces. This Part also sets out requirements of WHS entry permit holders who are exercising or proposing to exercise a right of entry and describes conduct that must not be engaged in by WHS entry permit holders or other persons at a workplace in relation to WHS entry permit holders.

Provisions within this Part have the potential to engage section 12(a) of the *Human Rights Act 2004*, which protects the right of individuals not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. As such, rights under this Part are subject to explicit protections in the Bill (such as notice requirements) and must also be read and applied in the context of the Privacy Act.

Machinery provisions necessary for the operation of this Part, such as the issuing of WHS entry permits, are included in Division 7.5. Division 7.6 includes procedures for dealing with disputes that arises about the exercise or purported exercise of a right of entry under the Bill.

The penalties imposed in Part 7 are civil only and the civil penalty proceedings machinery provisions are included in Part 13 – Legal Proceedings.

Division 7.1 – Introductory

Clause 116 – Definitions

This clause of Division 7.1 contains the key definitions for Part 7.

Official of a union

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

Relevant person conducting a business or undertaking

A *relevant PCBU* is used throughout Part 7 and is defined to mean a person conducting a business or undertaking in relation to which a WHS entry permit holder is exercising, or proposes to exercise, a right of entry.

There may be more than one *relevant PCBU* at a workplace that a WHS entry permit holder is exercising, or proposes to exercise, a right of entry.

Relevant union

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

Relevant worker

The term *relevant worker* is used in this Part to describe a worker whose workplace a WHS entry permit holder has a right to enter. A relevant worker is one:

- who is a member, or potential member, of a union that the WHS entry permit holder represents;
- whose industrial interests the relevant union is entitled to represent; and
- who works at the workplace at which the WHS entry permit holder is exercising, or intending to exercise, a right of entry under this Part.

Division 7.2 – Entry to inquire into suspected contraventions

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

Clause 117 – Entry to inquire into suspected contraventions

This clause allows a WHS entry permit holder to enter a workplace and exercise any of the rights contained in clause 118 in order to inquire into a suspected contravention of the Bill at that workplace. These rights may only be exercised in relation to suspected contraventions that relate to, or affect, a relevant worker (as defined in clause 116).

Subclause 117(2) requires the WHS entry permit holder to reasonably suspect before entering the workplace that the contravention has occurred or is occurring.

If this suspicion is disputed by another party, the onus is on the WHS entry permit holder to prove that the suspicion is reasonable.

Clause 118 – Rights that may be exercised while at workplace

This clause lists the rights that a WHS entry permit holder may exercise upon entering a workplace under clause 117 to inquire into a suspected contravention. A WHS permit holder may do any of the following in relation to the suspected contravention of this Bill:

- inspect any thing relevant to the suspected contravention including work systems, plant, substances, structure etc;
- consult with relevant workers or the relevant PCBU about the suspected contravention;
- require the relevant PCBU to allow the WHS entry permit holder to inspect and make copies of any document that is directly relevant to the suspected contravention that is kept at the workplace or accessible from a computer at the workplace, other than an employee record; or
- warn any person of a serious risk to his or health or safety emanating from an immediate or imminent exposure to a hazard that the WHS entry permit holder reasonably believes that person is exposed to.

Paragraph 118(2) provides that the relevant PCBU must comply with the request to provide documents related to the suspected contravention unless allowing the WHS entry permit holder to access a document would contravene a Commonwealth or State law.

Subclause 118(3) provides that failure or refusal of a PCBU to comply with a request of a WHS entry permit holder to inspect documents under clause 118(1)(d) is a civil penalty provision. It is a defence if the PCBU can show they had a reasonable excuse for not complying. A reasonable excuse in such circumstances might be a belief that to provide access to the documents to the WHS entry permit holder would contravene another law. The maximum penalty for this provision is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

The approach in subclauses 118(3) and (4) reverses the onus of proof generally applicable to civil proceedings because only the PCBU is in a position to show whether the reason they refused or failed to do something was reasonable. It would be too onerous to require the plaintiff in civil proceedings to prove that a refusal or failure to comply with a request of a WHS entry permit holder was unreasonable as they may not be privy to the reasons for that refusal or failure to comply.

Subclause 118(4) clarifies that the burden of proof on the defendant under subclause 118(3) is an evidential burden.

Legislative notes to this provision clarify that:

- *evidential burden* is as set out in section 58 of the *Criminal Code*; and
- at least 24 hours notice is required for an entry to a workplace to inspect employee records or other documents held by someone other than a person conducting a business or undertaking.

A further legislative note to this provision provides that the use or disclosure of personal information obtained during entry to a workplace to inquire into a suspected contravention is regulated under the *Privacy Act 1988 (Cwth).*

Clause 119 – Notice of entry

Subclause 119(1) requires a WHS entry permit holder to provide notice, in accordance with the regulations, to the relevant PCBU and the person with management or control of the workplace as soon as is reasonably practicable after entering a workplace under clause 117 to inquire into a suspected contravention. The contents of the notice must comply with the regulations.

However, subclause 119(2) provides that a WHS entry permit holder is not required to comply with the notice requirements in subclause 119(1), including to provide any or all of the information required by the regulations, if to do so:

- would defeat the purpose of the entry to the workplace; or
- would cause the WHS entry permit holder to be unreasonably delayed in their inquiry in an urgent case (i.e. in an emergency situation).

Subclause 119(3) provides that the notice requirements in subclause 119(1) do not apply to entry to a workplace under clause 120 to inspect or make copies of employee records or records or documents directly relevant to a suspected contravention that are not held by the relevant PCBU.

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

This clause authorises a WHS entry permit holder to enter a workplace to inspect, or make copies of, employee records that are directly relevant to a suspected contravention or other documents directly relevant to a suspected contravention that are held by someone other than the relevant PCBU. This applies if a WHS entry permit holder is entitled to enter the workplace under clause 117 to inquire into a suspected contravention of the Bill.

Subclause 120(3) requires the WHS entry permit holder to provide notice, in accordance with the regulations, of his or her proposed entry to inspect or make copies of these documents to the relevant PCBU and the person who has possession of the documents.

Subclauses 120(4) and (5) require the entry notice to comply with particulars prescribed in the regulations and to be given during the normal business hours of the workplace to be entered at least 24 hours, but not more than 14 days, before the proposed entry (subclause 119(4).

A legislative note to this provision explains that the use or disclosure of personal information obtained by a WHS entry permit holder during entry is regulated under the *Privacy Act 1988*.

Division 7.3 – Entry to consult and advise workers

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

Clause 121 – Entry to consult and advise workers

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

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

Clause 122 – Notice of entry

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

Division 7.4 – Requirements for WHS entry permit holders

This Division sets out the mandatory requirements that WHS permit holders must meet when exercising or proposing to exercise a right under Division 7.2 and 7.3 of the Bill.

Clause 123 – Contravening WHS entry permit conditions

The regulator may impose conditions on a WHS entry permit holder at the time of issuing the permit (e.g. to provide a longer period of notice for a specific PCBU than otherwise required under the Bill (see clause 135)). Clause 123 requires a permit holder to comply with any such condition and is a civil penalty provision with a maximum penalty of $10 000.

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

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

This clause requires a WHS entry permit holder to also hold an entry permit under the *Fair Work Act* to enter a workplace. This clause is a civil penalty provision and the maximum penalty is $10 000.

Clause 125 – WHS entry permit to be available for inspection

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

This clause is a civil penalty provision and the maximum penalty is $10 000.

Clause 126 – When right may be exercised

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

This clause is a civil penalty provision and the maximum penalty is $10 000.

Clause 127 – Where the right may be exercised

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

Clause 128 – Work health and safety requirements

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

This clause is a civil penalty provision and the maximum penalty is $10 000.

Clause 129 – Residential premises

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

This clause is a civil penalty provision and the maximum penalty is $10 000.

Clause 130 – WHS entry permit-holder not required to disclose names of workers

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

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

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

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

Division 7.5 – WHS entry permits

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

Clause 131 – Application for WHS entry permit

This clause allows a union to apply for a WHS entry permit to be issued to an official of the union.

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

Clause 132 – Consideration of application

This clause lists the matters the regulator, when considering whether to issue a WHS entry permit, must take into account when determining an application. This includes the objects of the Bill (in clause 3) and the object of enabling unions to enter workplaces for the purposes of ensuring the health and safety of workers.

Clause 133 – Eligibility criteria

This clause provides that the regulator must not issue a WHS entry permit unless satisfied of the matters listed in paragraphs (a)–(c).

The requirement in paragraphs 133(c) that the union official will hold an entry permit issued under the Fair Work Act has been included to deal with situations where a person has applied for such an entry permit and is simply waiting for it to be issued.

Clause 134 – Issue of WHS entry permit

This clause allows the regulator to issue a WHS entry permit if it has taken into account the matters listed in clause 132 and 133 and is satisfied about the matters in clause 133.

Clause 135 – Conditions on WHS entry permit

This clause allows the regulator to impose specific conditions on a WHS entry permit when it is issued.

Clause 136 – Term of WHS entry permit

This clause states that the term of a WHS entry permit is 3 years from the date it is issued.

Clause 137 – Expiry of WHS entry permit

This clause sets out when a WHS entry permit expires. Subclause 137(1) provides that unless it is revoked it will expire when the first of the following occurs:

- three years elapses since it was issued;

- the relevant industrial relations entry permit held by the WHS entry permit holder expires;
- the WHS entry permit holder ceases to be an official of the relevant union; or
- the relevant union ceases to be an organisation registered under the *Fair Work (Registered Organisations) Act 2009*.

Subclause 137(2) makes it clear that an application for the issue of a subsequent WHS entry permit may be submitted before or after the current permit expires.

Clause 138 – Application to revoke WHS entry permit

This clause allows:

- a relevant PCBU; or
- any other person in relation to whom the WHS entry permit holder has exercised or purported to exercise a right under this part; or
- any other person affected by the exercise or purported exercise of a right of entry of the WHS entry permit holder;

to apply to the regulator for the revocation of the WHS entry holder's permit.

Subclause 138(2) provides the grounds for making an application to revoke the WHS entry permit holder's permit. These include:

- the permit holder no longer satisfies the eligibility criteria for a WHS entry permit or for an entry permit under a corresponding work health and safety law, or the *Fair Work Act* or the Commonwealth *Workplace Relations Act 1996*;
- the permit holder has contravened any condition of the WHS entry permit they currently hold;
- the permit holder has acted, or purported to act, in an improper manner in the exercise of any right under the Bill; or
- the permit holder has intentionally hindered or obstructed a person conducting the business or undertaking or workers at a workplace when exercising, or purporting to exercise, a right of entry under Part 7 of the Bill.

The applicant is required to give written notice of the application, including the grounds on which it is made, to the WHS entry permit holder to whom it relates and the relevant union.

Both the WHS entry permit holder and the relevant union will be parties to the application for revocation (subclause 138(4)).

Clause 139 – Regulator must permit WHS entry permit holder to show cause

This clause provides that if the regulator receives an application for revocation of a WHS entry permit and believes that a ground for revocation exists, the regulator must give notice to the WHS entry permit holder of this, including details of the application. The regulator must also advise the WHS entry permit holder of his or her right to provide reasons (within 21 days) as to why the WHS entry permit should not be revoked.

Subclause 139(1)(b) requires the regulator to suspend a WHS entry permit while deciding the application for revocation if it considers that suspension is appropriate. The WHS entry permit holder must be notified if this occurs.

Clause 140 – Determination of application

This clause allows the regulator to make an order to revoke a WHS entry permit or an alternative order, such as imposing conditions on or suspending a WHS entry permit if satisfied on the balance of probabilities of the matters listed in subclause 138(2). Subclause 140(2) lists a number of matters that the regulator must take into account when deciding the appropriate action to take.

In addition to revoking a current WHS entry permit, the regulator may make an order about the issuing of future WHS entry permits to the person whose WHS entry permit is revoked. The regulator can also impose conditions on a WHS entry permit, suspend an entry permit or make another order imposing any alternative action the regulator considers appropriate.

