

s 22(1)

**From:** s 22(1) <s 22(1)>  
**Sent:** Monday, 16 May 2016 9:21 AM  
**To:** s 22(1) s 22(1)  
**Cc:** s 22(1)  
**Subject:** FW: Agenda for HWSA Regulatory scope creep working group meeting on 16th May 2016 [SEC=UNCLASSIFIED]  
**Attachments:** Meeting 1\_100516.doc; Agenda attachment 1\_HWSA Workplan April 2016 extract.docx; Agenda attachment 2\_Draft guiding principles .doc; SWA Incident Notification Information Sheet.pdf  
**Importance:** High

**UNCLASSIFIED**

Hi  
 Sorry I did not forward this earlier. We have a meeting today 3.30 to discuss. I think we just need to pass on general comments. For example for principle 1 (see below) it is more the point that the regulator **can't** investigate because they don't have power to do so.

S – can you print these documents out for me?

Thanks  
 s 22(1)

SafeWork NSW does not investigate incidents which are not work related and a duty holder under the legislation cannot be identified.

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 s 22(1)

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**From:** s 22(1) [mailto:s 22(1)]  
**Sent:** Wednesday, 11 May 2016 9:26 AM  
**To:** s 22(1)  
**Cc:** s 22(1)  
**Subject:** Agenda for HWSA Regulatory scope creep working group meeting on 16th May 2016

**Security Classification: Sensitive**

Good morning all

Please find attached the agenda (with attachments) for the HWSA Regulatory scope creep working group meeting on 16<sup>th</sup> May 2016.

In preparation for the meeting can you please 'Reply All' to this message with brief examples / scenarios of regulatory scope creep matters within your jurisdiction. These will be discussed further at the meeting.

If you have any questions please don't hesitate to contact me.

Thank you.

Kind regards

s 22(1)

**A/Senior Project Officer WHS Legislation & Policy**

SafeWork NSW

p s 22(1)

es 22(1)

| [www.safework.nsw.gov.au](http://www.safework.nsw.gov.au)

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## HWSA working group – Regulatory scope creep

### Meeting 1 agenda

**Meeting purpose:** Discuss activities, examples and actions of working group

**Date:** 16 May 2016 **Time:** 3:30pm – 4:30pm (AEST)

**Location:** Teleconference

**Attendees:** s 22(1) (Chairperson - NSW), s 22(1) (VIC), s 22(1) (VIC), s 22(1) (QLD), s 22(1) (SA), s 22(1) (WA), s 22(1) (Comcare), s 22(1) (Dept Employment), s 22(1) (TAS), s 22(1) (NSW)

**Apologies:**

**Minutes:** s 22(1) (NSW)

### Agenda Items

Item	Responsibility
1. Welcome and apologies	s 22(1)
2. Discuss the activities to be undertaken by the working group as per the HWSA work plan (attachment 1) <ul style="list-style-type: none"> <li>Research activities</li> <li>Discussion on examples/scenarios from jurisdictions</li> <li>Outputs of work plan</li> </ul>	s 22(1) /All
3. Discuss draft NSW Guiding Principles (attachment 2) as a possible starting point for national consideration	All
4. Confirm next steps	All
5. Confirm date and time for next meeting of working group	All
<b>Meeting close</b>	

### My actions

Item	Timeframe
1.	
2.	
3.	

**Next meeting:** TBA

## Extract from HWSA work plan 2016

Issue /Opportunity	Problem Description	Purpose / desired outcome	Activities	Outputs	Timeframe and deliverable	Lead	Others
Regulatory scope creep	<p>There is confusion about the scope of the WHS regulatory framework in terms of its reach &amp; applicability in particular situations e.g public safety, child protection, professional sport, recreational activities</p> <p>This confusion creates inconsistencies across borders &amp; makes it difficult to explain to the community &amp; senior officials how &amp; by whom these incidents are managed.</p>	<p>Provide clarity of the regulatory scope as intended by the objectives of the regulatory framework and how it applies to other regulators.</p> <p>Enable regulators to articulate a consistent approach regarding the management of these types of issues.</p> <p>Provide confidence that these issues are being managed in a way that provides the right level of protection in the community.</p>	<p>Research across all jurisdictions</p> <p>Reference relevant examples (ie. HSE UK)</p> <p>Workshop / liaise with participating members to identify potential scenarios (sport, public, schools, child protection, horse riding, pony club, speedway)</p>	<p>Paper including research outcomes, scenarios and findings.</p> <p>A set of guiding principles for discretionary use by jurisdictions</p> <p>Examples of how the guiding principles could be applied</p> <p>Communication tools / messages for use by regulators with key stakeholders</p>	<p>Liaison with participating jurisdictions by March / April 2016</p> <p>Paper by July 2016</p> <p>Guiding principles and reference tools by December 2016</p>	NSW	<p>WA, SA, Comm Dept. of Employment</p> <p>VIC, QLD, TAS, Comcare</p>

## REGULATORY SCOPE CREEP – DRAFT GUIDING PRINCIPLES

The following guiding principles are considered by SafeWork NSW when determining the level of investigation to be made:

### **Principle 1 : A duty holder must be involved in the incident**

SafeWork NSW does not investigate incidents which are not work related and a duty holder under the legislation cannot be identified.

An example of a non-work related incident would be where a community group that does not employ any workers and all members are volunteers decides to do some clean-up work at a historical house using their own personal tools and equipment, and one of the group falls off a ladder and is hospitalised. SafeWork NSW does not have jurisdiction in this matter as the community group is not a PCBU.

### **Principle 2 : The incident occurred within SafeWork NSW's jurisdiction**

When notified of an incident, SafeWork NSW undertakes an investigation to ascertain whether the duty holders or those responsible for oversight of any work related activities fall within NSW's jurisdiction. However, SafeWork NSW may make enquiries if a matter has been triaged out due to the relative minor nature of the incident.

SafeWork may conduct an initial investigation to determine if there are jurisdictional issues. SafeWork NSW does not investigate incidents which do not have a sufficient connection with New South Wales or where Commonwealth legislation covers the field. For example where a person conducting a business or undertaking is a Commonwealth authority or a corporation licensed under the *Safety Rehabilitation and Compensation Act (1988)* Commonwealth.

### **Principle 3 : The incident relates to the business or undertakings of duty holder**

There must be a direct connection between the work activity, incident and the PCBU. If not, the *Work Health and Safety Act 2011* does not apply.

### **Principle 4 : The incident was notifiable in accordance with section 35 *Work Health and Safety Act 2011*.**

For information as to incidents which are notifiable refer to SafeWork Australia's Incident Notification Information Sheet.

### **Principle 5 : The incident was an identified priority**

Outlined in the *National Compliance and Enforcement Policy* are priority areas which have been agreed to by all work health and safety authorities in adopting a consistent approach in selecting matters for investigation.

The priority areas are assessed against a number of factors including identified local issues to determine the seriousness, importance and the basis for the matter proceeding to investigation.

**Principle 6 : Other applicable legislation**

For example is there other legislation which may be more relevant such as the *NSW Crimes Act 1900* or *Civil Liability Act 2002*. However, this does not preclude SafeWork NSW from taking any action deemed necessary or in the public interest.

