

Statutory review of the Work Health and Safety Act 2011 (NSW)

#8



COMPLETE

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IP Address: [REDACTED]

PAGE 1: Have your say!

Q1: Do you wish your feedback to remain confidential? No

Q2: Contact information

Name

AMWU

Industry

Manufacturing

Region

NSW

Email Address (optional)

[REDACTED]

Q3: Tick the box that applies to you

Union representative

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Q4: Are the objects of the Act still valid?

No,

Please explain your answer

The objects of the Act need to be framed on a workers rights basis. This will require the removal of words such as 'balanced' as it introduces compromise which can not be afforded when considering health and safety.

Q5: Are the terms of the Act appropriate for achieving the stated objectives?

Yes,

Please explain your answer

Whilst most of the terms used within the object may be considered appropriate the use of the term 'reasonably practicable' at the end of (2) is not only inappropriate but creates a double caveat given the words 'highest level of protection' proceed it.

Q6: Could the objectives of the Act be achieved in ways that do not cost business as much time, resources or financial expenditure?

No,

Please explain your answer

This question is totally inappropriate and reflects a total misalignment of purpose and understanding by the NSW Regulator and Government if they are of the view this legislation was created to reduce (so called) burden on business. This legislation is solely established to protect workers and other in the workplace.



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**Q7: Are any of the objectives causing unnecessary costs for business?**

No,

Please explain your answer

This question is totally inappropriate and reflects a total misalignment of purpose and understanding by the NSW Regulator and Government if they are of the view this legislation was created to reduce (so called) burden on business. This legislation is solely established to protect workers and other in the workplace.

**Q8: Are the NSW-specific definitions in section four of the Act working effectively?**

No,

Please explain your answer

Subject to schedule 2 which is referenced in section 4, under 1 Regulator; it is recommended to remove " (6) SafeWork NSW is subject to the control and direction of the Minister except in relation to: (a) the contents of any advice, report or recommendation given to the Minister, or (b) any decision that relates to proceedings for offences under this Act, or (c) any decision that relates to a WHS undertaking". To be an effective Regulator there needs to be disentanglement from the Minister so as to ensure regulatory decisions are based on merit and policy decisions are based on achieving the object of the Act and compliance with the regulators functions. Stakeholders perceive that many of the Regulators past and ongoing failures stem from political interference. The previous question (7) is a clear example of the inappropriate influence when considered against the first paragraph of the Ministers Message as found in the Discussion Paper.

**Q9: Are these definitions clear? Please provide examples of circumstances where any definitions are not clear.**

Yes

**Q10: Do you have any comments about how the strict liability provision is working?**

Strict liability is an appropriate standard for this legislation given the gravity of consequences if provisions are contravened.

In NSW strict liability in many cases is not applied by the regulator resulting in a diminution of its deterrent effect and a lowering of expectation and confidence by workers.

PAGE 3: The Work Health and Safety Act 2011 (NSW)

**Q11: Do you have any comment regarding the provision that prevents duplication of incident notifications where they must be notified to the Resources Regulator?**

*Respondent skipped this question*

PAGE 4: The Work Health and Safety Act 2011



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**Q12: Do you have any comment to make regarding the Industrial Relations Commission being the forum that can receive and decide whether to disqualify a health and safety representative?**

We support the NSWIRC as the appropriate forum.

**Q13: Are the additional provisions that have been inserted for health and safety committees in coal mines working well?**

*Respondent skipped this question*

**Q14: Are the provisions relating to prisoners working well?**

*Respondent skipped this question*

PAGE 5: The Work Health and Safety Act 2011 (NSW)

**Q15: Are the organisations listed to clarify who is an emergency services worker, appropriate?**

Yes

**Q16: Are there any other organisations that should be listed?**

Yes, the regularor when giving a reasonable direction in accordance with its functions and Entry Permit Holders when exercising a rights conferred under section 118(e) and 121(2)

**Q17: Are there any other organisations listed that should not be?**

*Respondent skipped this question*

**Q18: Do you have any comment to make regarding the District Court of NSW being the forum that can receive applications about civil proceedings in relation to discriminatory, coercive or misleading conduct?**

Not withstanding the fact that the NSW regulator has failed to bring a single matter to court despite many HSRs being targeted and harmed by their respective PCBU.