Division 7.6 – Dealing with disputes

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

Clause 141 – Application for assistance of inspector to resolve dispute

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

An inspector may then attend the workplace to assist in resolving the dispute. However, an inspector is not empowered to make any determination about the dispute.

Clause 142 – Regulator may deal with a dispute about a right of entry under this Act

This clause allows the regulator, on its own initiative or on application, to deal with a dispute about a WHS entry permit holder's exercise, or purported exercise, of a right of entry.

Subclause 142(1) specifically notes that this would include a dispute about whether a request by the relevant PCBU or the person with management or control of the workplace that a WHS entry permit holder comply with work health and safety requirements is reasonable. It would also include, for example, a dispute about a refusal by a PCBU to allow the WHS permit holder to exercise rights.

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

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

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

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

Clause 143 – Contravening order made to deal with dispute

This clause provides that if the regulator makes an order following arbitration of a right of entry dispute a person could be liable to a civil penalty if they contravene that order. This clause is a civil penalty provision and the maximum penalty is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

Division 7.7 – Prohibitions

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

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

Clauses 144 and 145 prohibit a person taking certain actions against a WHS entry permit holder who is exercising rights in accordance with this Part. Both of these clauses are civil penalty provisions.

This clause prohibits a person from unreasonably refusing or delaying entry to a workplace that the WHS entry permit holder is entitled under the Part to enter.

Subclause 144(2) provides that if civil proceedings are brought against a person for a contravention of this provision the evidential burden is on them, the defendant, to show that they had a reasonable excuse for refusing or delaying the entry of the WHS entry permit holder. A reasonable excuse in such an instance might be, for example, that the person reasonably believed that the WHS entry permit holder did not hold the correct entry permits.

This is a civil penalty provision and the maximum penalty is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

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

This clause prohibits a person from intentionally and unreasonably hindering or obstructing a WHS entry permit holder who is exercising a right of entry or any other right conferred on them under this Part. This would cover behaviour such as making repeated and excessive requests that a WHS entry permit holder show his or her entry permit or failing to provide access to records that the permit holder is entitled to inspect.

This is a civil penalty provision and the maximum penalty is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

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

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

This clause is a civil penalty provision and the maximum penalty is $10 000.

Clause 147 – Misrepresentations about things authorised by this part

This clause provides that a person must not take action with the intention of giving the impression, or reckless as to whether they give the impression, that the action is authorised by the Part when it is not the case. An example of this behaviour would include where a person represents himself or herself as a permit holder when he or she does not hold a valid entry permit.

However, subclause 147(2) provides that a person has not contravened this clause if, when doing that thing, they reasonably believed that it was authorised by the Part. For instance, if a WHS entry permit holder reasonably believed that they were exercising a right of entry in an area of the workplace where relevant workers worked or that affected the health and safety of those workers.

This is a civil penalty provision and the maximum penalty is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

Clause 148 – Unauthorised use or disclosure of information or documents

This clause provides that a person must not use or disclose information or documents obtained by a WHS entry permit holder when inquiring into a suspected contravention.

This clause is intended to operate to prevent the use or disclosure of the information or documents for a purpose other than that for which they were acquired. The exceptions at (a) to (e) are the only other authorised reasons for use or disclosure.

Subclause 148(a) authorises use or disclosure if the person reasonably believes that it is necessary to lessen or prevent a serious risk to a person's health or safety or a serious threat to public health or safety.

Subclause 148(b) authorises use or disclosure as part of an investigation of a suspected unlawful activity or in the reporting of concerns to relevant persons or authorities of concerns of suspected unlawful activity.

Subclause 148(c) authorises use or disclosure if it is required or authorised by or under law.

Subclause 148(d) authorises use or disclosure if the persons doing so believes it is reasonably necessary for an enforcement body (as defined in the *Privacy Act*) to do a number of things such as prevent, detect, investigate, prosecute or punish a criminal offence or breach of a law.

Subclause 148(e) provides that disclosure or use is also authorised if it is made or done with the consent of the individual to whom the information relates.

This clause mirrors section 504 of the *Fair Work Act*.

This is a civil penalty provision and the maximum penalty is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

Division 7.8 – General

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

Clause 149 – Return of WHS entry permits

If a person's WHS entry permit is revoked, suspended or expires, clause 149 requires them to return it to the regulator within 14 days.

This is a civil penalty provision and the maximum penalty is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

Subclause 149(2) provides that at the end of a suspension period, the regulator must return any WHS entry permit that has not expired to the WHS entry permit holder if they, or the union they represent, applies for its return.

Clause 150 – Union to provide information to regulator

This clause requires the relevant union to advise the regulator if a WHS entry permit holder resigns from or otherwise leaves the union, has a *Fair Work Act* or other relevant industrial relations law entry permit suspended or revoked, or if the union ceases to be registered, or taken to be registered, under the *Fair Work (Registered Organisations) Act*.

A civil penalty may be imposed if the union does not comply with this clause. The maximum penalty is $5 000 in the case of an individual or $25 000 in the case of a body corporate.

Clause 151 – Register of WHS entry permit holders

This clause requires the regulator to maintain an up-to-date, publicly accessible register of all WHS entry permit holders in the jurisdiction.

The regulations may provide for the particulars of the register.

Part 8 – The regulator

Division 8.1 – Functions of regulator

This Division sets out the regulator's functions and allows additional functions to be prescribed by regulations. This Division also establishes the regulator's ability to delegate powers and functions under the Bill and to obtain information.

Other functions and powers of the regulator are included elsewhere under the Bill (e.g. powers and functions in relation to incident notification, inspector notices and WHS undertakings).

Clause 152 – Functions of regulator

This clause lists the broad areas in which the regulator has functions.

Functions set out in paragraphs 152(a)–(d) include advising and making recommendations to the Minister, monitoring and enforcing compliance and providing work health and safety advice and information. Paragraphs 152(e)–(g) describe the functions of the regulator in fostering and promoting work health and safety. Paragraph 152(h) enables the regulator to conduct and defend legal proceedings under this Bill.

Paragraph 152(i) is a catchall provision that clarifies that the regulator has any other function conferred on it under the Bill or another territory law.

Clause 153 – Powers of regulator

This clause confers on the regulator all the powers and functions that an inspector has under the Bill.

A note to the clause clarifies that, under section 196 of the *Legislation Act 2001*, a provision of a law that gives a function to an entity also gives the entity the powers necessary and convenient to exercise the function.

Clause 154 – Delegation by regulator

This clause allows the regulator to delegate the regulator's powers and functions under the Bill, or another Territory law, to any person.

A note to this clause clarifies that, under Part 19.4 of the *Legislation Act 2001*, a delegation must be in writing, the power to delegate may not be delegated, a delegation may be amended or revoked and the delegator may exercise a power or function that has been delegated, despite the delegation.

Division 8.2 – Powers of regulator to obtain information

Powers under this Division are intended to facilitate the regulator's function of monitoring and enforcing compliance with the Bill and ensure effective regulatory coverage of work health and safety matters (paragraph 152(b)). Provisions have been designed to provide

robust powers of inquiry and questioning subject to appropriate checks and balances to ensure procedural fairness.

Powers under this Division are only available if the regulator has reasonable grounds to believe that a person is capable of giving information, providing documents or giving evidence in relation to a possible contravention of the Bill or that will assist the regulator to monitor or enforce compliance under the Bill. These powers are only exercisable by way of written notice, which must set out the recipient's rights under the Bill (e.g. entitlement to legal professional privilege and the 'derivative use immunity').

Additionally, powers to require a person to appear before the regulator to give evidence are only exercisable if the regulator has taken all reasonable steps to obtain the relevant information by other means available under the clause but has been unable to do so. The time and place specified in the notice must be reasonable in the circumstances, including taking into account the circumstances of the person required to appear.

Clause 155 – Powers of regulator to obtain information

This clause sets out the powers of the regulator to obtain information from a person in circumstances where the regulator has reasonable grounds to believe that the person is capable of:

- giving information;
- producing documents; or
- giving evidence;

in relation to a possible contravention of the Bill or that will assist the regulator to monitor or enforce compliance with the Bill.

Subclause 155(2) requires the regulator to exercise these powers by written notice served on the person and sets out what the regulator can require of that person and the manner in which it should be provided to the regulator.

Subclause 155(3) sets out the content requirements for the written notice, which must include statements to the effect that:

- the requirement is made under this clause;
- a failure to comply with a requirement is an offence;
- the person is entitled, for some notices and if they are an individual, to the effect of clause 172 of the Bill;
- the person is entitled to claim legal professional privilege (if applicable); and
- if required to appear— the person is entitled to attend with a lawyer (subparagraph 155(3)(c)(ii)).

Additional pre-requisites apply if the regulator wishes to obtain evidence from a person by requiring them to appear before a person appointed by the regulator (subclause 155(4)). First, the regulator cannot require a person to appear before the nominated person unless the regulator has first taken all reasonable steps to obtain the information by other means (i.e. by requiring production of documents or records etc).

Secondly, if the person is required to appear in person, then the day, time and place specified by the regulator must be reasonable in all the circumstances (paragraph 155(2)(c)).

Subclause 155(5) prohibits a person from refusing or failing to comply with a requirement under clause 155 without a reasonable excuse. Subclause 155(6) clarifies that this places an evidential burden on the accused to show a reasonable excuse. The maximum penalty for this offence is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

A note at the foot of subclause 155(5) clarifies that strict liability applies to each physical element of this offence.

Subclause 155(7) makes it clear that the provisions dealing with self-incrimination, including the use and derivative immunity, apply to a requirement made under this clause, with any necessary changes.

Part 9 – Securing compliance

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

Division 9.1 – Appointment of inspectors

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

Clause 156 – Appointment of inspectors

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

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

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

Clause 157 – Identity cards

This clause provides for the issue, use and return of inspectors' identity cards. The card must include the person's name, a statement that the person is an inspector, a recent photograph of the person, the card's issue and expiry dates, and, anything else prescribed by regulation.

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

Further, if a person to whom an identity card has been issued ceases to be an inspector, the person must return the identity card to the regulator as soon as practicable.

Clause 158 – Accountability of inspectors

Subclause 158(1) requires inspectors to give written notice to the regulator of all interests, pecuniary or otherwise, that the inspector has, or acquires, and that conflict or could conflict with the proper performance of the inspector's functions.

Subclause 158(2) requires the regulator to consider whether the inspector should not deal, or should no longer deal, with an affected matter and direct the inspector accordingly, if the regulator becomes aware that the inspector has a potential conflict of interest in relation to that matter and the regulator considers that the inspector should not deal, or should no longer deal, with the matter.

Clause 159 – Suspension and ending of appointment of inspectors

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

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

Division 9.2 – Functions and powers of inspectors

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

Clause 160 – Functions and powers of inspectors

This clause lists the functions and powers of inspectors and cross-references a number of important compliance powers which are detailed elsewhere (e.g. the power to issue notices).

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

Clause 161 – Conditions on inspectors' compliance powers

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

Clause 162 – Inspectors subject to regulator's directions

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

Division 9.3 – Powers relating to entry

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

Subdivision 9.3.1 – General powers of entry.

Clause 163 – Powers of entry

Subclause 163(1) provides for entry at any time by an inspector into any place that is, or the inspector reasonably suspects is, a workplace.

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

Subclause 163(3) requires an inspector to immediately leave a place that turns out not to be a workplace. The note following the clause explains that this requirement would not prevent an inspector from passing through residential premises if this is necessary to gain access to a workplace under paragraph 170(c).

Subclause 163(4) provides for entry by an inspector under a search warrant.

Clause 164 – Notification of entry

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

Subclause 164(2) requires the inspector, as soon as practicable after entering a workplace or suspected workplace, to take all reasonable steps to notify relevant persons of his or her entry and the purpose of entry. Those persons are:

- the relevant PCBU in relation to which the inspector is exercising the power of entry (paragraph 164(2)(a)); and
- the person with management or control of the workplace (paragraph 164(2)(b)); and
- any HSR for either of these PCBUs (paragraph 164(2)(c)).