**Principle 7: SafeWork NSW is the primary regulator for this incident**

SafeWork NSW will not investigate a matter where another agency or governing authority is responsible for administering incident related legislation and has resolved to investigate the matter.

SafeWork NSW may also undertake an investigation (including a joint investigation) where the matter is being investigated by another agency or governing authority and SafeWork NSW believes that the incident is within the jurisdiction of the legislation administered by SW NSW.

Examples

- A worker is killed in a motor vehicle accident. In this case the appropriate regulator may be NSW Police or Roads and Maritime Services.
- A professional sportsperson is severely injured during the course of a rugby league game. The game is well regulated and the NSW Office of Sport is considered to be the most appropriate department to investigate the incident.
- A child sustains a serious eye injury after being involved in a fight with another student during a lunch break. The Department of Education is the most appropriate body to investigate this incident.
- Some equipment catches on fire in a workplace. In recent months the equipment had been recalled by the manufacturer and the PCBU had not been notified of this. In this case the Australian Competition and Consumer Commission or the NSW Fair Trading may be the more appropriate regulator. However, if the PCBU was previously notified of the recall and did not take action, SafeWork NSW may be the more appropriate regulator to deal with this incident.

**Principle 8: What was reasonably practicable to ensure health and safety taking into account relevant matters as outlined in section 18 *Work Health and Safety Act 2011*.**

**Principle 9 : Public Interest**

SafeWork NSW will consider factors such as whether:

- SafeWork NSW regulates the particular activity i.e. fireworks, amusement devices, hazardous goods and whether the public are at risk
- the public expects SafeWork NSW to take action.

DRAFT

# INCIDENT NOTIFICATION INFORMATION SHEET

## Overview

This information sheet provides general guidance on mandatory reporting requirements for 'notifiable incidents' under Work Health and Safety (WHS) legislation.





Businesses and undertakings must notify their work health and safety regulator of certain 'notifiable incidents' at work. This information sheet will help you decide when you need to notify the regulator of a work-related death, injury, illness or dangerous incident.

Work health and safety regulators are committed to preventing work-related deaths and injuries. Notifying the regulator of 'notifiable incidents' can help identify causes of incidents and prevent similar incidents at your workplace and other workplaces.

The WHS law requires:

- a 'notifiable incident' to be reported to the regulator immediately after becoming aware it has happened
- if the regulator asks—written notification within 48 hours of the request, and
- the incident site to be preserved until an inspector arrives or directs otherwise (subject to some exceptions).

Failing to report a 'notifiable incident' is an offence and penalties apply.

## What is a 'notifiable incident'

A 'notifiable incident' is:

- the death of a person
- a 'serious injury or illness', or
- a 'dangerous incident'

arising out of the conduct of a business or undertaking at a workplace.

'Notifiable incidents' may relate to any person—whether an employee, contractor or member of the public.

### Serious injury or illness

Only the most serious health or safety incidents are notifiable, and only if they are work-related. They trigger requirements to preserve the incident site pending further direction from the regulator.

Serious injury or illness must be notified if the person requires any of the types of treatment in the following table:

Types of treatment	Example
Immediate treatment as an in-patient in a hospital	Admission into a hospital as an in-patient for any duration, even if the stay is not overnight or longer.  <b>It does not include:</b>  Out-patient treatment provided by the emergency section of a hospital (i.e. not requiring admission as an in-patient)  Admission for corrective surgery which does not immediately follow the injury (e.g. to fix a fractured nose).
Immediate treatment for the amputation of any part of the body	Amputation of a limb such as arm or leg, body part such as hand, foot or the tip of a finger, toe, nose or ear.
Immediate treatment for a serious head injury	Fractured skull, loss of consciousness, blood clot or bleeding in the brain, damage to the skull to the extent that it is likely to affect organ/face function.  Head injuries resulting in temporary or permanent amnesia.  <b>It does not include:</b>  A bump to the head resulting in a minor contusion or headache.

Types of treatment	Example
Immediate treatment for a serious eye injury	<p>Injury that results in or is likely to result in the loss of the eye or total or partial loss of vision.</p> <p>Injury that involves an object penetrating the eye (for example metal fragment, wood chip).</p> <p>Exposure of the eye to a substance which poses a risk of <b>serious</b> eye damage.</p> <p><b><u>It does not include:</u></b></p> <p>Eye exposure to a substance that merely causes irritation.</p>
Immediate treatment for a serious burn	<p>A burn requiring intensive care or critical care which could require compression garment or a skin graft.</p> <p><b><u>It does not include:</u></b></p> <p>A burn that merely requires washing the wound and applying a dressing.</p>
Immediate treatment for the separation of skin from an underlying tissue (such as de-gloving or scalping)	<p>Separation of skin from an underlying tissue such that tendon, bone or muscles are exposed (de-gloving or scalping).</p> <p><b><u>It does not include:</u></b></p> <p>Minor lacerations.</p>
Immediate treatment for a spinal injury	<p>Injury to the cervical, thoracic, lumbar or sacral vertebrae including the discs and spinal cord.</p> <p><b><u>It does not include:</u></b></p> <p>Acute back strain.</p>
Immediate treatment for the loss of a bodily function	<p>Loss of consciousness, loss of movement of a limb or loss of the sense of smell, taste, sight or hearing, or loss of function of an internal organ.</p> <p><b><u>It does not include:</u></b></p> <p>Mere fainting</p> <p>A sprain or strain.</p>
Immediate treatment for serious lacerations	<p>Deep or extensive cuts that cause muscle, tendon, nerve or blood vessel damage or permanent impairment.</p> <p>Deep puncture wounds.</p> <p>Tears of wounds to the flesh or tissues—this may include stitching to prevent loss of blood and/or other treatment to prevent loss of bodily function and/or infection.</p>

Types of treatment	Example
Medical treatment within 48 hours of exposure to a substance	'Medical treatment' is treatment provided by a doctor.  Exposure to a substance includes exposure to chemicals, airborne contaminants and exposure to human and/or animal blood and body substances.

Notification is also required for the following serious illnesses:

- Any infection where the work is a significant contributing factor. This includes any infection related to carrying out work:
  - (i) with micro-organisms
  - (ii) that involves providing treatment or care to a person
  - (iii) that involves contact with human blood or body substances
  - (iv) that involves handling or contact with animals, animal hides, skins, wool or hair, animal carcasses or animal waste products.
- The following occupational zoonoses contracted in the course of work involving handling or contact with animals, animal hides, skins, wool or hair, animal carcasses or animal waste products:
  - (i) Q fever
  - (ii) Anthrax
  - (iii) Leptospirosis
  - (iv) Brucellosis
  - (v) Hendra Virus
  - (vi) Avian Influenza
  - (vii) Psittacosis.

### **Treatment**

'Immediate treatment' means the kind of urgent treatment that would be required for a serious injury or illness. It includes treatment by a registered medical practitioner, a paramedic or registered nurse.

'Medical treatment' refers to treatment by a registered medical practitioner (a doctor).

Even if immediate treatment is not readily available, for example because the incident site is rural or remote or because the relevant specialist treatment is not available, the notification must still be made.

### **Still unsure?**

If you are still unsure about whether a particular incident should be notified then contact your regulator for advice or further guidance. Contact details are included below.