The AMWU considers that prosecutions for offences under Work Health and Safety legislation should be heard in specialist courts having expertise and experience in dealing with workplace health and safety and industrial regulation generally. Accordingly, the prosecution of offences should be heard in industrial courts.

The history of the prosecution of offences under health and safety legislation in various Australian and overseas jurisdictions has been characterised by an ongoing battle to ensure that such offences are treated with the seriousness they deserve. The conferral of jurisdiction to hear prosecutions under health and safety legislation upon the general criminal courts has undermined these efforts.

Offences under health and safety legislation have particular characteristics that may be overlooked by courts having general jurisdiction. The approach and procedures of the general criminal courts are less suited to the determination of offences involving systemic failings and the liability of corporate employers.

Proceedings brought in specialist industrial courts are likely to be significantly faster, less costly and less formal than criminal proceedings undertaken through the general criminal courts. The advantages in the use of specialist industrial courts benefits all persons involved in proceedings under health and safety legislation, including prosecutors, victims and their families and defendants.

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**Q19: Do you wish to comment about the Industrial Relations Commission being the Authorising Authority for NSW?**

We support the NSWIRC as the Authorising Authority in NSW.

**Q20: Do you wish to comment on the Industrial Relations Act 1996 being named as the relevant state or industrial law in NSW?**

*Respondent skipped this question*



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Q21: Is the definition of 'authorised person' working well?

No,

If no, please provide details and examples about how this could be improved for your particular circumstances

For most workers the 'authorised person' definition would leave them no wiser with regards to their role.

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Q22: Are the classes of persons that the regulator may appoint as an Inspector working well?

No,

Please explain your answer

The calibre and capacity of some Inspectors has been called into question by many of our members. There is a requirement to apply a more rigorous test to this classes of persons.

Q23: Are the provisions for Inspectors to obtain a search warrant to obtain information about a suspected WHS breach clear?

Yes

Q24: Do the references to the Law Enforcement (Powers and Responsibilities) Act 2002 provide suitable powers for a WHS inspector and NSW Police to cooperate and obtain information about a suspected WHS breach?

Yes

Q25: Are any other provisions needed for the WHS Inspector and NSW Police to cooperate and obtain information about a suspected WHS breach via a search warrant?

*Respondent skipped this question*

Q26: Do you wish to comment on the provisions that NSW currently provides for an inspector to obtain a person's name and address?

*Respondent skipped this question*

Q27: Do you wish to comment on the provision regarding a person who fails to prove that the name or address they provided to an inspector, is correct?

*Respondent skipped this question*

PAGE 9: The Work Health and Safety Act 2011 (NSW)

Q28: Do you have any comment to make regarding the District Court of NSW being the forum that can receive applications by the regulator, about non-compliance with notices?

*Respondent skipped this question*

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**Q29: Do you wish to comment about the District Court of NSW being the nominated forum to receive and hear an application for orders where a person is alleged to have contravened a WHS undertaking in NSW?**

The AMWU considers that matters under Work Health and Safety legislation should be heard in specialist courts having expertise and experience in dealing with workplace health and safety and industrial regulation generally. Accordingly, the prosecution of offences should be heard in industrial courts.

PAGE 11: The Work Health and Safety Act 2011 (NSW)

**Q30: Do you wish to comment about the Industrial Relations Commission being the nominated external body to receive and decide an application for review of a reviewable decision made by the regulator?**

The AMWU supports the NSWIRC to receive and decide external reviews.

To assist, in particular workers, in accessing these rights a representative as defined under section 4 should be allowed to make applications.

**Q31: Do you wish to comment about the Industrial Relations Commission being the nominated external body to receive and hear an application for review of a decision made or taken to have been made, on an internal review by the regulator?**

The AMWU supports the NSWIRC to receive and decide external reviews.

To assist, in particular workers, in accessing these rights a representative as defined under section 4 should be allowed to make applications.

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**Q32: Is the forum for proceedings for an offence against the WHS laws (except category 3 offences) being the local or district court in its summary jurisdiction, working well?**

No,

Please explain your answer

As a result of the move away from the NSWIRC to deal with these matters NSW has seen a collapse in the fines issued as a percentage of maximum penalties and a collapse of matters brought to court due to the regulator and the additional hurdles which have been put in place.