The requirements in paragraphs 164(2)(a) and (b) address multi-business worksites where the worksite is managed by some sort of management company (e.g. principal contractor on a construction site). In those situations, the management company, as well as any other PCBUs

whose operations are proposed to be inspected, are subject to the notification requirements in this provision.

Subclause 164(3) provides that notification is not required if it would defeat the purpose for which the place was entered or would cause unreasonable delay (e.g. during an emergency).

Subclause 164(4) provides that, in this clause, relevant person conducting a business or undertaking means the person conducting a business or undertaking in relation to which the inspector is exercising the powers of entry.

Special notification rules apply to entry on warrant (see clause 168).

Clause 165 – General powers on entry

Subclause 165(1) sets out inspectors' general powers on entry. The list of powers reflects a consolidation of powers currently included in work health and safety laws across Australia.

Paragraph 165(1)(a) confers a general power on inspectors to inspect, examine and make inquiries at workplaces, which is supported by more specific powers to conduct various tests and analyses in paragraphs 165(1)(b)–(e).

Paragraph 165(1)(g) allows inspectors to exercise any compliance power or other power that is reasonably necessary to be exercised by the inspector for purposes of the Bill. This provision must be read subject to Subdivisions 3 and 4 of Part 9, which place express limitations around the exercise of specific powers (e.g. production of documents).

Requirements for reasonable help

Paragraph 165(1)(f) allows an inspector to require a person at the workplace to provide reasonable help to exercise the inspector's powers in paragraphs (a)–(e).

This clause provides, in very wide terms, for an inspector to require any person at a workplace to assist him or her in the exercise of their compliance powers. Although this could include an individual such as a self-employed person or member of the public at the workplace, the request would have to be reasonable in all the circumstances to fall within the scope of the power.

Limits on what may be required

Inspectors may only require reasonable help to be provided if the required help is—for example:

- connected with or for the purpose of exercising a compliance power
- reasonably required to assist in the exercise of the inspector's compliance powers
- reasonable in all the circumstances, or
- connected to the workplace where the required assistance is being sought.

Subclause 165(2) makes it an offence for a person to refuse to provide reasonable help required by an inspector under this clause without a reasonable excuse. The maximum penalty is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

A note at the foot of subclause 165(2) clarifies that strict liability applies to each physical element of this offence.

What will be a reasonable excuse will depend on all of the circumstances. A reasonable excuse for failing to assist an inspector as required may be that the person is physically unable to provide the required help.

Subclause 165(3) places the evidentiary burden on the individual to demonstrate that they have a reasonable excuse.

Clause 166 – Persons assisting inspectors

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

Subclause 166(2) provides that assistants may do anything the relevant inspector reasonably requires them to do to assist in the exercise of his or her compliance powers and must not do anything that the inspector does not have power to do, except as provided under a search warrant (e.g. use of force by an assisting police officer to enter premises). This provision ensures that assistants are always subject to directions from inspectors and the same restrictions that apply to inspectors.

Subclause 166(3) provides that anything lawfully done by the assistant under the direction of an inspector is taken for all purposes to have been done by the inspector. This means that the inspector is accountable for the actions of the assistant. This provision is intended to ensure the close supervision of assistants by the responsible inspector.

Subdivision 9.3.2 – Search warrants

This Subdivision provides for search warrants to allow inspectors to search places (whether workplaces or not) for evidence of offences against the Bill. This power to apply for and act on a search warrant is additional to inspectors' compliance powers under Subdivisions 3.1 and 3.4 of Division 9.3.

Search warrants will be issued in accordance with Territory laws relating to warrants.

Clause 167 – Search warrants

This clause establishes an application process for obtaining search warrants under the Bill and establishes the process and requirements for their issue. Under this provision, an inspector may apply to a magistrate for the issue of a search warrant for a place. The application must be sworn and state the grounds on which the warrant is sought.

Under subclause 167(3) the magistrate may refuse to consider the application until the inspector gives the magistrate all the information the magistrate requires about the application

in the way the magistrate requires. For example, the magistrate may require additional information supporting the application to be given by statutory declaration.

Subclause 167(4) provides that a magistrate may only issue a search warrant if he or she is satisfied there are reasonable grounds for suspecting:

- there is a particular thing or activity connected with an offence against this Bill; and
- the thing or activity is, or is being engaged in at the premises, or, may be, or may be engaged in, at the premises within the next seven days.

A search warrant under this clause must state the offence for which the warrant is issued, the things that may be seized under the warrant, the houses when the place may be entered, the date the warrant ends (within 7 days after the warrant's date of issue), and, that an inspector may, with any necessary and reasonable help and force, enter the place and exercise the inspector's compliance powers.

Subclause 167(5A) establishes that, in this clause, a thing is *connected* with an offence if the offence has been committed in relation to it, it will provide evidence of the commission of the offence, or, it was used, is being used or is intended to be used, to commit the offence. It also establishes that *offence*, in this clause, includes an offence that there are reasonable grounds for believing has been, is being, or will be, committed.

The power to seize evidence is subject to the relevant provisions in the Bill (clauses 175–181), in addition to any other limitations specified in the warrant.

Clause 167A – Warrants – application made other than in person

This clause provides that an inspector may apply for a warrant by phone, fax, email, radio or other form of communication if the inspector considers it necessary because of urgent circumstances, or, other special circumstances.

Subclauses 167A (3)-(5) provide that:

- before applying for the warrant, the inspector must prepare an application stating the grounds on which the warrant is sought;
- the inspector may apply for the warrant before the application is sworn;
- after issuing the warrant the magistrate must immediately fax a copy to the inspector if it is practicable to do so;
- if it is not practicable to fax a copy to the inspector, the magistrate must tell the inspector the terms of the warrant and the date and time the warrant was issued; and
- if it is not practicable to fax a copy to the inspector, the inspector must complete a form of warrant (the *warrant form*) and write on it the magistrate's name, the date and time the magistrate issued the warrant and the warrant's terms.

Subclause 167A(6) provides that the faxed copy of the warrant, or the warrant form properly completed by the inspector, authorises the entry and the exercise of the inspector's powers under this part.

This clause also provides that the inspector must, at the first reasonable opportunity, send the magistrate the sworn application, and, if the inspector completed a warrant form, the

completed warrant form. The magistrate must then attach the documents they receive to the warrant.

Subclause 167A(9) the court must find that a power exercised by the inspector was not authorised by a warrant under this clause if the question arises in a proceeding in the court whether the exercise of power was authorised by a warrant, the warrant is not produced in evidence, and, it is not proved that the exercise of power was authorised by a warrant under this clause.

Clause 168 – Announcement before entry on warrant

Clauses 168 sets out notification requirements that apply to entry on warrant and when they do, and do not, apply.

Clause 169 – Copy of warrant to be given to person with management or control of place

Clause 169 sets out the notification requirements that apply to entry on warrant, in particular, the requirement to provide a copy of the warrant and a document setting out the person's rights and obligations, in specific circumstances. Where this clause applies, the inspector must also identify himself or herself to that person by producing his or her identity card for inspection.

Clause 169A – Occupier entitled to be present during search etc

Clause 169A provides that, if the occupier of premises or someone else who apparently represents the occupier, is present at the premises while a search warrant is being executed, the person is entitled to observe the search being conducted. However, the person is not entitled to observe the search if to do so would impede the search, or, the person is under arrest and allowing the person to observe the search being conducted would interfere with the objectives of the search.

This clause does not prevent two or more areas of the premises being searched at the same time.

Subdivision 9.3.3 – Limitation on entry powers

This subdivision deals with limitations on entry powers of inspectors under the Bill.

Clause 170 – Places used for residential purposes

This clause limits entry to residential premises of an inspector to the following:

- with the consent of the person with management or control of the place;
- under the authority conferred by a search warrant; or
- for the purpose only of gaining access to a suspected workplace where the inspector reasonably believes that no alternative access is available, and, at a reasonable time having regard to the times at which an inspector believes work is being carried out at the place to which access is sought.

Subdivision 9.3.4 – Specific powers on entry

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

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

Identify who has relevant documents

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

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

Request documents

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

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

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

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

Interview

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

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

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

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

Offence provision

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

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

The maximum penalty is $10 000 in the case of an individual or $50 000 in the case of a body corporate. A note at the foot of subclause 171(6) clarifies that strict liability applies to each physical element of this offence.

Subclause 171(7) clarifies that subclause (6) places an evidential burden on the accused to prove a reasonable excuse for not complying with a requirement under that subclause.

This clause also sets out the steps an inspector must take before requiring a person to produce a document or answer a question under Part 9.

Clause 172 – Abrogation of privilege against self-incrimination

The Bill seeks to ensure:

- that the strongest powers to compel the provision of information currently available to regulators across Australia are available for securing ongoing work health and safety; and
- that the rights of persons under the criminal law are appropriately protected.

Subclause 172(1) clarifies that there is no privilege against self-incrimination under the Bill, including under clauses 171 (Power to require production of documents and answers to questions) and 155 (Powers of regulator to obtain information).

This means that persons must comply with requirements made under these provisions, even if it means that they may be incriminated or exposed to a penalty in doing so.

These arrangements are proposed because the right to silence is clearly capable of limiting the information that may be available to inspectors or the regulator, which may compromise inspectors' or the regulator's ability to ensure ongoing work health and safety protections. Securing ongoing compliance with the Bill and ensuring work health and safety are sufficiently important objectives as to justify some limitation of the right to silence.

Subclause 172(2) instead provides for a 'use immunity' which means that the answer to a question or information or a document provided by an *individual* under clause 171 is not admissible as evidence against *that individual* in civil or criminal proceedings. An exception applies in relation to proceedings arising out of the false or misleading nature of the answer information or document.

In accordance with the jurisdictional note to the model Bill, the Territory has amended model provision 172(2) to also provide for 'derivative use immunity.' As such, the protection afforded to a person by subclause 172(2) extends to any information, document or thing obtained, *directly or indirectly*, because of the giving of the answer or the production of the document is not admissible in evidence against the person in a criminal or civil proceeding.

Clause 173 – Warning to be given

This clause sets out the steps an inspector must take before requiring a person to produce a document or answer a question under Part 9. These steps are not required if documents or information are provided voluntarily.

Under this clause, an inspector must first identify himself or herself as an inspector by producing his or her identity card or in some other way and then:

- warn the person that failure to comply with the requirement or to answer the question without reasonable excuse would constitute an offence (paragraph 173(1)(b));
- warn the person about the abrogation of privilege against self-incrimination in clause 172 (paragraph 173(1)(c)); and
- advise the person about legal professional privilege (the effect of clause 269 of the Bill) – which is unaffected by the Bill (paragraph 173(1)(d)).

This ensures that persons are fully aware about the legal rights and obligations involved when responding to an inspector's requirement to produce a document or answer a question.

If requirements to produce documents are made by written notice (see subclause 171(2)), the notice must also include the appropriate warnings and advice.

Subclause 173(2) provides that it is not an offence for an individual to refuse to answer an inspector's question or provide information or a document to an inspector under this part of the Bill on grounds of self-incrimination, unless he or she was first given the warning about the abrogation of the privilege against self-incrimination set out at subclause 173(1)(c).

Subclause 173(3) clarifies that nothing in the clause would prevent the inspector from gathering information provided voluntarily (i.e. without requiring the information and without giving the warnings required by clause 173).

Clause 174 – Powers to copy and retain documents

Subclause 174(1) allows inspectors to copy, or take extracts from, documents given to them in accordance with a requirement made under the Bill and retain them for the period that the inspector considers necessary.

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

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

Clause 175 – Power to seize evidence etc.

This clause deals with the seizure of evidence under Part 9 of the Bill.

If the place is a workplace, then the inspector may seize anything (including a document) that the inspector reasonably believes constitutes evidence of an offence against the Bill (paragraph 175(1)).