### **Dangerous incidents including 'near misses'**

Some types of work-related dangerous incidents must be notified even if no-one is injured. The regulator must be notified of any incident in relation to a workplace that exposes any person to a serious risk resulting from an immediate or imminent exposure to:

- an uncontrolled escape, spillage or leakage of a substance
- an uncontrolled implosion, explosion or fire
- an uncontrolled escape of gas or steam
- an uncontrolled escape of a pressurised substance
- electric shock:
  - examples of electrical shock that are not notifiable
    - shock due to static electricity
    - 'extra low voltage' shock (i.e. arising from electrical equipment less than or equal to 50V AC and less than or equal to 120V DC)
    - defibrillators are used deliberately to shock a person for first aid or medical reasons

– examples of electrical shocks that are notifiable

• minor shock resulting from direct contact with exposed live electrical parts (other than ‘extra low voltage’) including shock from capacitive discharge

- the fall or release from a height of any plant, substance or thing
- the collapse, overturning, failure or malfunction of, or damage to, any plant that is required to be design or item registered under the Work Health and Safety Regulations, for example a collapsing crane
- the collapse or partial collapse of a structure
- the collapse or failure of an excavation or of any shoring supporting an excavation
- the inrush of water, mud or gas in workings, in an underground excavation or tunnel, or
- the interruption of the main system of ventilation in an underground excavation or tunnel.

A dangerous incident includes both immediate serious risks to health or safety, and also a risk from an immediate exposure to a substance which is likely to create a serious risk to health or safety in the future, for example asbestos or hazardous chemicals.

## Only work-related incidents are notifiable

To be notifiable, an incident must arise out of the conduct of the business or undertaking. An incident is not notifiable just because it happens at or near a workplace.

Incidents may happen for reasons which do not have anything to do with work or the conduct of the business or undertaking, for example:

- a worker or another person suffers a heart attack while at work which is unrelated to work or the conduct of the business or undertaking
- 

- an amateur athlete is injured while playing for the local soccer team and requires immediate medical treatment (this is not work)
- a person driving to work is injured in a car accident (where driving is not part of their work)
- a person with epilepsy has a seizure at work.

These kinds of incidents are **not notifiable**.

## Work-related incidents that occur outside a workplace may be notifiable

Work-related incidents may affect people outside the workplace. These may still be notifiable if they involve a death, serious illness or injury or a dangerous incident.

For example:

- an object like a hand tool falls off a multi-storey building under construction hitting a person below
- scaffold collapse that causes a risk of serious injury to persons adjacent to a construction site
- an awning over a shop-front collapses, hitting a person underneath it.

Appendix A provides more information about incidents at public places or sporting events.

## Who is responsible for notifying?

Any person conducting a business or undertaking (PCBU) from which the ‘notifiable incident’ arises must ensure the regulator is notified immediately after becoming aware it has happened.

Procedures should be put into place to ensure work health and safety incidents are promptly notified to the people responsible for responding to them, for example a manager and then notified to the regulator, if required.

## Incidents involving multiple businesses or undertakings

If a ‘notifiable incident’ arises out of more than one business or undertaking then each must ensure that the incident has been notified to the regulator.

[www.safeworkaustralia.gov.au](http://www.safeworkaustralia.gov.au)

There is no need for all duty holders to notify—only one needs to. However, all duty holders retain their responsibility to notify, regardless of any agreement between them.

In these circumstances the duty holders must, so far as is reasonably practicable, consult, cooperate and coordinate to put appropriate reporting and notification arrangements in place.

For example contractors at a construction workplace may agree that the principal contractor for the workplace will notify all ‘notifiable incidents’ that occur at the workplace.

### **Incidents involving a ‘State-based contractor working for a Commonwealth entity’**

Workplaces shared by a Commonwealth entity and one or more state-based contractors may be covered by both Commonwealth and state or territory work health and safety (WHS) laws.

For example an asbestos removal company is engaged by the Department of Defence (Defence) to carry out asbestos removal work at Randwick Army Barracks in Sydney and a dangerous incident occurs (as defined above). Because the incident has occurred at a place where work is carried out for Defence (on behalf of the Commonwealth) the

company must ensure that both Comcare and WorkCover NSW are notified of the incident. Defence and the company may co-operate so that only one notification is made to Comcare on behalf of both.

### **When and how to notify**

You must notify the regulator immediately after becoming aware of a ‘notifiable incident’.

The notice must be given by the fastest possible means—which could be by telephone or in writing, for example by email or online (if available). See page 8 for contact details.

Regulators have adopted a common-sense approach to assessing whether an incident has been notified immediately. This means incidents must be notified as soon as the particular circumstances permit.

In general a PCBU ‘becomes aware’ of a notifiable incident once any of their supervisors or managers becomes aware of the incident. For example when a worker suffers a serious injury and reports it to their immediate supervisor, it is at this point that the PCBU is considered to be aware of the incident.

It is therefore essential to develop internal communication systems to ensure health or safety incidents are promptly brought to the relevant persons’ attention.

### **What information will be requested?**

At first, the regulator will ask for a clear description of the incident with as much detail as possible. This will help the regulator assess whether or not the incident is notifiable and the need for a follow-up investigation. The following information is usually requested:

<b>What happened: an overview</b>	<ul style="list-style-type: none"> <li>• Provide an overview of what happened.</li> <li>• Nominate the type of notifiable incident—was it death, serious injury or illness, or ‘dangerous incident’ (as defined above)?</li> </ul>
<b>When did it happen</b>	Date and time.
<b>Where did it happen</b>	<p>Incident address.</p> <p>Details that describe the specific location of the notifiable incident—for example section of the warehouse or the particular piece of equipment that the incident involved—to assist instructions about site disturbance.</p>
<b>What happened</b>	Detailed description of the notifiable incident.

[www.safeworkaustralia.gov.au](http://www.safeworkaustralia.gov.au)

<b>Who did it happen to</b>	<ul style="list-style-type: none"> <li>• Injured person's name, date of birth, address and contact number.</li> <li>• Injured person's occupation.</li> <li>• Relationship of the injured person to the entity notifying.</li> </ul>
<b>How and where are they being treated (if applicable)</b>	<ul style="list-style-type: none"> <li>• Description of serious injury or illness—i.e. nature of injury</li> <li>• Initial treatment of serious injury or illness.</li> <li>• Where the patient has been taken for treatment.</li> </ul>
<b>Who is the person conducting the business or undertaking (there may be more than one)</b>	<ul style="list-style-type: none"> <li>• Legal and trading name.</li> <li>• Business address (if different from incident address), ABN/ACN and contact details including phone number and email.</li> </ul>
<b>What has/is being done</b>	Action taken or intended to be taken to prevent recurrence (if any).
<b>Who is notifying</b>	<ul style="list-style-type: none"> <li>• Notifier's name, contact phone number and position at workplace.</li> <li>• Name, phone number and position of person to contact for further information (if different from above).</li> </ul>

Notify immediately, and provide the information you can, even if you do not have all of the required information.

The regulator may follow-up with a request for more information later if necessary. You must provide the required information in writing within 48 hours of the request being made.

### Can work continue where the incident occurred?

An incident site must not be disturbed until an inspector arrives at the site or directs otherwise (whichever is earlier). The person with management or control of the workplace is responsible for preserving the incident site, so far as is reasonably practicable.