**Q33: Is the requirement for proceedings about category 3 offences to be dealt with summarily, working well?**

No,

Please explain your answer

It is the AMWU's understanding that the NSW regulator has failed to bring 1 matter for prosecution under category 3. In short it is not working at all.

**Q34: Are the provisions of the Industrial Relations Act 1996 that relate to appeals under the WHS Act working well?**

No,

Please explain your answer

Due to no matters being brought.



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**Q35: Do you wish to comment on the provision for the secretary of a union to bring proceedings for an offence against the Act?**

Trade unions have been able to prosecute breaches of workplace safety legislation in NSW for more than 70 years. Regardless of whether SafeWork NSW or an industrial organisation undertakes a health and safety prosecution, it is ultimately up to the relevant court to determine whether the prosecution is successful or not.

The use of the prosecution power has never been abused, with only a small number of unions undertaking a very small number of prosecutions. The grounds for each prosecution is decided on its merits before proceeding with the application, as unions have tended to be very selective and targeted in which matters are chosen for prosecution.

As a result of the unprecedented barriers which are now presented before Union Secretaries before they can proceed with a prosecution per section 230(3) there has not been a union prosecution under the WHS Act 2011.

Union Secretaries should not be limited to bringing matters under category 1 & 2 only and should not be required to await a decline by the regulator to proceed with a matter following advice from the DPP to bring the proceedings. All offences under the Act and Regulation should be open to prosecution by unions particularly in light of the failings of the regulator.

**Q36: Do you wish to comment on the penalty notice scheme being made under the Fines Act 1996?**

*Respondent skipped this question*

PAGE 13: The Work Health and Safety Act 2011 (NSW)

**Q37: Do you wish to comment on the provisions for sharing information by the NSW WHS regulators?**

*Respondent skipped this question*

**Q38: Do you have any comment regarding ongoing reviews of the Act?**

*Respondent skipped this question*

**Q39: What is/is not working well for small business in relation to the NSW-specific provisions of the WHS laws?**

*Respondent skipped this question*

**Q40: What has/has not improved for PCBUs or workers operating in more than one jurisdiction?**

The provision of model WHS legislation was on the basis of providing consistency for all PCBU's across Australia. With the exceptions of Victoria and Western Australia this has been achieved.

Little has been done for workers operating in more than one jurisdiction. FIFO/DIDO workers can elect representatives which have no rights the minute they cross a border and transient workers and those working in insecure employment are unable to elect HSRs due to the nature of their employment and the failure of the regulators to uphold Part 6 of the Act.

There is now a need to consider roving reps for these industries and employment categories and there should be some consideration about whom can fill these roles.

**Q41: Are there differences between how the NSW regulators are applying the legislation compared to other states, territories and the commonwealth?**

No,

If yes, please provide a detailed response. Just different levels of failure to carry out their functions.



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**Q42: Are there differences between how the NSW regulators are providing advice and assistance compared to the other states, territories and the commonwealth?**

Yes,

If yes, please provide a detailed response.  
All other jurisdictions have an established tripartite body for the purposes of developing and sharing advice and assistance. NSW continues to be in breach of its obligations under ILO convention 155. We are aware of regulators in other jurisdictions engaging with unions for the purpose of targeted campaigns in specific industries. This has never occurred within the NSW Manufacturing industry despite its appalling serious injury rates.

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**Q43: Are the provisions that relate to two separate WHS regulators working well?**

*Respondent skipped this question*

**Q44: Are any additional provisions needed to provide for easier communication and exchange of information between the regulators?**

*Respondent skipped this question*

PAGE 15: The Work Health and Safety Act 2011 (NSW)

**Q45: Do you have any comments to make about the forums nominated to conduct reviews under the Regulation in NSW?**

*Respondent skipped this question*

PAGE 16: The Work Health and Safety Act 2011 (NSW)

**Q46: Do any parts or sections of schedule 4 require updating?**

No

PAGE 17: The Work Health and Safety Regulation 2011

**Q47: Are the definitions in clause 5 and 7 working effectively?**

Yes

**Q48: Do you wish to comment on provisions for the Act to apply (or may apply) to dangerous goods and high risk plant that are not at a workplace? (clause 10)**

*Respondent skipped this question*

**Q49: Do you wish to comment on the exclusions that mean the Act does not apply (or may not apply) to dangerous goods and high risk plant that are not at a workplace? (clause 10)**

*Respondent skipped this question*

PAGE 18: The Work Health and Safety Regulation 2011



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**Q50: Is the note about training for health and safety representatives helpful?**

Yes,

Please explain your answer

The unions preference would be for this 'note' to be elevated within clause 21. To contemplate the removal of this 'note' would lead to the bare minimum training provided by the legislation to HSRs being the only training afforded to HSRs. This would be contrary to the objective of the legislation as it would limit the effectiveness of representatives and unwind a process to deliver continuous improvement and progressively higher standards.