If a place (even if it is not a workplace) has been entered with a search warrant under this Part, then the inspector may seize the evidence for which the warrant was issued (subclause 175(2)).

In either case, the inspector may also seize anything else at the place if the inspector reasonably believes the thing is evidence of an offence against the Bill, and, the seizure is necessary to prevent the thing being hidden, lost, destroyed, or used to continue or repeat the offence (subclause 175(3)).

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

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

Clause 177 – Powers supporting seizure

This clause provides that a thing that is seized may be moved, made subject to restricted access by reasonable action or, if the thing is plant or a structure, dismantled. For example, access by be reasonably restricted by sealing a thing, or by sealing the entrance to a room where the thing is situated, and marking it to show access is restricted.

Subclause 177(2) makes it an offence to tamper, or attempt to tamper, with a thing that an inspector has placed under restricted access or something restricting access to the thing without an inspector's approval. The maximum penalty for this offence is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

A note at the foot of subclause 177(2) clarifies that strict liability applies to each physical element of this offence.

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

Subclause 177(3) allows an inspector to require a person with control of the seized thing to take it to a stated reasonable place by a stated reasonable time, and, if necessary, to remain in control of it at the stated place for a reasonable time.

Subclause 177(4) provides that the requirement must be made by written notice unless it is not practicable to do so, in which case the requirement may be made orally and confirmed in writing as soon as practicable.

Subclause 177(5) allows the inspector to make further requirements in relation to the same thing if it is necessary and reasonable to do so. For example, a requirement could be made to de-commission or otherwise make plant safe once it has been moved to the required place.

Subclause 177(6) makes it an offence for a person to refuse or fail to comply with a requirement made under subclause 177(3) or 177(5) if they do not have a reasonable excuse. The evidentiary burden is on the individual to demonstrate that they have a reasonable excuse (subclause 177(7)). A note at the foot of subclause 177(6) clarifies that strict liability applies to each physical element of this offence.

The maximum penalty is $10 000 for an individual or $50 000 for a body corporate.

Clause 178 – Receipt for seized things

This clause requires inspectors to give receipts for seized things, as soon as practicable. This includes things seized under a search warrant. The receipt must be given to the person from whom the thing was seized or, if that is not practicable, the receipt must be left in a conspicuous position in a reasonably secure way at the place of seizure (subclause 178(2)).

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

Subclause 178(4) provides that this clause does not apply to a thing (ie that a receipt need not be given) if it is impracticable or would be unreasonable to give the receipt required by this clause (given the thing's nature, condition and value).

Clause 179 – Forfeiture of seized things

This clause provides that a seized thing may be forfeited to the Territory if:

- after making reasonable inquiries, the regulator cannot find the 'person entitled' to the thing;
- after making reasonable efforts, the thing cannot be returned to that person; or
- the regulator reasonably believes it is necessary to forfeit the thing to prevent it being used to commit an offence against this Bill.

Subclauses 179(2) and (3) provide that inquiries or efforts to return a seized thing are not necessary if this would be unreasonable in the circumstances (e.g. the person entitled to return of the thing tells the regulator they do not want the thing returned to them).

Subclause 179(4) provides that, if a regulator decides to forfeit the thing under subclause 179(1)(c) the regulator must tell the person entitled to the thing of that decision by written notice unless:

- the regulator cannot find the person entitled to the thing, after making reasonable enquiries; or
- it would be impracticable or would be unreasonable to give the notice.

Subclause 179(5) sets out what must be stated in the written notice given by the regulator.

Subclause 179(6) specifies the matters that must be stated in a notice of forfeiture, including the reasons for the decision and information about the right of review.

Subclause 179(7) specifies matters that must be taken into account in deciding whether and what inquiries and efforts are reasonable or whether it would be unreasonable to give notice about a thing under this clause, including the thing's nature, condition and value.

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

Subclause 179(9) defines the 'person entitled' to mean the person from whom the thing was seized (which will usually be the person entitled to possess the thing) or if that person is not entitled to possession, the owner of the thing.

Clause 180 – Return of seized things

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

The applicant may be the 'person entitled' to the thing, that is, either the person entitled to possess the thing or the owner of the thing (subclause 180(4)).

Subclause 180(3) allows the regulator to impose conditions on the return of a thing, but only if the regulator considers it appropriate to eliminate or minimise any risk to work health or safety related to the thing.

Clause 181 – Access to seized things

This clause provides that a person from whom a thing was seized, the owner of the thing or a person they have authorised, with certain access rights, including the right of inspection and, if the thing is a document, the right to copy it, at all reasonable times.

This does not apply if it is impracticable or would be unreasonable to allow inspection or copying (subclause 181(2)).

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

Division 9.4 – Damage and compensation

This Division requires inspectors to minimise any damage, detriment or inconvenience. It also provides for notice of any damage to be given and allows for compensation to be claimed against the Territory in certain circumstances.

Clause 182 – Damage etc. to be minimised

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

Clause 183 – Inspector to give notice of damage

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

Clause 184 – Compensation

Subclause 184(1) allows a person to make a claim for compensation if they incur a loss or expense because of the exercise or purported exercise of a power under Division 9.3 of Part 9.

Subclause 184(2) specifies the forum and process for claiming compensation.

Subclause 184(3) limits the compensation that is recoverable to compensation that is 'just' in all the circumstances of the case. This means that compensation is not recoverable simply because the relevant powers have been exercised or purportedly exercised at a workplace. The intention is to limit the recovery of compensation to those cases where there is a sufficient degree of unreasonableness or unfairness in the exercise or purported exercise of those powers to warrant an award of just compensation. For example, compensation may be awarded if the taking of a sample of a thing by an inspector or forfeiture of a thing resulted in the acquisition of property other than on just terms, or in circumstances where an error by an inspector caused significant detriment.

Subclause 184(4) allows the regulations to prescribe the matters that may or must be taken into account by the relevant court when considering whether it is just to make the order for compensation.

Division 9.5 – Other matters

This Division provides inspectors with certain powers to require a person to provide their name and home address, take affidavits and attend coronial inquests in certain circumstances.

Clause 185 – Power to require name and address

Subclauses 185(1) and (2) allow an inspector to require a person to tell the inspector his or her name and residential address if the inspector:

- finds the person committing an offence against the Bill (paragraph 185)(1)(a));
- reasonably suspects the person has committed an offence against the Bill, based on information given to the inspector, or the circumstances in which the person is found (paragraph 185(1)(b)); or
- reasonably believes the person may be able to assist in the investigation of an offence against the Bill (paragraph 185(1)(c)).

As this provision has the potential to engage section 12 of the *Human Rights Act 2004*, which protects the right of individuals not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily, it is subject to explicit protections in the Bill (such as those outlined below) as well as under the Privacy Act.

Before making a requirement under this provision, the inspector must give the person their reasons for doing so and also warn the person that failing to respond without reasonable excuse would constitute an offence (subclause 185(2)).

If the inspector reasonably believes the person's response to be false, the inspector may further require the person to give evidence of its correctness (subclause 184(3)). For example, an inspector could ask to see the person's driver's licence.

Subclause 185(4) makes it an offence for a person to refuse or fail to comply with a requirement under this clause if they do not have a reasonable excuse. Subclause (5) clarifies that there is an evidential burden on the accused to show a reasonable excuse. The maximum penalty for this offence is $10 000.

A note at the foot of subclause 185(4) clarifies that strict liability applies to each physical element of this offence.

Clause 186 – Inspector may take affidavits

This clause clarifies that an inspector may take affidavits for any compliance-related or incidental purpose under the Bill.

Clause 187 – Attendance of inspector at coronial inquests

This clause clarifies that an inspector may attend coronial inquests into the cause of death of a worker while the worker was carrying out work and allows inspectors to examine witnesses at the inquest.

Division 9.6 – Offences in relation to inspectors

This Division establishes offences against inspectors.

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

Clause 188 – Offence to hinder or obstruct inspector

This clause makes it an offence to intentionally hinder or obstruct an inspector in exercising compliance powers under the Bill, or induce or attempt to induce any other person to do so. This would include unreasonably refusing or delaying entry, as well as behaviour such as intentionally destroying or concealing evidence from an inspection. The maximum penalty for this offence is $10 000 in the case of an individual and $50 000 in the case of a body corporate.

Any reasonable action taken by a person to determine his or her legal rights or obligations in relation to a particular requirement (e.g. the scope of legal professional privilege) is not intended to be caught by this provision.

Clause 189 – Offence to impersonate inspector

This clause makes it an offence for a person who is not an inspector to recklessly hold himself or herself out to be an inspector. The maximum penalty for this offence is $10 000.

Clause 190 – Offence to assault, threaten or intimidate inspector

This clause makes it an offence to engage in conduct if the person intends, by engaging in that conduct, to directly or indirectly assault, threaten or intimidate another person and the other person is an inspector or a person assisting an inspector. The maximum penalty for this offence is $50 000, or, $250 000 in the case of a body corporate.

The *Criminal Code* will imply intention as the default fault element for this offence.

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

Part 10 – Enforcement measures

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

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

Division 10.1 – Improvement notices

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

Clause 191 – Issue of improvement notices

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

This clause allows an inspector to issue improvement notices if the inspector reasonably believe a person:

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

Subclause 191(2) lists what action an improvement notice may require, including that the person remedy the contravention, prevent a likely contravention from occurring, or, remedy the things or operations causing the contravention or likely contravention.

Clause 192 – Contents of improvement notices

Subclause 192(1) sets out mandatory and optional content for improvement notices. The mandatory content aims to ensure that the person who is issued with the notice understands the grounds for the inspector's decision, including (in brief) how the laws are being or have been contravened. The optional content includes such things as directions about measures to be taken to remedy the contravention or prevent the likely contravention from occurring (subclause 192(2)).

Improvement notices must also specify a date for compliance with the notice (paragraph 192(1)(d)). The day stated for compliance with the improvement notice must be reasonable in all the circumstances. Relevant factors could include the seriousness of the contravention or the likely contravention.

Clause 193 – Compliance with improvement notice

This clause makes it an offence for a person to fail or refuse to comply with an improvement notice within the time allowed for compliance as stated in the notice, including any extended time for compliance (see clause 194). The maximum penalty for this offence is $50 000 in the case of an individual or $250 000 in the case of a body corporate.

A note at the foot of this clause clarifies that strict liability applies to each physical element of this offence.

This is subject to provisions for review of decisions, including stays of decisions to issue notices (see Part 12).

Clause 194 – Extension of time for compliance with improvement notices

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

Division 10.2 – Prohibition notices

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

Clause 195 – Power to issue prohibition notice

This clause allows inspectors to issue prohibition notices to stop or prevent an activity at a workplace, or modify the way the activity is carried out, if they reasonably believe that:

- if the activity is occurring—it involves or will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard; or
- if the activity is not occurring but may occur, and if it does—it will involve a serious risk to the health or safety of a person emanating from an immediate or imminent exposure to a hazard.

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

Pre-requisites for issue of prohibition notices

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

Operation of prohibition notices

A prohibition notice takes effect immediately upon being issued and ordinarily continues to operate—subject to the review provisions in Part 12—until an inspector is satisfied that the matters that give or will give rise to the risk have been remedied.

There is no requirement for an inspector to visit a workplace to verify that the risks identified in the notice have been remedied. This recognises that an inspector may be satisfied of compliance with a prohibition notice in some circumstances without the need for a workplace visit (e.g. if an independent expert report is provided to the inspector, or independently verified video footage of the affected activity is submitted).

Oral directions

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

Clause 196 – Contents of prohibition notice

This clause sets out the mandatory and optional content of prohibition notices. The mandatory content requirements are designed to ensure that the person who is issued with the notice understands the inspector's decision, including the basis for the inspector's belief that a notice should be issued and (in brief) the activity the inspector believes involves or will involve a serious risk and the matters that give or will give rise to the risk. It must also cite the provision of the Bill or regulations that the inspector believes is being or is, likely to be, contravened by the activity.