Any evidence that may assist an inspector to determine the cause of the incident must be preserved—including any plant, substance, structure or thing associated with the incident.

However, preserving an incident site does not prevent any action needed:

- to assist an injured person
- to remove a deceased person
- to make the site safe or to minimise the risk of a further notifiable incident, or
- to facilitate a police investigation.

The sooner the regulator is notified, the sooner the site can be released.

An inspector may issue a non-disturbance notice, if they consider that the incident site should remain undisturbed in order to facilitate their investigation. This notice must specify the period for which the notice is to apply—no more than seven days.

Penalties apply if an individual or body corporate fails to preserve a site.

### Site preservation requirements only apply to the incident site

Requirements to preserve a site only apply to the area where the incident occurred—not the whole workplace.

If you are unsure about what you need to do, you can ask the regulator for advice or to be excused from having to preserve the site.

### Amending notifications

If you receive information that changes the incident type of a notified incident, you must notify the regulator of those changes. For example, if a notified serious injury or illness later results in the person's death, the regulator must be advised immediately upon you learning that the person has died.

## Record keeping requirements

Records of notifiable incidents must be kept for at least five years from the date of notification. Penalties apply for failing to do so.

It is useful to keep a record of having made the notification (e.g. confirmation from the regulator), and also any directions or authorisations given by an inspector at the time of notification.

## Contact details for regulators

To notify a 'notifiable incident' contact your local regulator:

Jurisdiction	Regulator	Telephone	Website
<b>New South Wales</b>	SafeWork NSW	13 10 50	<a href="http://safework.nsw.gov.au">safework.nsw.gov.au</a>
<b>Victoria</b>	WorkSafe Victoria	1800 136 089	<a href="http://worksafe.vic.gov.au">worksafe.vic.gov.au</a>
<b>Queensland</b>	WorkSafe Queensland	1300 369 915	<a href="http://worksafe.qld.gov.au">worksafe.qld.gov.au</a>
<b>South Australia</b>	SafeWork SA	1800 777 209	<a href="http://safework.sa.gov.au">safework.sa.gov.au</a>
<b>Western Australia</b>	WorkSafe WA	1300 307 877	<a href="http://commerce.wa.gov.au/worksafe">commerce.wa.gov.au/worksafe</a>
<b>Australian Capital Territory</b>	WorkSafe ACT	02 6207 3000	<a href="http://worksafe.act.gov.au/healthsafety">worksafe.act.gov.au/healthsafety</a>
<b>Tasmania</b>	WorkSafe Tasmania	1300 366 322 (Tas) 03 6233 7657 (External)	<a href="http://worksafe.tas.gov.au">worksafe.tas.gov.au</a>
<b>Northern Territory</b>	NT WorkSafe	1800 019 115	<a href="http://worksafe.nt.gov.au">worksafe.nt.gov.au</a>
<b>Commonwealth</b>	Comcare	1300 366 979	<a href="http://comcare.gov.au">comcare.gov.au</a>

## Appendix A

### Public places and sporting events

Workplaces may also be public or partly public places, for example:

- public parks, streets
- public transport
- shopping centres
- sports facilities
- schools and colleges
- aged care facilities, hospitals and medical centres
- cafes, restaurants, hotels and other kinds of public accommodation.

Incidents involving bystanders, visitors, students, patrons or other members of the public are only notifiable if:

- there is a death
- a 'serious injury or illness' is suffered or there is a dangerous incident ('near miss' as described above), and
- the incident arises out of the conduct of a business or undertaking.

An incident may arise out of the conduct of a business or undertaking for example because of:

- the way a work activity is organised (for example inadequate safety precautions)
- the way equipment or substances are used (for example lifts, machinery)
- the condition of a workplace (for example poorly maintained or slippery floors)
- actions of someone who is not a worker at the workplace.

If a visitor at a shopping centre is taken to hospital after sustaining a serious fracture then the incident would be notifiable. If a visitor is taken to hospital because of their pre-existing medical condition (for example heart attack, epileptic seizure at a shop) this would not be notifiable as it did not result from the conduct of the business or undertaking.

### Incidents during sports activities

Work health and safety duties apply in relation to professional sports people for whom sport is work and sport organised by businesses or undertakings. They do not apply to purely social or recreational activities or activities organised by wholly volunteer associations that do not employ anyone.

For more information about the way the work health and safety laws affect volunteers and organisations with volunteers refer to the online resource kit published by Safe Work Australia.

Some sports injuries may arise from 'work' (for example a professional AFL footballer) while others may not (a local amateur club footballer).

Sports injuries are **not notifiable** if arising out of the normal conduct of a sports activity for example rough and tumble of a game.

Sports injuries **are notifiable** only if arising out of the conduct of a business or undertaking for example:

- the way a work activity involving sport is arranged
- the way the sporting activity is managed or controlled
- the condition, design or maintenance of premises or equipment, or
- the way work is carried out, for example inadequate supervision.

Examples of notifiable incidents include:

- the condition of the premises or sports equipment was a factor in the incident—for example where a participant suffers an injury requiring admission as an inpatient at a hospital due to tripping over on a potholed tarmac surface, or
- there was inadequate supervision to prevent an incident—like ensuring the safe use of equipment used by students on a school excursion or failings in the organisation and management of an event.



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**Sent:** Monday, 16 May 2016 1:19 PM  
**To:** s 22(1) s 22(1)  
**Subject:** FW: Agenda for HWSA Regulatory scope creep working group meeting on 16th May 2016 [SEC=UNCLASSIFIED]  
**Attachments:** Enf-note---Public-safety 22 March 2013.doc

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**From:** s 22(1) [mailto:s 22(1)]  
**Sent:** Monday, 16 May 2016 12:54 PM  
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**Cc:** s 22(1)  
**Subject:** RE: Agenda for HWSA Regulatory scope creep working group meeting on 16th May 2016

Good afternoon everyone

Please find attached a copy of the draft Queensland operational document in relation to public safety matters. It contains a number of principles and examples which may also be useful for the discussion later this afternoon.

Cheers

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s

s 22(1) | Director | Work and Electrical Safety Policy  
 Office of Industrial Relations | Queensland Treasury  
 Lvl 20 State Law Building, 50 Ann Street, Brisbane | GPO Box 69, Brisbane Qld 4001  
 s 22(1) | s 22(1)

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Security Classification: Sensitive

Good morning all

Please find attached the agenda (with attachments) for the HWSA Regulatory scope creep working group meeting on 16<sup>th</sup> May 2016.

In preparation for the meeting can you please 'Reply All' to this message with brief examples / scenarios of regulatory scope creep matters within your jurisdiction. These will be discussed further at the meeting.

If you have any questions please don't hesitate to contact me.

Thank you.

Kind regards

s 22(1)

**A/Senior Project Officer WHS Legislation & Policy**

SafeWork NSW

p s 22(1)

e s 22(1) s 22(1)

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92-100 Donnison Street Gosford NSW 2250



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## WHSQ operational document – Enforcement note 43

**Enforcement note number: //Q/XXXX**

**Title/subject: Public safety and the Office of Fair and Safe Work Queensland**

### Purpose

To clarify the regulator's position on how the *Work Health and Safety Act 2011* (the WHS Act) should be applied to the issue below to ensure compliance and enforcement outcomes remain consistent, constructive, transparent, accountable, proportionate, responsive and targeted.