PAGE 19: The Work Health and Safety Regulation 2011

**Q51: Is any additional information required to make it easier to understand that the requirements for demolition licensing continue to apply from chapter 10 of the former legislation?**

No

**Q52: Is the meaning of electrical equipment in clause 144 clear?**

Yes

**Q53: Do you wish to comment on the term 'authorised' that has been inserted by NSW in clause 146?**

*Respondent skipped this question*

**Q54: Do you wish to comment on the exclusion in clause 152 that applies to an electricity supply authority, or a person accredited and providing contestable services?**

*Respondent skipped this question*

**Q55: Is the note in clause 164 that advises that residual current devices are also regulated under the Electricity (Consumer Safety) Act 2004, helpful?**

Yes

**Q56: Is the note in clause 166 that advises the Electricity (Consumer Safety) Act 2004 and the Electricity Supply (Safety and Network Management) Regulation 2008 also apply to the PCBU, helpful?**

Yes

PAGE 20: The Work Health and Safety Regulation 2011

**Q57: Are the professional organisations or associations in clause 235, for determining a competent person to conduct a major inspection of registered mobile cranes and tower cranes, appropriate?**

*Respondent skipped this question*

PAGE 21: The Work Health and Safety Regulation 2011

**Q58: Do the local laws that NSW added for exemptions to clause 328 remain appropriate?**

*Respondent skipped this question*





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Q59: Do you wish to comment on the Pesticides Act 1999 being specified in clause 354 to provide for an exemption, meaning an identification of physical or chemical reactions is not required when the chemical is being used for agricultural purposes?

*Respondent skipped this question*

PAGE 22: The Work Health and Safety Regulation 2011

Q60: Do you wish to comment on the exemption in clause 419 that means a license is not required for work involving transport and disposal of asbestos or asbestos waste - that is done in accordance with the Protection of the Environment Operations Act 1997?

*Respondent skipped this question*

Q61: Do you wish to comment on whether the requirement for the regulator to be satisfied that the applicant is able to ensure the licensed work will be done safely, competently and in compliance with the conditions of the licence, working well? (clauses 497 and 500)

There is no evidence which would support this. These clauses have a sole reliance on a person making an application not having a record (criminal or other) of wrong doing.

PAGE 23: The Work Health and Safety Regulation 2011

Q62: Do you wish to comment on the exclusion in clause 530(1) that means chapter 9 does not apply to a facility that is regulated by the National Offshore Petroleum Safety and Environmental Management Authority under the Offshore Petroleum and Greenhouse Gas Storage Act 2006 of the Commonwealth?

*Respondent skipped this question*

Q63: Do you wish to comment on the exclusion in clause 530(2)(a) that means chapter 9 does not apply to a port operational area under the control of a port authority?

This exemption should be removed.

The NSW Port Authority's functions are to:

manages the navigation, security and operational safety needs of commercial shipping on Sydney Harbour, Port Botany and Port Kembla and the ports of Newcastle, Eden and Yamba, provides the emergency response and clean-up in each port for maritime incidents such as oil and fuel spills, operates Sydney's international cruise terminals at Circular Quay and White Bay, hosts the city's only dry bulk facilities, located on Glebe Island.

The NSW Port Authority does not have a function to proactively manage major hazard facilities.

As port operations are coming under the control of PCBUs operating for profit often creating perverse incentives to cut corners.

Q64: Do you wish to comment on the exclusion in clause 530(2)(b) that means chapter 9 does not apply to a pipeline to which the Gas Supply Act 1996 or the Pipelines Act 1967 applies?

*Respondent skipped this question*

Q65: Do you wish to comment on the exclusion in clause 530(2)(e) that means chapter 9 does not apply to a mine or petroleum site?