Prohibition notices may also include directions about measures to be taken to remedy the risk, activities to which the notice related, or any contravention or likely contravention mentioned in the notice (subclause 196(2)).

Subclause 196(3) gives examples of the ways in which a prohibition notice may prohibit the carrying on of an activity in a specified way, but does not limit the inspector's power to issue prohibition notices in clause 195.

Clause 197 – Compliance with prohibition notice

This clause provides that it is an offence for a person to fail or refuse to comply with a prohibition notice or a direction issued under subclause 195(2) of the Bill. The maximum penalty for this offence is $100 000 in the case of an individual or $500 000 in the case of a body corporate.

A note at the foot of this clause clarifies that strict liability applies to each physical element of this offence.

The penalties reflect the consequences that may result from failure to remedy serious risks to health or safety.

Division 10.3 – Non-disturbance notices

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

Clause 198 – Issue of non-disturbance notice

Clause 198 provides that an inspector may issue non-disturbance notices to the person with management or control of a workplace if the inspector reasonably believes that it is necessary to ensure non-disturbance of a site to facilitate the exercise of his or her compliance powers.

Clause 199 – Contents of non-disturbance notice

This clause provides that A non-disturbance notice may require the person to whom it is issued to preserve the site of a notifiable incident for a specified period or prevent a particular site being disturbed for a specified period that is reasonable in the circumstances.

A 'notifiable incident' occurs where a person dies, suffers a serious injury or illness or where there is a dangerous incident (clause 35). The terms 'serious injury or illness' and 'dangerous incident' are defined in clauses 36 and 37 respectively.

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

A non-disturbance notice must specify how long it operates (this cannot be more than seven days), what the person must do to comply with the notice and the penalty for contravening the notice (subclause 199(2)).

Subclause 199(4) allows certain activities to proceed, despite the non-disturbance notice. These activities generally relate to ensuring health or safety of affected persons, assisting police investigations or activities expressly permitted by an inspector.

Clause 200 – Compliance with non-disturbance notice

This clause makes it an offence for a person to, without reasonable excuse, fail or refuse to comply with a non-disturbance notice. This is subject to the provisions for review of decisions, including stays of decisions to issue notices (see Part 12).

The maximum penalty for this offence is $50 000 in the case of an individual and $250 000 in the case of a body corporate. A note at the foot of subclause 200(1) clarifies that strict liability applies to each physical element of this offence.

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

Clause 201 – Issue of subsequent notices

This clause allows inspectors to issue one or more subsequent non-disturbance notices in relation to a site, whether or not the previous notice has expired.

This would be subject to the requirements in clauses 198 and 199, which relate to the issue and contents of non-disturbance notices.

Division 10.4 – General requirements applying to notices

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

Clause 202 – Application - Division 10.4

This clause provides that, in this Division, *notice* means improvement notice, prohibition notice or non-disturbance notice.

Clause 203 – Notice to be in writing

This clause requires that all notices issued under this Part be given in writing, although enforceable directions may be given orally in advance of a prohibition notice (clause 195).

Clause 204 – Directions in notices

This clause clarifies that a direction included in an improvement or prohibition notice may refer to a code of practice and offer the person to whom it is issued a choice of ways to remedy the contravention.

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

Clause 205 – Recommendations in notice

This clause clarifies that improvement and prohibition notices may include recommendations. The difference between a direction and recommendation is that it is not an offence to fail to comply with recommendations in a notice (subclause 205(2)).

Clause 206 – Changes to notice by inspector

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

Subclause 206(2) makes it clear that this provision is in addition to the inspector's power to extend the period for compliance with an improvement notice under clause 194.

Clause 207 – Regulator may vary or cancel notice

Clause 207 provides that a notice issued by an inspector may only be varied or cancelled by the regulator. Clause 207 is subject to clause 206 that empowers an inspector to make minor changes to improvement, prohibition and non-disturbance notices for certain purposes.

Subclause 207 requires substantive variations to notices to be made by the regulator. It also empowers the regulator to cancel notices issued under this Part.

Clause 208 – Formal irregularities or defects in notice

This clause makes it clear that formal defects or irregularities in notices issued under this Part do not invalidate the notices, unless this would cause or be likely to cause substantial injustice.

Subclause 208(b) clarifies that a failure to use the correct name of the person to whom the notice is issued falls within this provision, if the notice sufficiently identifies the person and has been issued or given to the person in accordance with clause 209.

Clause 209 – Issue and giving of notice

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

'Issuing' and 'giving' notices

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

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

Clause 210 – Display of notice

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

It is an offence for a person to refuse or fail to display a notice as required by this clause. The maximum penalty for this offence is $5 000 in the case of an individual or $25 000 in the case of a body corporate.

A note at the foot of subclause 210(1) clarifies that strict liability applies to each physical element of this offence.

It is also an offence for a person to intentionally remove, destroy, damage or deface the notice while it is in force (subclause 210(2)). The maximum penalty for this offence is $5 000 in the case of an individual or $25 000 in the case of a body corporate.
There is no requirement to display notices that are stayed under review proceedings, as they would not be considered to be ‘in force’ for the period of the stay.

Division 10.5 – Remedial action

Clause 211 – When regulator may carry out action

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

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

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

This clause allows the regulator to take remedial action if the regulator reasonably believes that:

- circumstances in which a prohibition notice can be issued exist; and
- a prohibition notice cannot be issued at a workplace because, after taking reasonable steps, the person with management or control of the workplace cannot be found.

In these circumstances, the regulator may take any remedial action necessary to make the workplace safe. The word ‘necessary’ is intended to imply that the regulator should take the

least interventionist approach possible, while making the workplace safe (e.g. erecting barricades around a site).

Clause 213 – Costs of remedial or other action

This clause enables the regulator to recover the reasonable costs of any remedial action taken under clauses 211 or 212 as a debt due to the Territory.

For costs to be recoverable from a person under clause 211, the person must have been notified of the regulator's intention to take the remedial action and the person's liability for costs.

Division 10.6 – Injunctions

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

Clause 214 – Application of Division

This clause provides that, in this Division, notice means improvement notice, prohibition notice or non-disturbance notice.

Clause 215 – Injunctions for noncompliance with notices

This clause allows the regulator to apply to the Supreme Court for an injunction to compel a person to comply with a notice or restrain the person from contravening a notice issued under this Part.

Injunctive relief may be sought in relation to an improvement notice whether or not a proceeding has been brought for an offence against this Bill in connection with any matter in relation to which the notice was issued, and, even if any time for complying with the notice has expired (paragraph 215(2)).

Part 11 – Enforceable undertakings

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

Clause 216 – Regulator may accept WHS undertakings

This clause enables the regulator to accept a WHS undertaking given by a person in connection with a matter relating to a contravention or alleged contravention by the person of this Bill, with the exception of a breach or alleged breach relating to a Category 1 offence.

A Category 1 offence, as defined in clause 31, is the most serious work health and safety offence and involves reckless conduct by a duty holder that exposes an individual to a risk of death or serious illness or injury without reasonable excuse. The use of enforceable undertakings would not be appropriate in such circumstances.

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

Subclause 216(3) establishes that the giving of a WHS undertaking does not constitute an admission of guilt by the person giving it in relation to the contravention or alleged contravention to which the undertaking relates.

Clause 217 – Notice of decision and reasons for decision

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

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

Clause 218 – When a WHS undertaking is enforceable

This clause deals with when an undertaking takes effect and becomes enforceable. That is, when the regulator's decision to accept is given to the person who made the undertaking or at any later date specified by the regulator.

Clause 219 – Compliance with WHS undertaking

This clause provides that it is an offence to contravene a WHS undertaking that is in effect. The maximum penalty for this offence is $50 000 in the case of an individual or $250 000 in the case of a body corporate.

A note at the foot of this clause clarifies that strict liability applies to each physical element of this offence.

Clause 220 – Contravention of WHS undertaking

This clause applies if a person contravenes a WHS undertaking. Where, on an application by the regulator, a court is satisfied that the person has contravened the undertaking it may, in addition to imposing a penalty, direct the person to comply with the undertaking, or discharge the undertaking.

The court may also make any other order it considers appropriate in the circumstances, including orders that the person pay the costs of proceedings and orders that the person pay the regulator's costs in monitoring compliance with the WHS undertaking in the future.

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

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

Clause 221 – Withdrawal or variation of WHS undertaking

Subclauses 221(1)-(2) provide that, with the written agreement of the regulator, a person who has made a WHS undertaking may withdraw or vary the undertaking, but only in relation to the contravention or alleged contravention to which the WHS undertaking relates.

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

Clause 222 – Proceeding for alleged contravention

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

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

Part 12 – Review of decisions

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

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

Division 12.1 – Reviewable decisions

Clause 223 – Which decisions are reviewable

This clause contains a table that sets out the decisions made under the Bill that are reviewable decisions.

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

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

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

Subclause 223(3) defines a *person entitled* to a thing, for the purposes of a reviewable decision made under clauses 179 or 180, as the person from whom it was seized unless that person is not entitled to possess it, in which case it means the owner of the thing.

Division 12.2 – Internal review

This Division establishes a process of internal review for reviewable decisions under the Bill.

Clause 224 – Application for internal review

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

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

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

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

Clause 225 – Internal reviewer

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

Clause 226 – Decision of internal reviewer

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

Subclause 226(2) allows the internal reviewer to confirm or vary the reviewable decision, or set aside the reviewable decision and substitute with another decision that the internal reviewer considers appropriate.
Subclauses 226(3)–(5) provide a process for seeking further information from an applicant. If the internal reviewer seeks further information, the 14 day decision making period will cease to run until that information is provided. Subclause 226(4) states that the internal reviewer can specify a period of not less than seven days in which additional information must be

provided. If the information is not provided within the specified period, subclause 226(5) states that the reviewable decision is taken to be confirmed by the internal reviewer.

Subclause 226(6) provides that if the internal reviewer does not vary or set aside a decision within 14 days the reviewable decision is taken to have been confirmed.

Clause 227 – Decision on internal review

This clause requires an internal reviewer to provide to the applicant in writing the decision on internal review and reasons for it as soon as practicable after reviewing the decision.

Clause 228 – Stays or reviewable decisions on internal review

Subclause 228(1) establishes that an application for internal review of a reviewable decision (other than a decision to issue a prohibition notice or a non-disturbance notice) stays the operation of the decision.

Subclause 228(2) establishes that, if an application is made for an internal review of a decision to issue a prohibition notice or a non-disturbance notice, the reviewer may stay the operation of the decision.

This clause also provides that the reviewer may make the decision to stay the operation of a decision on the reviewer's own initiative, or, on the application of the applicant for review.

Under subclause 228(4)-(5), the reviewer must make a decision on an application for a stay within 1 working day after the reviewer receives the application. If the reviewer has not made a decision to stay a decision within 1 working day, the reviewer is taken to have made a decision to grant a stay.

Finally, the clause provides that a stay of the operation of a decision pending a decision on an internal review continues until the end of the prescribed period for applying for an external review of the decision made on the internal review, or, an application for external review is made (whichever is earlier).

Division 12.3 – External review

This Division establishes a process of external review for reviewable decisions under the Bill.

Clause 229 – Application for external review

Subclause 228(1) provides that an eligible person may apply to the ACT Civil and Administrative Tribunal (ACAT) for an external review of any reviewable decision made by the regulator or a decision made, or taken to have been made, on internal review.

Subclause 228(2) provides when an application for external review must be made. An application for external review must be made:

- within 28 days after an applicant is notified where a decision was to forfeit a thing;
- within 14 days after an applicant was notified where a decision does not involve forfeiting a thing; or

- within 14 days if the regulator is required by the external review body to give the eligible person a statement of reasons.

Part 13 – Legal Proceedings

This Part is divided as follows:

- Division 13.1 deals with the prosecution of offences;
- Division 13.2 covers sentencing for offences;
- Division 13.3 provides for infringement notices;
- Division 13.4 deals with offences committed by bodies corporate;
- Divisions 13.5 and 6 deal with offences committed by the Territory and public authorities;
- Division 13.7 provides for WHS civil penalty proceedings; and
- Division 13.8 deals with the effect of the Bill on civil liability.