### Issues

The purpose of this enforcement note is to provide:

- a framework to inspectors to assist them in determining what action is required of WHSQ with respect to incidents involving members of the public
- guidance on the jurisdictional interpretation of public safety issues where the issues involve a workplace or a business or an undertaking.

### Background

*Work Health and Safety Act 2011*

The *Work Health and Safety Act 2011* (WHS Act) commenced on 1 January 2012, superseding the *Workplace Health and Safety Act 1995*. The primary objective of the WHS Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces. In order to fulfil this purpose, the WHS Act places a primary duty on persons conducting a business or undertaking (PCBUs) to ensure, so far as is reasonably practicable, that the health and safety of workers and other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. The Act also imposes duties on other duty holders including officers, workers, designers of plant and other persons to comply with various obligations relating to work, health and safety.

*Safety in Recreational Water Activities Act 2011*

The SRWA Act also commenced on 1 January 2012. The main object of the SRWA Act is to ensure the health and safety of persons involved in recreational water activities provided by a business or undertaking. The term **recreational water activity** means an activity carried out for the purposes of recreation undertaken on, in or under waters.

The SRWA Act applies in conjunction with the WHS Act and deals with recreational water activities only in the context of them being provided by a person in the conduct of a business or undertaking and under the management or control of the person. Where an inconsistency between the two Acts exists, the WHS Act overrides the SRWA Act to the extent of the inconsistency.

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The scope of the obligations in these two Acts often blurs the boundary between safety at work and public safety. In defining the boundaries of the WHS Act and the SRWA Act the scope of the objectives of the Acts must be understood to ensure enforcement actions are not directed to persons who are not subject to these Acts.

WHSQ is increasingly called upon to provide advice on, and enforce, the WHS Act and SRWA Act where there is interaction with members of the public, public events, or public functions and activities, such as:

- professional and amateur sporting events where a variety of entities including volunteers meet to manage, participate and watch the events (e.g. cricket, football, motor racing)
- adventure activities undertaken as a paid business or enterprise (e.g. tandem sky-diving; white water rafting; bungee-jumping, abseiling; artificial climbing structures; challenge rope courses; trail horse-riding activities)
- adventure activities undertaken by the provision of facilities only (e.g. access to a paddock with pre-constructed bike or vehicle track; a private jetty on river for kayaking, canoeing; race track where participants provide their own vehicle; bushwalking; mountain biking; angling, caving)
- incidents or events where there is an interaction between a workplace and members of the public where no work is occurring (e.g. guttering or window pane falls off a building which is not under construction; person falls into open drain on public land, child falls off playground equipment).

For the purpose of this document, the activities listed above and others of similar types not listed, are referred to as **public involvement activities**. This term covers adventure/sporting activities and other activities which may involve or affect members of the public.

### **Volunteers**

It is important to note that *volunteer associations* do not conduct a 'business or undertaking' for the purposes of the WHS Act and so do not owe any duties under this legislation (s5 WHS Act). A volunteer association means a group of volunteers working together for one or more community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association. An example of such an association could be a neighbourhood bush regeneration group. However, where an organisation does employ a person, then that person is a 'worker' and is owed a duty under the legislation.

Where a PCBU engages volunteers, then those volunteers would, at the very least, be classified as 'other persons' and so be owed a duty under s19 WHS Act. As 'other persons' they would also have duties under s29 WHS Act.

## **Regulator's position**

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## 1. Investigating incidents related to public involvement activities

In order to determine the requisite connection between operations of the business or undertaking and any injury sustained by a participant in a public involvement activity, there will need to be some enquiry by the inspectorate in order to determine jurisdiction and responsibility over a work incident, work or work activity involving public involvement activities.

Attachment 1 sets out a number of scenarios and the level of investigation required to determine jurisdiction and what actions would be considered reasonable for the inspector to take. Columns 1 to 5 set out scenarios and ask questions to determine:

- A description of the incident and whether the legislation applies (*Context*, including *Business or Undertaking* test, columns 1-2); and
- the level of control duty holders have over the specified incident and any reasonably practicable risk management measures undertaken, or which should have been undertaken, by duty holders, including the injured participant (*Degree of Control and Risk Management* test in columns 3-5).

Column 6 then sets out what actions are required in each circumstance by the inspector.

To assist inspectors in using the table, some information relevant to each column is set out below.

Attachment 1 is organised according to applicable legislation (WHS Act or SRWA Act) and, under each Act, the type of public involvement activity (adventure/sporting activities, other public involvement activities).

### *Column 1 – Scenario*

This column simply describes the scenario, e.g. 'horse-riding in a public park'.

### *Column 2 – Business or undertaking?*

For the legislation to apply, the incident which caused injury or death must have occurred **in the course of the conduct of a business or undertaking**. This column asks whether the incident occurred during or as a result of the conduct of a business or undertaking. This is particularly relevant where an incident occurred in a place that might sometimes be used to conduct a business or undertaking, but at other times used for private purposes.

Possible questions the investigator could ask when considering the context of the incident include:

- Was there a direct connection between the incident and the undertaking of any obligation holder? (i.e. what did the business/undertaking agree to provide?)
- Did the activity occur at the direction of a PCBU or one of his or her workers either directly or indirectly?

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- Were other workers exposed (or possibly exposed) to the same risks?

N.B. If the incident did **not** occur in the course of a business or undertaking, then the WHS Act and/or SRWA Act do not apply and there is no need to answer the questions under columns 3-5. The investigator would not need to take any action. However, it might be prudent for the investigator to refer the matter to the appropriate authority, e.g. the police or a public health authority.

#### *Column 3 - Duty Holder/s*

In column 3, inspectors will need to identify the duty holders regarding the specific incident. The overriding general duty is owed by PCBUs. Under s19 of the WHS Act, a PCBU has an obligation under the s19(1) of the WHS Act to ensure, as far as reasonably practicable, the health and safety of the PCBU's workers while the workers are at work in the business or undertaking. A PCBU must also ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking (see s19(2) WHS Act). This includes those PCBUs providing public involvement activities.

However, other persons also have duties under the legislation (sections 20-29 WHS Act). Duty holders include designers of equipment or plant, persons with management or control of the workplace, officers, workers and other persons, such as participants/clients. Participants have a duty to look after their own health and safety, not to put others at risk of harm, and to follow any reasonable directions given by the PCBU (or a worker of the PCBU).

More than one person can be a duty holder in relation to an incident (s16 WHS Act). For instance, in a business or undertaking engaged in a public involvement activity, it is likely the following people would have duties to varying degrees: the PCBU, the PCBU's workers and the client/participant. To some degree, they are all owed a duty by the PCBU as well.

#### *Column 4 - Degree of Control and Risk Management*

In column 4, inspectors will need to describe the degree of control over the situation which the duty holder had and the risk management measures taken by the duty holder.

A duty holder has a responsibility to either eliminate risks or hazards as far as reasonably practicable, or minimise them as far as reasonably practicable (s17 WHS Act). The factors which should be taken into account in assessing whether a duty holder has met the 'reasonably practicable' standard include (s18 WHS Act):

- The likelihood of the risk or hazard occurring;
- The degree of harm that might result;
- What the person concerned knew or ought to have known about the nature of the risk or hazard, and the availability and suitability of ways of eliminating or minimising the risk or hazard;

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- Whether the cost of eliminating or reducing the risk or hazard would be grossly disproportionate

Reference to the relevant codes of practice or other reputable industry standards may assist the inspector in assessing whether the measures taken by the duty holder were reasonably practicable (e.g. *Recreational Diving, Recreational Technical Diving and Snorkelling Code of Practice 2011*).