*Respondent skipped this question*



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**Q66: Is the example in clause 552 under the heading 'arrangements for preventing unauthorised access to the major hazard facility' helpful?**

Yes

**Q67: Do you wish to comment on the requirement in clause 557(2)(a)(i) to consult with Fire & Rescue NSW in preparing an emergency plan for a major hazard facility?**

*Respondent skipped this question*

**Q68: Do you wish to comment on the requirement in clause 557(2)(a)(ii) to consult with the NSW Rural Fire Service in preparing an emergency plan for a major hazard facility?**

*Respondent skipped this question*

**Q69: Do you wish to comment on the requirement in clause 561 for the operator of a major hazard facility, to provide the content for a safety case, as stated in schedule 18?**

*Respondent skipped this question*

**Q70: Do you wish to comment on the Civil and Administrative Tribunal in clause 599 being the forum for external review following the Regulator's decision to refuse to renew a MHF license?**

*Respondent skipped this question*

PAGE 24: The Work Health and Safety Regulation 2011

**Q71: Do you wish to comment on the period of 21 days for the internal reviewer to review the previous decision in clause 680?**

*Respondent skipped this question*

**Q72: Do you wish to comment on the period of 21 days for the internal reviewer to give notice of the decision and the reasons for the decision in clause 681?**

*Respondent skipped this question*

**Q73: Do you wish to comment on the Civil and Administrative Tribunal being the forum that is nominated to hear and decide applications for external review of a decision in clause 683?**

*Respondent skipped this question*

**Q74: Is the note in clause 699, advising that the Public Health Act 2010 also imposes obligations relating to the notification of certain medical conditions, helpful?**

Yes

**Q75: Do you wish to comment on the Acts that have been prescribed in the Regulation for the purposes of section 271 (3) (c) (ii) of the Act? (clause 702)**

*Respondent skipped this question*

**Q76: Do you wish to comment on the penalty notice offences listed in schedule 18A? (clause 702A)**

Many of these offences are matters which effects the protection of workers or assists their representatives. Given the gravity of the consequences when things go wrong the level of penalties is grossly inadequate.

PAGE 25: Codes of Practice



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**Q77: Which of the pre-WHS codes do you still use?**

Control of work-related exposure to hepatitis and HIV.  
Cutting and drilling concrete and other masonry product.  
Formwork.  
Moving plant on construction sites  
Overhead protective structures.  
Safe use of synthetic mineral fibres.  
Safe work on roofs Part 1.  
Tunnels under construction.  
Work near overhead power lines.

**Q78: How often do you use the pre-WHS codes you have listed? Please explain how often you use each code you named for the question above.**

The union has members whose safe work is subjected to these codes of practice every day.

**Q79: What parts of the pre-WHS codes have you looked up in the last 18 months? Please describe the situation and whether the part you looked up was useful, or not, and why.**

Nearly all of the listed codes of practice the union would have looked at over the past 18 months. Generally as a result of a request of a members or their HSR who is seeking information in relation to the particular hazard.

Generally the codes are useful, it is noted however that some of them are getting dated and require a review so as to ensure the latest information and technology is adopted.

**Q80: What parts of the pre-WHS codes do you or persons you represent find useful? Please describe which parts are useful, when and how these are useful to you or persons you represent.**

The prescriptive elements of the codes are of most use in setting out duties, strategies, monitoring requirements, general practices, controls and control measures (including training and education) and other hazards to be aware of.

It is also beneficial where codes have descriptors and photos or diagrams to help explain.

**Q81: Are there any parts of the pre-WHS codes that are unclear or confusing?** No

**Q82: Are there any documents that cover the same subject matter as any pre-WHS codes, but are inconsistent with the codes?** No

**Q83: Is additional guidance needed for any of the subjects covered by the pre-WHS codes?** Yes,

If additional guidance is needed, please explain what guidance would be useful with practical examples of when you (or persons you represent) would use it.

As stated some of these codes need to be reviewed for the purpose of updating. It would also be helpful if there was a basis template that the codes followed which is currently missing as a result of the codes being developed over decades and coming from different sources. It would be incredible unhelpful if guidance was developed as some sort of add on to the codes as this makes finding the information for workers and HSRs more difficult and is not evidentiary thus carrying less weight in the workplace.