Division 13.1 – General matters

Clause 230 – Prosecutions

Subclause 230(1) provides that, subject to subclause 230(5) proceedings for an offence against the Bill may be brought by the regulator or an inspector with the written authorisation of the regulator (generally or in a particular case).

Subclause 230(2) provides that, if the regulator believes on reasonable grounds that a person has committed an offence against the Bill, the regulator may refer the matter to the DPP.

The transparency and accountability of proceedings for an offence against this Bill are facilitated by:

- providing that the regulator must issue and publish on its website general guidelines in relation to the referral of matters to the DPP under this clause of the Bill and the acceptance of WHS undertakings under the Bill (these guidelines are notifiable instruments) (subclause 230(3)-(4)); and
- clarifying that nothing in clause 230 affects the ability of the Director of Public Prosecutions (DPP) to bring proceedings for an offence against the Bill (subclause 230(5)). Therefore, if the regulator does not bring proceedings for an offence against the Bill the DPP can.

Clause 231 – Procedure if prosecution is not brought

This clause allows for the review by the DPP of a regulator's decision not to prosecute a serious offence, that is, a Category 1 or Category 2 offence.

Subclause 231(1) allows a person who reasonably believes that a Category 1 or 2 offence has been committed but no prosecution has been brought to ask the regulator, in writing, to bring a prosecution. The request can be made if no prosecution has been brought between six and 12 months after the occurrence of the act, matter or thing that they reasonably believed occurred. Subclause 231(7) clarifies that, in this clause, a reference to the occurrence of an act, matter or thing includes a reference to a failure in relation to an act, matter or thing.

Subclause 231(2) sets out how and when the regulator must respond to a request made in subclause 231(1). In particular, the regulator must provide a written response to a request within three months and must advise the person whether the investigation is complete and, if the investigation is complete:

- whether the regulator has referred or will be referring the matter to the DPP; or
- (if it has not and will not be referred) the reasons why the regulator will not be referring the matter to the DPP;

In the interests of transparency and fairness, under subclause 231(2)(b), the regulator must also advise in writing, within three months, the person who the applicant believes committed the offence of the application.

If the regulator advises under subclause 231(2) that the regulator will not be referring the matter, the regulator must, under subclause 231(3), inform the applicant that they may ask for the matter to be referred to the DPP. If the applicant makes a written request, the regulator must refer the matter to the DPP within one month.

Subclause 231(4) requires the DPP to consider the matter and advise the regulator in writing as soon as practicable as to whether the DPP considers that a prosecution should be brought.

Subclause 231(5) requires the regulator to ensure that written reasons are given to the person who made the request and the person who the applicant believes committed the offence, if the DPP considers that a prosecution should not be brought.

Subclause 231(6) provides that if the regulator declines to follow the advice of the DPP to bring proceedings, the regulator must give written reasons for its decision to any person to whom written reasons were given under subclause 231(5).

Clause 232 – Limitation period for prosecutions

The limitation periods provided in this clause balance the need of a duty holder to have proceedings brought and resolved quickly with the public interest in having a matter thoroughly investigated by the regulator so that a sound case can be brought.

Subclause 232(1) sets out the limitation periods for when proceedings for an offence may begin. Proceedings must be commenced:

- within two years after the offence first came to the regulator's attention (paragraph (a)) within one year after a coronial report is made or a coronial inquiry or inquest ended, if it appeared from the report or the proceeding at the inquiry or inquest that an offence had been committed against this Bill (paragraph (b)); or
- if a WHS undertaking has been given in relation to the offence, within six months of the undertaking being contravened or when the regulator becomes aware of a contravention or agrees under clause 221 to withdraw the undertaking.

Reflecting the seriousness of Category 1 offences, subclause 232(2) enables proceedings for such offences to be brought after the end of the applicable limitation period if fresh evidence

is discovered and the court is satisfied that the evidence could not reasonably have been discovered within the relevant limitation period.

Clause 233 – Multiple contraventions of health and safety duty provision

This clause modifies the criminal law rule against duplicity. This rule means that, ordinarily, a prosecutor cannot charge two or more separate offences relating to the same duty in one count of an indictment, information or complaint.

Unless modified, the rule could complicate the prosecution of work health and safety offences and impede a court's understanding of the nature of the defendant's breach of duty particularly when an offence is ongoing. For example, the duplicity rule might prevent a charge from including all the information about how the defendant had breached their duty of care because information about a second breach of the duty could not be provided in the prosecution for a first breach of that duty. Presenting only one aspect of a defendant's failure might deprive the court of the opportunity to appreciate the seriousness of the failure and result in inadequate penalties or orders being made.

Subclause 233(1) provides that two or more contravention of a health and safety duty provision by a person in the same factual circumstances may be charged as a single offence or as separate offences.

Subclause 233(2) clarifies that the clause does not authorise contraventions of two or more health and safety duty provisions being charged as a single offence.

Subclause 233(3) provides that only a single penalty may be imposed when two or more contraventions of a health and safety duty provision are charged as a single offence.

Subclause 233(4) provides that in the clause a 'health and safety duty provision' means a provision of Division 2.2, 2.3 or 2.4 of Part 2.

Division 13.2 – Sentencing for offences

Contemporary Australian OHS laws provide courts with a variety of sentencing options in addition to the traditional sanctions of fines and custodial sentences. The national review of OHS laws concluded that judicious combinations of orders can enhance deterrence, make meaningful action by an offender more likely, be better targeted and permit a more proportionate response. In these ways, the Bill's goals of increased compliance and a reduction in work-related injury and disease will be promoted. A range of sentencing options is provided for the court in Division 13.2. The court may:

- impose a penalty;
- make an adverse publicity order;
- make a restoration order;
- make a community service order;
- release the defendant on the giving of a court-ordered WHS undertaking;
- order an injunction; or
- make a training order.

Clause 234 – Application - Division 13.2

This clause provides that Division 13.2 applies if a court convicts a person or finds them guilty of an offence against the Bill.

Clause 235 – Orders generally

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

A note to this clause clarifies that an order under this division may be made as a condition of a good behaviour order under the *Crimes (Sentencing) Act 2005*.

Clause 236 – Adverse publicity orders

Adverse publicity orders can be an effective deterrent for an organisation that is concerned about its reputation. Such orders can draw public attention to a particular wrongdoing and the measures that are being taken to rectify it.

Subclause 236(1) sets out the kinds of adverse publicity orders that a court may make. For instance, the court may order an offender to publicise the offence or notify a specified person or specified class of persons of the offence, or both. The offender must give the regulator evidence of compliance with the order within seven days of the end of the compliance period specified in the order.

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

Subclauses 236(3)–(4) enable action to be taken by the regulator if an offender does not comply with the adverse publicity order or fails to give evidence to the regulator.

Subclause 236(5) provides that if action is taken by the regulator under subclauses 236(3) or (4), the regulator is entitled to recover from the offender reasonable expenses associated with it taking that action.

Clause 237 – Orders for restoration

Subclause 237(1) allows the court to order an offender to take such steps as are specified within a specified period to remedy any matter caused by the commission of the offence that appears to be within the offender's power to remedy.

Subclause 237(2) enables the court to grant an extension of the period to allow for compliance, provided an application for extension is made before the end of the period specified in the original order.

Clause 238 – Work health and safety project orders

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

Subclause 238(2) provides that a work health and safety project order may specify conditions that must be complied with in undertaking the project.

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

Subclause 239(1) enables a court to adjourn proceedings, with or without recording a conviction, for up to two years and make an order for the release of an offender on the condition that an offender gives an undertaking with specified conditions. This is called a court-ordered WHS undertaking.

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

Subclause 239(2) sets out the conditions that must be included in a court-ordered WHS undertaking. The undertaking must require the offender to appear before the court if called on to do so during the period of the adjournment. Furthermore, the offender must not commit any offence against the Bill during the period of adjournment and must observe any special conditions imposed by the court.

Subclauses 239(3) and (4) allow the court to call on an offender to appear before it if the offender is given not less than four days notice of the court order to appear.

Subclause 239(5) provides that when an offender appears before the court again, if the court is satisfied that the offender has observed the conditions of the undertaking, it must discharge the offender without any further hearing of the proceeding.

Clause 240 – Injunctions

This clause allows a court to issue an injunction requiring a person to stop contravening the Bill if they have been found guilty of an offence against it. This power can be an effective deterrent where a penalty fails to provide one.

A note to this clause reiterates that an injunction for non-compliance with a non-disturbance notice, improvement notice or prohibition notice may also be obtained under clause 215.

Clause 241 – Training orders

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

Clause 242 – Offence to fail to comply with order

Subclause 242(1) makes it an offence for a person to fail to comply with an order made under Division 13.2 without reasonable excuse. The clause places an evidential burden on the defendant to show a reasonable excuse.

The maximum penalty for this offence is $50 000 in the case of an individual or $250 000 in the case of a body corporate. A note at the foot of subclause 242(1) clarifies that strict liability applies to each physical element of this offence.

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

Division 13.3 – Infringement notices

Clause 243 – Infringement notes

This clause of the model Bill has been replaced, in accordance with the jurisdictional note, with a note clarifying that infringement notices for offences against this Act are dealt with under Part 3.8 of the *Magistrates Court Act 1930*.

Division 13.4 – Offences by bodies corporate

Clause 244 – Imputing conduct to bodies corporate

This clause in the model Bill has been replaced with notes which clarify that:

- under section 50 of the *Criminal Code*, a physical element of an offence consisting of conduct is taken to be committed by a corporation if it is committed by an employee, agent or officer of the corporation acting within the actual or apparent scope of his or her employment or within his or her actual or apparent authority;
- sections 51 and 52 of the *Criminal Code* deal with fault elements in relation to corporations; and
- section 53 of the *Criminal Code* deals with mistake of fact in relation to corporations.

Division 13.5 – The Territory

Clause 245 – Offences and the Territory

Subclause 245(1) provides that if the Crown is guilty of an offence against the Bill the penalty to be applied is the penalty applicable to a body corporate.
The Crown in Right of the Territory is also an artificial entity that acts and makes decisions through individuals. Subclause 245(2) provides that conduct engaged in on behalf of the Territory by an employee, agent or officer of the Territory is also conduct engaged in by the Territory. The conduct must be within the actual or apparent scope of the person's employment or authority. Clause 247 defines when a person will be an 'officer of the Territory'.

Subclause 245(3) provides that in proceedings against the Crown requiring proof of knowledge, intention or recklessness, it is sufficient to prove that the person referred to in subclause 245(2) possessed the relevant knowledge, intention or recklessness.

Similarly, subclause 245(4) provides that if mistake of fact is relevant in determining liability in proceedings against the Territory for an offence against the Bill, it is sufficient that the person referred to in subclause 245(2) made that mistake of fact.

Clause 246 – WHS civil penalty provisions and the Territory

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

Subclause 246(2) mirrors subclause 245(2). That is, any conduct that is engaged in on behalf of the Territory by an employee, agent or officer acting within the actual or apparent scope of their employment or their authority is conduct also engaged in by the Territory for the purposes of a WHS civil penalty provision of the Bill.

Subclause 246(3) mirrors subclause 245(3) in providing that if a WHS civil penalty provision requires proof of knowledge, it is sufficient in proceedings against the Crown to prove that the person referred to in subclause 246(2) had that knowledge.

Clause 247 – Officers

Subclause 247(1) defines when a person will be an officer of the Territory for the purposes of the Bill. A person will be taken to be an officer if they make, or participate in making, decisions that affect the whole or a substantial part of the business or undertaking of the Territory for the purposes of this Bill.

However, subclause 247(2) clarifies that, when acting in their official capacity, a Minister of a State or the Commonwealth is not an officer for the purposes of the Bill.