#### *Column 5 – Participant knowledge of risks*

Column 5 asks whether the injured participant knew, or should reasonably have been aware, of the risks involved in the activity. As stated above, not only does the PCBU (and its workers) owe a duty to participants to ensure their health and safety, but the participant also owes a duty to: ensure their own health and safety, not to put others at risk, and to follow reasonable directions from the PCBU (s29 WHS Act).

#### *Column 6 – Actions of the inspector*

The action required by the inspector is described in column 6. The answers provided in the other columns will assist in determining whether further action, such as conducting a full investigation, is required. It may be that no action at all is required, especially if the incident is not covered by the relevant legislation.

### **Swimming Pool incidents**

For incidents occurring at swimming pools, in addition to the tests listed above, inspectors are to assess the facility against the relevant guidelines issued by the Royal Life Saving Society Association (RLSSA) in Queensland. Consideration should be given to engaging the RLSSA as an expert to undertake an assessment of the facility against the RLSSA Guidelines for Safe Pool Operations for incidents involving a death or serious injury. Contact details are:

**Location:** 1204 New Cleveland Road  
Gumdale Qld 4154

**Contact Details:** Phone: (07) 3823 2823  
Fax: (07) 3823 2423  
Email: [rlssqadmin@ozemail.com.au](mailto:rlssqadmin@ozemail.com.au)

**Postal Address:** P.O. Box 1093  
CAPALABA DC QLD 4157

**ABN: 60 478 008 791**

## **2. Conducting proactive interventions in a business/undertaking engaging in public involvement activities**

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An inspector may be asked to measure compliance with the relevant legislation at a business or undertaking which provides services to the public for activities such as:

- Abseiling
- Artificial Climbing Structures
- Bushwalking
- Canoeing/Kayaking
- Challenge Ropes Courses
- Trail Horse Riding
- Mountain Biking
- Rock Climbing
- Recreational Angling
- Recreational Caving
- River Rafting
- Surfing
- Snorkelling, Wildlife Swims
- Trail Bike Touring
- Four Wheel Driving

A business/undertaking would be considered to be operating under best practice principles by:

- demonstrating an understanding of the application of risk management principles to its operations and facilities that satisfies an accredited industry standard or in the absence of such an industry standard, a standard acceptable to an independent risk management assessment (e.g. non-compulsory government published industry standards such as the *River Rafting - Queensland Adventure Activity Standards, November 2011*); and specifically:
  - that participants' skills and experience have been assessed (that is, a participant holds a qualification, accreditation or has sufficient experience and skills to undertake the activity) and;
  - sufficient information is provided to participants to enable them to make an informed decision about the risks associated with the conduct of the activity.

A business/undertaking would be considered to be operating at the *minimum standard* required by the legislation by:

- applying risk management principles to its operations and facilities that ensure:
  - any equipment including tracks, roads and paths is maintained on a regular basis to ensure the activity can be done safely
  - that participants' skills, experience and level of fitness have been assessed to ensure the activity can be done safely
  - sufficient information is provided to participants to enable them to make an informed decision about the risks associated with the conduct of the activity and
  - records are kept to verify actions taken.

Where proactive activities are being conducted at swimming pools, inspectors should also be satisfied that the facility meets the requirements of the appropriate guideline/s issued by the Royal Life Saving Society Association or some other body of similar standing.

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## Attachment 1

### Work Health and Safety Act 2011

### Adventure/Sporting activities

Context of incident		Compliance with legal duty?			Action
Scenario/activity	Business or undertaking?	Duty holders <u>PCBUs, Officers, Workers</u>	Degree of control/ Risk management <b>'Reasonably practicable' test</b>	Participant/Other person <b>Knowledge of risk/ degree of control</b>	Inspector action
Horse-riding person falls from horse	- horse track on public (Council) property	PCBU (Council)	- Council maintains tracks, including signage - Otherwise, little control over horse-riding as activity unsupervised	Should have had knowledge of risk associated with riding activity itself – maybe also observed condition of track  Rider also owes duty under s29 – rider's experience should be considered	Make enquiries into PCBU compliance determine whether full investigation required  Check state of track, signage
Horse-riding - person falls from horse	- track owned by riding school - riding school provides track, equipment, horse, training, supervision of riders	- PCBU (Riding School) - worker (instructor)	PCBU has control as riding is supervised	Reasonable for rider to assume PCBU knows what they are doing  Rider also owes duty under s29 to follow reasonable instructions from PCBU. Also, rider's experience should be considered	Conduct full investigation
Amusement ride - person falls from ride	<u>No</u> business or undertaking - occurred on private	N/A	N/A	N/A	No jurisdiction - no action

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Context of incident		Compliance with legal duty?			Action
Scenario/activity	Business or undertaking?	Duty holders <u>PCBUs, Officers, Workers</u>	Degree of control/ Risk management 'Reasonably practicable' test	Participant/Other person Knowledge of risk/ degree of control	Inspector action
	property - operator is retiree not running a business - no fee charged for ride				
Amusement ride - person falls from ride	Yes - occurs on site of agricultural show - commercial enterprise, charging admission to showgrounds and ride - more than one business/undertaking being conducted on site	- Showground owner/manager - Ride operator/owner - Designer & /or manufacturer of ride (plant)	- Showground operator/manager only has limited or no control over ride operator - Ride owner/operator would have control over ride/plant maintenance & operation – primary duty holder? - Designer/manufacturer may have had some degree of control, depending on cause of accident	- Reasonable for participant to assume PCBU <b>ride operator</b> is operating ride safely - Reasonable for participant to assume <b>ride operator</b> has maintained plant in good order - <b>Participant</b> also owes duty under s29 to follow reasonable instructions from PCBU ride operator	Full investigation, including: - role of all relevant PCBUs - role of injured participant
Person injured in vehicle accident	Yes - race/driving track - paid admission to	- Track owner/manager (PCBU)	PCBU has control over the condition of the track and provision of	- Reasonable for driver to assume <b>PCBU</b> has maintained track	Make enquiries to determine whether PCBU

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Context of incident		Compliance with legal duty?			Action
Scenario/activity	Business or undertaking?	Duty holders <u>PCBUs, Officers, Workers</u>	Degree of control/ Risk management <b>'Reasonably practicable' test</b>	Participant/Other person <b>Knowledge of risk/ degree of control</b>	Inspector action
	race/driving track only		information to track users	- driver also has duty under s29	breached duty
Person hit with cricket ball	Yes Professional cricket match - paid admission for spectators	- PCBU – cricket venue management	PCBU has control over ensuring safe access and egress of spectators – but has no control over destination of cricket balls	Yes, but little or no control over them.	Further inquiry to determine if full investigation needed
Person hit with cricket ball	No Engaged in family cricket day at the beach	- N/A	N/A	N/A	No action – no jurisdiction
Person attacked by crocodile	Probably not - Location is national park, administered by a government authority - free admission	- PCBU – Park administrators	Park administration has no control over behaviour of resident crocs or injured person  Park administration can erect limited signage, but clearly not everywhere	Person should be aware of existence of crocs in the vicinity	No action – no jurisdiction
Person attacked by crocodile	Yes Commercial operation providing	PCBU Zoo owner/manager	Yes PCBU has obligation	Patron has little control – assumes Zoo	Full investigation

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Context of incident		Compliance with legal duty?			Action
Scenario/activity	Business or undertaking?	Duty holders <u>PCBUs, Officers, Workers</u>	Degree of control/ Risk management 'Reasonably practicable' test	Participant/Other person Knowledge of risk/ degree of control	Inspector action
	customers with the opportunity to mix with reptiles		to implement safe systems	manages risk	

WHSQ enforcement note. Yet to be approved.