Clause 248 – Responsible agency for the Territory

Subclause 248(1) provides that certain notices for service on the Territory may be given to or served on the relevant responsible agency. The relevant notices are provisional improvement notices, prohibition notices, non-disturbance notices, infringement notices or notices of WHS entry permit holder entry.

Subclauses 248(2) and (3) provide, respectively, that if an infringement notice is to be served on the Territory or a proceeding is to be brought against the Territory for an offence or contravention of the Bill, the responsible agency may be specified in the infringement notice or document initiating or relating to the proceeding.

Subclause 248(4) provides that the responsible agency in respect of an offence is entitled to act for the Territory in a proceeding against the Territory for the offence. Also, subject to any

relevant rules of court, the procedural rights and obligations of the Territory as the accused are conferred or imposed on the responsible agency.

Subclause 248(5) allows the prosecutor or the person bringing the proceeding to change the responsible agency during the proceedings with the court's leave.

Subclause 248(6) defines the expression 'responsible agency' and includes rules governing what happens if the relevant agency of the Territory has ceased to exist.

Division 13.6 – Public authorities

Clause 249 – Application to public authorities that are bodies corporate

This clause provides that Division 13.6 is applicable only to public authorities that are bodies corporate.

Clause 250 – Proceedings against public authorities

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

Clause 251 – Imputing conduct to public authorities

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

Subclause 251(2) provides that in a proceeding against the public authority requiring proof of knowledge, intention or recklessness, it is sufficient to prove that the person referred to in subclause 251(1) had the relevant knowledge, intention or recklessness.

Similarly, subclause 251(3) provides that where proof of mistake of fact is relevant in proceedings against the public authority for an offence against the Bill, it is sufficient if the person referred to in subclause 251(1) made that mistake of fact.

Clause 252 – Officer of public authority

The expression 'officer of a public authority', which is used in clause 251, is defined in clause 252 as a person who makes or participates in making decisions that affect the whole or a substantial part of the business or undertaking of a public authority.

Clause 253 – Proceedings against successors to public authorities

Subclause 253(1) provides that where a public authority has been dissolved, a proceeding for an offence committed by that authority that were, or could have been, instituted against it

before its dissolution, can be continued against its successor if the successor is a public authority. A similar rule applies to infringement notices (subclause 253(2)).

Subclause 253(2) and (3) provide, respectively, that an infringement notice served on a public authority for an offence against the Bill or a penalty paid by a public authority in relation to such an infringement notice is taken to be an infringement notice served on, or penalty paid by, its successor if the successor is a public authority.

Division 13.7 – WHS civil penalty provisions

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

Subclause 254(1) clarifies that a provision in Part 7 is a 'WHS civil penalty provision' if it is identified as such in that Part. Part 7 contains right of entry offences subject to a civil penalty regime consistent with that in the *Fair Work Act.*

Subclause 254(2) clarifies that 'WHS civil penalty provisions' will also be identified as such in regulations made under the Bill as set out.

Clause 255 – Proceedings for contravention of WHS civil penalty provision

This clause provides that, subject to this Division, a proceeding may be brought against a person for a contravention of a WHS civil penalty provision.

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

Subclause 256(1) provides that a person who is involved in a contravention of a WHS civil remedy provision is taken to have contravened that provision.

Subclause 256(2) clarifies that a person will be *involved in* a contravention of the civil remedy provision only if they have been involved in one of the acts listed in paragraphs (a) to (d) (for example, if the person has aided and abetted the contravention or conspired in the contravention).

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

This clause clarifies that it is not a criminal offence to contravene a WHS civil penalty provision.

Clause 258 – Civil proceeding rules and procedure to apply

This clause requires a court to apply the rules of evidence and procedure for a civil proceeding when hearing a proceeding for a contravention of a WHS civil penalty provision.

Clause 259 – Proceeding for a contravention of a WHS civil penalty provision

Subclause 259(1) provides that in a proceeding for a contravention of a WHS civil penalty provision, if the court is satisfied that a person has contravened a WHS civil penalty

provision, it may order the person to pay a monetary penalty and make any other order it considers appropriate, including an injunction.

Subclause 259(2) provides that a monetary penalty imposed under subclause (1) cannot exceed the maximum specified under Part 7 or the regulations in respect of the WHS civil penalty provision contravened.

Clause 260 – Proceeding may be brought by the regulator or an inspector

Similarly to the bringing of a proceeding for an offence against the Bill, this clause provides that a proceeding for a contravention of a WHS civil penalty provision can only be brought by the regulator or an inspector authorised in writing by the regulator. Authorisation may be granted generally or to bring proceedings in a particular case.

Clause 261 – Limitation period for WHS civil penalty proceedings

The limitation period for bringing a proceeding for a contravention of a WHS civil penalty is two years after the contravention first came to the regulator's notice.

Clause 262 – Recovery of a monetary penalty

This clause provides that if a pecuniary penalty is payable to the Territory, as the case may be, the penalty is payable to the Territory and the Territory may enforce the order as if it were a judgment of the court.

Clause 263 – Civil double jeopardy

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

Clause 264 – Criminal proceedings during civil proceedings

Subclause 264(1) provides that a proceeding against a person for a contravention of a WHS civil penalty provision are stayed if a criminal proceeding is commenced or has already commenced against the person for an offence constituted by conduct that is substantially the same as the conduct alleged to constitute the contravention of the WHS civil penalty provision.

If the person is not convicted of the criminal offence, subclause 264(2) allows the proceedings for the civil contravention to be resumed.

If proceedings are not resumed they are taken to be dismissed.

Clause 265 – Criminal proceedings after civil proceedings

This clause provides that, regardless of any court order made under clause 259 for a contravention of a civil penalty provision that a person has found to have made, a criminal

proceeding may be commenced against the person for conduct that is substantially the same as the conduct constituting the civil contravention.

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

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

Subclause 266(2) is an exception to subclause 266(1). It provides that such evidence is admissible in a criminal proceeding for giving false evidence in the proceeding for the contravention of the WHS civil penalty provision.

Division 13.8 – Civil liability not affected by this Act

Clause 267 – Civil liability not affected by this Act

This clause provides that except as provided in Parts 6 and 7 and Division 13.7 of Part 13, nothing in the Bill is to be interpreted as conferring a right of action in a civil proceeding because of a contravention of the Bill, conferring a defence to a civil action or otherwise affecting a right of action in a civil proceeding, or as affecting the extent (if any) to which a right of action arises or a civil proceeding may be brought, in relation to breaches of duties or obligations imposed by the regulations.

Part 14 – General

This Part contains a number of miscellaneous provisions.

Division 14.1 contains provisions relating to the giving of false or misleading information, legal professional privilege, immunity from liability, confidentiality of information, contracting out and levying workers.

Division 14.2 deals with codes of practice.

Division 14.3 sets out regulation making powers.

Division 14.1 – General provisions

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

Clause 268 – Offence to give false or misleading information

This clause from the model Bill has been replaced with a note clarifying that it is an offence to give false or misleading information or produce false or misleading documents under sections 338 and 339 of the *Criminal Code*.

Clause 269 – Act does not affect legal professional privilege

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

A note clarifies that section 171 of the *Legislation Act 2001* deals with client legal privilege.

Clause 270 – Immunity from liability

Inspectors, in particular, have a crucial role to play in the promotion of work health and safety and in eliminating or minimising serious risks to health and safety. They may be required to exercise judgment, make decisions and exercise powers with limited information and in urgent circumstances.

As a result, it is important that they and others engaged in the administration of the Bill are not deterred from exercising their skill and judgment due to fear of personal legal liability.

Subclause 270(1) provides that inspectors and others engaged in the administration of the Bill incur no civil liability for acts or omissions so long as those acts or omissions are done in good faith and in the execution or purported execution of their powers and functions.

Subclause 270(2) states that any civil liability that would otherwise attach to the person instead attaches to the Territory.

Clause 271 – Confidentiality of information

Inspectors are given broad powers and protections under the Bill. Clause 271 is one of a number of mechanisms designed to ensure that inspectors are accountable and credible when they perform functions and exercise powers.

This clause applies where a person obtains information or gains access to a document in exercising a power or function under the Bill, other than under Part 7. Part 7 deals with workplace entry by WHS permit holders and contains its own provisions dealing with the use or disclosure of information or documents.

Subclause 271(2) prohibits the person who has obtained information or a document from doing any of the following:

- disclosing the information or the contents of the document to another person;
- giving another person access to the document; or
- using the information or document for any purpose, other than in accordance with subclause 271(3).

Prohibited disclosures are an offence and the maximum penalty is $10 000 in the case of an individual or $50 000 in the case of a body corporate. A note at the foot of subclause 271(2) clarifies that strict liability applies to each physical element of this offence.

Subclause 271(3) provides a list of circumstances in which subclause 271(2) does not apply. These include where disclosure is necessary to exercise powers or functions under the Bill, certain disclosures by the regulator, or where it is required by law or by a court or tribunal or where it is provided to a Minister. It also enables the sharing of information between inspectors who exercise powers or functions under different Acts. Personal information can be disclosed with the relevant person's consent.

Subclause 271(4) prohibits a person from intentionally disclosing to another person the name of an individual, where the individual has made a complaint in relation to the person to whom the individual's name is disclosed, and, the defendant knows or is reckless as to that fact. However, the defendant does not commit an offence under subclause 271(4) if the disclosure is made with the consent of the individual or is required under a law.

Failure to do so is an offence and the maximum penalty is $10 000 in the case of an individual or $50 000 in the case of a body corporate.

Clause 272 – No contracting out

This clause deems void any term of any agreement or contract that purports to exclude, limit or modify the operation of the Bill or any duty owed under the Bill, or that purports to transfer to another person any duty owed under the Bill. This upholds the principle that duties of care and obligations cannot be delegated therefore agreements cannot purport to limit or remove a duty held in relation to work health and safety matters.

Clause 273 – Person not to levy workers

This clause prohibits a PCBU from charging workers for anything done or provided relating to work health and safety. Contravening this provision is a strict liability offence and the maximum penalty is $5 000 in the case of an individual or $25 000 in the case of a body corporate.

A note at the foot of this clause clarifies that strict liability applies to each physical element of this offence.

Division 14.2 – Codes of practice

Codes of practice play an important role in assisting duty holders to meet the required standard of work health and safety. This Division sets out:

- how codes of practice are approved;
- the role that codes of practice play in assisting duty holders to meet their legislated obligations; and
- how codes of practice may be used in proceedings for an offence against the Bill.

Clause 274 – Approved codes of practice

Subclause 274(1) permits the Minister to approve a code of practice for the purposes of the Bill and to revoke or vary such a code.

Subclause 274(2) provides that tri-partite consultation between State, Territory and Commonwealth governments, unions and employer organisations is a prerequisite for approving, varying or revoking a code of practice.

Subclause 274(3) provides that a code of practice can apply, incorporate or adopt anything in a document, with or without modification as in force at a particular time or from time to time.

A note to subclause 274(3) clarifies that, under section 47(7) of the *Legislation Act 2001*, the text of an applied, adopted or incorporated instrument, whether applied as in force from time to time or as at a particular time, is taken to be a notifiable instrument if the operation of section 47(5) or (6) is not disapplied. A further note clarifies that a notifiable instrument must be notified under the *Legislation Act.*

Subclause 274(4) provides that an approval, variation or revocation of a code of practice takes effect when a notice is published in the Government Gazette or on a later date that is specified. A note clarifies that a notifiable instrument must be notified under the *Legislation Act.*

Subclause 274(5) provides that, as soon as practicable after approving, varying or revoking a code of practice, the Minister must ensure that notice is published in a daily newspaper.

Subclause 274(6) provides that a regulator must ensure that members of the public are able to inspect free of charge, at the office of the regulator during normal business hours, a copy of each code of practice that is currently approved and each document applied, adopted or incorporated by a code of practice.

Clause 275 – Use of codes of practice in proceedings

Currently, provisions about how codes of practice are used vary in two significant ways across Australian jurisdictions:

- in some jurisdictions non-compliance with approved codes of practice creates a rebuttable presumption of non-compliance with a duty; and
- other jurisdictions provide that compliance with an approved code constitutes ‘deemed compliance’ with a duty.