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## Attachment 2

### Work Health and Safety Act 2011

### Other activities

Context of incident		Compliance with legal duty?			Action
Scenario/activity	Business or undertaking?	Duty holders <u>PCBUs, Officers, Workers</u>	Degree of control/ Risk management 'Reasonably practicable' test	Participant/Other person Knowledge of risk/ degree of control	Inspector action
Person injured in vehicle accident	<u>No</u> business/ undertaking  Injured person driving own vehicle on public road. No council road works involved.	None	N/A	N/A	No action no jurisdiction
Person injured in vehicle accident	Yes  Organised ride in professionally driven vehicle or driven by participant with instruction by PCBU/worker	1. PCBU – driving instruction business 2. Worker/instructor where relevant	PCBU has more control where PCBU/worker is driving the vehicle.  Still some control where PCBU/worker is instructor	Driver should reasonably know of dangers.  However, driver should be able to rely to some extent on the PCBU's skill, particularly where PCBU is driver.  Driver would have s29 obligation to follow instructions of PCBU.	Conduct full investigation

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Context of incident		Compliance with legal duty?			Action
Scenario/Activity	Business or undertaking?	Duty Holders	Degree of Control/Risk Management 'Reasonably Practicable' test	Participant/Other Person Knowledge of risk/degree of control	Inspector Action
Guttering or pane of glass falls from building and strikes/does not strike a passer-by	Yes Construction business carrying out construction work	PCBU construction business	PCBU has control over conduct of business and its safety aspects	No knowledge of risk	Full investigation
Guttering or pane of glass falls from building and strikes/does not strike a passer-by	Possible there is a business or undertaking.	The entity which is responsible for maintaining the awnings/panes  Might not be a PCBU, but private entity	Responsible entity has control over maintaining awning/panes in good order	No knowledge of risk	If no business/undertaking, then local government is the lead agency.  <u>Note:</u> Sections 248 and 249 of the <i>Building Act 1975</i> provide local governments with the power to rectify structural failures of buildings or their components. WHSQ has limited jurisdiction.  Make enquiries to determine whether WHS Act applies and

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Context of incident		Compliance with legal duty?			Action
					if so, whether relevant PCBU breached any duty.
Spray drift from agricultural activities	<u>No</u> business/undertaking Drift originated from private property, non-commercial activities	N/A	N/A	N/A	No jurisdiction Refer complainant to local council environmental health
Spray drift from agricultural activities	Yes - drift comes from commercial property and spreads in local area	PCBU commercial property owner	PCBU has degree of control in assessing wind conditions before release, and choosing chemicals	Affected person may know of risk, but has little or no control over being affected by emissions No s29 duty	Full investigation Also contact relevant public health or environmental authority
Fugitive emissions of dust, spray paint, noise etc	Yes - emissions come from workplace of business/undertaking	PCBU	PCBU has control and should have instigated appropriate risk management	Affected person may know of risk, but has little or no control over being affected by emissions No s29 duty	Full investigation Also contact relevant public health or environmental authority

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## Attachment 3

### Safety in Recreational Water Activities Act 2011

### Adventure/Sporting activities

Context of incident		Compliance with legal duty?			Action
Scenario/activity	Business or undertaking?	Duty holders <u>PCBUs, Officers, Workers</u>	Degree of control/ Risk management 'Reasonably practicable' test	Participant/Other person Knowledge of risk/ degree of control	Inspector action
Person injured when kayak overturns in Brisbane River	No business/ undertaking  Injured person using own kayak – no commercial entity involved	N/A	N/A	N/A	No jurisdiction
Person injured when kayak overturns in Brisbane River	Yes Commercial kayak business supplying kayaks for use	Kayak Supplier (PCBU)	PCBU should have control over condition and maintenance of kayak (s16 SWRA Act)	Yes - Should know of risks - Has duty to take care, follow reasonable instructions from PCBU (s19 SWRA Act)	Investigation - only investigate whether kayak maintained in good order
Person injured when kayak overturns in Brisbane River	Yes Commercial kayak business supplying kayaks for use and also providing supervised training	Kayak Operator (PCBU)	PCBU should have control over condition and maintenance of kayak, <u>and</u> supervision of any training provided (s16 SWRA Act)	Kayaker has little or no control - assumes the operator knows what they are doing. But has s19 duty to follow PCBU instructions	Full investigation

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Context of incident		Compliance with legal duty?			Action
Scenario/activity	Business or undertaking?	Duty holders <u>PCBUs, Officers, Workers</u>	Degree of control/ Risk management 'Reasonably practicable' test	Participant/Other person Knowledge of risk/ degree of control	Inspector action
Person injured when kayak run over in Brisbane River by Council ferry	Yes Ferry owned and operated by Council PCBU	PCBU	PCBU should have control over operation of ferry – managing risks	Kayaker has s19 duty to take care of own health and safety	MOU with Queensland Transport applies.  Queensland Transport Maritime Safety would take lead role
Person drowns whilst swimming	No Local swimming hole in a public place	N/A	N/A	N/A	No jurisdiction
Person drowns whilst swimming	Yes Council pool	Council (PCBU)	PCBU only responsible for signage warning of depth.  PCBU might provide supervision.	Deceased had a s19 duty to look after self and to follow PCBU instructions.	Enquire whether PCBU has breached duty.  Appropriate industry standard is the current RLSSAQ Guidelines

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Context of incident		Compliance with legal duty?			Action
Scenario/activity	Business or undertaking?	Duty holders <u>PCBUs, Officers, Workers</u>	Degree of control/ Risk management 'Reasonably practicable' test	Participant/Other person Knowledge of risk/ degree of control	Inspector action
Person drowns whilst swimming	Yes  Public beach patrolled by surf lifesavers.  Business/undertaking is surf lifesaving club.	Surf Lifesaving Club (PCBU)	PCBU responsible for managing situation to the extent that deceased complied with PCBU instructions (including flags)	Deceased had a s19 duty to look after self and comply with PCBU directions, e.g. swimming between flags.	Enquire whether PCBU has breached duty.  Appropriate industry standard - current RLSSAQ Guidelines

Document approval process – version 0.1

Reviewed by:	Date:
Donna Heelan Manager, Coronial Liaison and Investigation Support Services	<insert date reviewed>
Approved by:	Approval Date:
Paul Goldsbrough	
Julie Neilsen Acting Senior Director, Operations and Compliance	<insert date approved> <i>(sighted and signed)</i>

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s 22(1)

**From:** s 22(1) <s 22(1)>  
**Sent:** Monday, 16 May 2016 1:41 PM  
**To:** s 22(1) s 22(1)  
**Cc:** s 22(1)  
**Subject:** RE: Agenda for HWSA Regulatory scope creep working group meeting on 16th May 2016 [SEC=UNCLASSIFIED]

UNCLASSIFIED

Probably Comcare

s 22(1)  
s 22(1)

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**From:** s 22(1)  
**Sent:** Monday, 16 May 2016 11:40 AM  
**To:** s 22(1) s 22(1)  
**Cc:** s 22(1)  
**Subject:** RE: Agenda for HWSA Regulatory scope creep working group meeting on 16th May 2016 [SEC=UNCLASSIFIED]

Hi s 22(1)

Are there any particular scenarios/examples of regulatory scope creep within our jurisdiction we should provide to Jennifer before the meeting? Or is this something that Comcare should be providing feedback on rather than us?