The Bill does not adopt either approach.

Codes of practice provide practical guidance to assist duty holders to meet the requirements of the Bill. A code of practice applies to anyone who has a duty of care in the circumstances described in the code. In most cases, following an approved code of practice would achieve compliance with the health and safety duties in the Bill, in relation to the subject matter of the code.

Duty holders can demonstrate compliance with the Bill by following a code or by another method which provides an equivalent or higher standard of health and safety than that provided in a code. This allows duty holders to take into account innovation and technological change in meeting their duty and to implement measures most appropriate for their individual workplaces without reducing safety standards.

Subclause 275(2) provides that a code of practice is admissible in proceedings as evidence of whether or not a duty or obligation under the Bill has been complied with.

Subclause 275(3) enables a court to use a code of practice as evidence of what is known about hazards, risk, risk assessment and risk control. A code may also be used to determine what is reasonably practicable in the circumstances to which the code relates.

This clause does not prevent a person introducing evidence of compliance with the Bill apart from the code of practice—so long as this provides evidence of compliance at a standard that is equivalent to or higher than the code of practice (subclause 275(4)).

Division 14.3 – Regulation-making power, forms and fees

The function of regulations is to specify, in greater detail, what steps are required for compliance with the general duties in relation to particular hazards or risks.

Clause 276 – Regulation-making powers

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

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

Subclause 276(3) makes further provision in relation to the nature of regulations. For instance, regulations may:

- be of general or limited application;
- leave particular matters to the discretion of the regulator or an inspector;
- apply, adopt or incorporate matters contained in any document;
- prescribe exemptions or allow the regulator to make exemptions from compliance with a regulation;
- prescribe fees; or
- prescribe infringement penalties for infringement offences and other penalties for contravention of a regulation not exceeding $30 000.

Clause 277 – Approved forms

This clause establishes that the Minister may approve forms for this Act in writing and that, if the Minister approves a form for a particular purposes, the approved form must be used for that purpose. An approved form is a notifiable instrument.

Clause 278 – Determination of fees

This clause provides that the Minister may determine fees for this Bill and that a determination is a disallowable instrument.

Part 20 Transitional

This Part provides for certain transitional arrangements to allow for implementation of the Bill in the Territory.

Clause 300 – Definitions – Part 20

This clause provides that, in this part, *commencement day* means the day the Work Health and Safety Act 2011 commences.

Clause 301 – Transitional – worker consultation units to be work groups

This clause provides that, if a group of workers is a worker consultation unit under the *Work Safety Act 2008* immediately before the commencement day, the group is, on the commencement day, taken to be a work group.

Clause 302 – Transitional – work safety representatives to be health and safety representatives

This clause provides that, if a person is a work safety representative for a worker consultation unit under the *Work Safety Act 2008* immediately before the commencement day, the person is, on the commencement day, taken to be a health and safety representative for the work group corresponding to the worker consultation unit.

Clause 303 – Transitional – work safety committees to be health and safety committees

This clause provides that, if a work safety committee exists under the *Work Safety Act 2008* immediately before the commencement day, the committee is, on the commencement day, taken to be a health and safety committee.

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

Schedule 1 extends the application of the Bill by providing that:

- the term ‘carrying out work’ refers to the operation and use of high risk plant affecting public safety as well as the storage and handling of dangerous goods;
- the term ‘workplace’ refers to places where high risk plant affecting public safety is situated or used as well as where dangerous goods are stored and handled; and
- for the purposes of storage and handling of dangerous goods or the operation or use of high risk plant affecting public safety, the term ‘work health and safety’ includes a reference to public health and safety.

Schedule 2 – The regulator and local tripartite consultation arrangements

The Schedule inserts provisions into the model Bill relating to the establishment of the regulator and local tripartite consultative arrangements for the Territory. These provisions have largely been reproduced from the *Work Safety Act 2008.*

Part 2.1 Work safety council

This Part establishes the Work Safety Council.

Division 2.1.1- Establishment, functions and powers

This division contains provisions which establish the council and detail its functions.

Clause 2.1- Establishment

This clause establishes the Work Safety Council.

Clause 2.2- Functions

This clause lists the functions of the Council. Broadly the Council is required to advise the Minister on matters relating to work safety legislation and workers compensation legislation.

The Minister may also refer matters to the Council in relation these two areas. Other functions may be prescribed by regulation. Subclause 185(2) lists other matters on which the Council may advise the Minister, including:

- Approval of codes of practice under clause 18 of the Bill;
- The promotion of work safety; and
- The operation of this Bill, the *Workers Compensation Act 1951* and the *Dangerous Substances Act 2004*.

Division 2.1.2- Constitution and meetings

This division is a procedural division. It outlines how the council will be constituted and how meetings will be scheduled and run.

Clause 2.3- Membership

This clause concerns the membership of Council. The Council has 13 members:

- Four members representing the interest of employees;
- Four members representing the interests of employers';
- Four members appointed by the Minister; and
- The Work Safety Commissioner.

Members are appointed by the Minister except for the Commissioner who is an ex-officio member and is appointed by the Executive.

Clause 2.4- Terms of Appointment

This clause confirms that Council members are part time appointees and that the maximum term of appointment is three years.

Clause 2.5- Appointment of chair and deputy chair

This clause requires the Minister when making appointments to nominate someone who will chair meetings. A deputy chair must also be appointed at the same time.

Clause 2.6- Leave

This clause specifies that the Council chair will be given leave at the Minister's discretion and may wish to do so on a proviso. Likewise, the Council may grant leave to any other member, but may also wish to impose conditions on a period of leave.

Clause 2.7- Disclosure of interest

This clause is a conflict of interest provision. It details that should a member have a financial or other interest in a matter being put to Council that will prevent them from engaging with the issue impartially, the member must disclose the type of conflict to their Council colleagues as soon as they become aware that it exists. Unless Council decides otherwise, that member should step out of the room and not take part in the discussion on the matter nor the decision making process.

The extent of the conflict must be recorded in the minutes of the meeting.

Clause 2.8- Reporting of disclosed council interests to Minister

This clause stipulates that where a conflict of the kind in clause 2.7 exists and is disclosed, the Council chair must write to the Minister within three months of the disclosure reporting the disclosed conflict and any action taken by Council. Further reporting at the end of the financial year is also required.

Clause 2.9- Ending appointment of council member

This clause details how Council member appointments may be terminated.

Clause 2.10- Calling meetings

This clause concerns how meetings will be called.

Clause 2.11- Presiding member at council meetings

This clause determines who will supervise each Council meeting in the absence of the Chair.

Clause 2.12- Quorum at council meetings

This clause deems that seven members present constitutes a quorum at council meetings. However, the seven must be representative of the appointments under clause 2.3 of this Schedule. The clause gives detail as to how a legitimate quorum is established.

Clause 2.13- Voting at council meetings

This clause asks that all members aside from the Council chair should vote at meetings. A simple majority of votes at a council meeting will decide an issue. Where votes are even, the chair (or acting chair, be they deputy or otherwise) casts the deciding vote.

Clause 2.14- Conduct of council meetings etc

This clause outlines that Council members will determine what conduct is acceptable at Council meetings, however minutes must be taken and recorded.

The clause provides that members views can be put to meetings in their absence and that Council decisions can be made out of session.

Clause 2.15- Protection of council members from liability

This clause protects council members from any personal civil liability for anything done in good faith when acting as a Council member and instead passes that liability on to the Territory.

Division 2.1.3 - Advisory committees

This division allows the Work Safety Council or responsible Minister to convene advisory sub-committees as they require.

Clause 2.16- Establishment

This clause gives council the power to establish an advisory committee to help fulfil their responsibilities under the legislation. The Minister may also direct the council to establish an advisory committee. The advisory committee will determine its own procedures.

Part 2.2 Work safety commissioner

This part concerns the establishment and functions of the work safety commissioner and how the Minister is permitted to direct the activities of this position.

Clause 2.17- Appointment of commissioner

This clause requires the Executive to appoint a Work Safety Commissioner. The maximum term of appointment is seven years.

Clause 2.18- Functions

This clause outlines the functions of the commissioner as detailed under the legislation and other Territory laws. The commissioner's role is not determined by the relevant director-general as per the ACT's Administrative Arrangements. However the Commissioner's obligation this clause include:

- to make people aware that they have work safety and related duties, and why;
- to research work safety;
- to develop and promote work safety awareness, acceptance and education programs; and
- to advise the Minister on work safety and related issues.

Clause 2.19- Retirement

This clause provides for the retirement of the commissioner where the relevant Director-General (as per the ACT's Administrative Arrangements) and Commissioner agree that the Commissioner's physical or mental state does not allow them to exercise their functions properly.

Clause 2.20- Removal of commissioner

Clause 2.21- Suspension and removal of commissioner

These two clauses cover misconduct or other cases where the commissioner fails to perform his duties adequately. They constitute the exclusive conditions under which the commissioner may be removed or suspended from office.

Clause 2.20 allows the Executive to remove the Commissioner from office for various reasons including failing to perform his/her duties for more than two consecutive weeks or more than a month in total during any twelve month period. The Legislative Assembly may also ask the Executive to remove the commissioner from office because he/she is physically or mentally incapable of performing his or her duties.

Clause 2.21 allows the Executive to suspend the Commissioner if they have reason to believe that the Commissioner has engaged in questionable conduct, or is suffering from a physical or mental condition which renders the Commissioner incapable of performing his/her duties adequately.

Clause 2.22- Ministerial directions to commissioner

This clause permits the Minister to ask the Commissioner in writing to perform his/her duties in a certain way. The Minister's directions must be tabled in the Legislative Assembly within five sitting days of being passed to the Commissioner. The Commissioner is obliged to act on the Minister's advice.

Clause 2.23- Staff

This clause clarifies that the commissioner's staff are employed under the *Public Sector Management Act 1994*.

Clause 2.24- Delegation by commissioner

This clause allows the Commissioner to pass on any of the activities he/she has a duty to perform as Commissioner to one of his/her staff (according to the provisions laid out in part 19.4 of the *Legislation Act 2001*).

Schedule 3 – Regulation-making powers

This Schedule details a variety of matters that may be the subject of regulations (see clause 276). These include duties imposed by the Bill, the protection of workers, and matters relating to records, hazards, work groups, health and safety committees and WHS entry permits. These more specific regulation-making powers deal with matters that are not expressly identified within the scope or objects of the Bill for which regulations may be required. They do not limit the broad regulation making power in subclause 276(1).

Dictionary

The dictionary defines key terms used in the Bill. Some key explanations from the model explanatory statement are as set out below.

Compliance powers

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

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

Health

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

Import

The term 'import' is defined to mean importing into the jurisdiction from outside Australia. This means that interstate movements are excluded from the definition. It is not intended to capture any movement of goods to or from the external territories as defined by the *Acts Interpretation Act 1901(Cth).*

Plant

The term 'plant' is defined broadly to cover a wide range of items, ranging from complex installations to portable equipment and tools.
The definition includes 'anything fitted or connected', which covers accessories but not other things unconnected with the installation or operation of the plant (e.g. floor or building housing the plant).

Officer

The term 'officer' is defined by reference to the 'officer' definitions in section 9 of the *Corporations Act 2001*, but does not include a partner in a partnership. It also includes

‘officers’ of the Territory within the meaning of clause 247 and ‘officers’ of public authorities within the meaning of clause 252. All of these ‘officers’ owe the officers’ duty provided for in clause 27, subject to the volunteers’ exemption from prosecution in clause 34.

This Act

‘This Act’ is defined to include the regulations unless a particular provision provides otherwise.

Volunteer

The term ‘volunteer’ is defined to mean a person who acts on a voluntary basis, irrespective of whether the person receives out-of-pocket expenses. Whether an individual is a ‘volunteer’ for the purposes of the Bill is a question of fact that will depend on the circumstances of each case.

‘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.