Regards,  
s 22(1)

---

**From:** s 22(1)  
**Sent:** Monday, 16 May 2016 9:21 AM  
**To:** s 22(1) s 22(1)  
**Cc:** s 22(1)  
**Subject:** FW: Agenda for HWSA Regulatory scope creep working group meeting on 16th May 2016 [SEC=UNCLASSIFIED]  
**Importance:** High

UNCLASSIFIED

Hi  
 Sorry I did not forward this earlier. We have a meeting today 3.30 to discuss. I think we just need to pass on general comments. For example for principle 1 (see below) it is more the point that the regulator **can't** investigate because they don't have power to do so.

s 22(1) – can you print these documents out for me?

Thanks  
s 22(1)

SafeWork NSW does not investigate incidents which are not work related and a duty holder under the legislation cannot be identified.

s 22(1)  
s 22(1)

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**From:** s 22(1) [mailto:s 22(1)]  
**Sent:** Wednesday, 11 May 2016 9:26 AM  
**To:** s 22(1)

**Cc:** s 22(1)  
**Subject:** Agenda for HWSA Regulatory scope creep working group meeting on 16th May 2016

**Security Classification: Sensitive**

Good morning all

Please find attached the agenda (with attachments) for the HWSA Regulatory scope creep working group meeting on 16<sup>th</sup> May 2016.

In preparation for the meeting can you please 'Reply All' to this message with brief examples / scenarios of regulatory scope creep matters within your jurisdiction. These will be discussed further at the meeting.

If you have any questions please don't hesitate to contact me.

Thank you.

Kind regards  
s 22(1)

**A/Senior Project Officer WHS Legislation & Policy**

SafeWork NSW

p s 22(1)

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s 22(1)

**From:** s 22(1)  
**Sent:** Tuesday, 17 May 2016 9:56 AM  
**To:** s 22(1) s 22(1)  
**Cc:** s 22(1)  
**Subject:** RE: Regulatory Scope Creep [SEC=UNCLASSIFIED]

**UNCLASSIFIED**

Thanks s 22(1)

As far as possible we would like to work together on the activities of the HWSA working group.

Regards

s 22(1)

s 22(1)

Director  
 Regulatory Policy  
 Regulatory Operations Group  
 s 22(1)

Comcare  
 GPO Box 9905, Canberra, ACT 2601  
 1300 366 979 | [www.comcare.gov.au](http://www.comcare.gov.au)

Email: s 22(1)

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**From:** s 22(1) [mailto:s 22(1)]  
**Sent:** Monday, 16 May 2016 5:17 PM  
**To:** s 22(1)  
**Cc:** Js 22(1) s 22(1)  
**Subject:** Regulatory Scope Creep [SEC=UNCLASSIFIED]

Hi s 22(1)

Following on from the teleconference this afternoon, are you happy to work with us to provide a coordinated response to NSW on the regulatory scope creep issues in the Commonwealth and any comments on NSW's draft guiding principles?

I already have a few comments on NSW's draft guiding principles, in addition to those I mentioned in the teleconference, that I can type up and share with you and would be happy to incorporate any additional comments from Comcare.

Happy to discuss,

s 22(1)

Assistant Director, Work Health and Safety Policy Team | Work Health and Safety Policy Branch  
 Australian Government Department of Employment

Phone (s 22(1))

s 22(1)

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s 22(1)

**From:** s 22(1) s 22(1)  
**Sent:** Wednesday, 18 May 2016 11:57 AM  
**To:** s 22(1) s 22(1)  
**Subject:** FW: regulatory scope creep teleconference [SEC=UNCLASSIFIED]

Hi s and s

I've just been speaking with s from Comcare. She and s and drafting the input to the HWSA regulatory scope creep working group and will provide the input to us for consolidation before it goes back to NSW. Sounds like we have much the same input to provide back in relation to the draft guiding principles, in terms of their purpose and scope.

Happy to discuss more if you like.

s 22(1)

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**From:** s 22(1) [mailto:s 22(1)]  
**Sent:** Wednesday, 18 May 2016 10:58 AM  
**To:** s 22(1)  
**Cc:** s 22(1)  
**Subject:** regulatory scope creep teleconference [SEC=UNCLASSIFIED]

UNCLASSIFIED

Hi s 22(1)

I'm working with s at the moment in developing a table of Comcare's protocols/procedures for interagency and interjurisdictional communication following the regulatory scope creep teleconference last week. I understand we need to coordinate a response.

I tried calling earlier but I wasn't able to get a hold of you - grateful if you could please give me a ring.

Kind Regards,

s 22(1)

Policy Officer (Regulatory Policy)  
 Regulatory Operations Group  
 Ph: s 22(1)  
 Email: s 22(1)

Comcare  
 1300 366 979 | [www.comcare.gov.au](http://www.comcare.gov.au)

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s 22(1)

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**From:** s 22(1) s 22(1)  
**Sent:** Tuesday, 8 March 2016 4:30 PM  
**To:** s 22(1)  
**Cc:** s 22(1); s 22(1)  
**Subject:** UPDATE | Regulatory Scope Creep [SEC=UNCLASSIFIED]  
**Importance:** Low

**UNCLASSIFIED**

Hi s 22(1)

Just a quick update following my discussion with s 22(1) (NSW) regarding how this work was progressing.

The paper that will go to HWSA on 23 March 2016 will just provide an update regarding the transfer of this work from SWA to HWSA and also canvas whether any other jurisdictions would like to assist in progressing the issue by joining the working group. s 22(1) had not contacted us to discuss/work with her on the paper as it is really just an update to the committee.

She mentioned that she may start doing some preliminary work on the issue prior to the HSWA 23 March meeting and if so, will contact us to discuss.

s  
~

## SAFE WORK AUSTRALIA MEMBERS' MEETING 26

## REGULATORY SCOPE CREEP

## DECISION

**Members** to discuss whether, and if so how, an appropriate boundary could be drawn between the scope of the model WHS Act and the wider protection of public safety.

## BACKGROUND

*Work health and safety legislation*

1. Prior to the harmonization of Australia's work health and safety laws, each jurisdiction had provisions within their own legislation that sought to protect persons other than workers (such as members of the public) from harm occurring from the performance of work or from the escape of harmful things at or from a workplace. Examples are set out in the table below.

**Table 1: Examples of protection of public safety in work health and safety related legislation**

State	Section	Provision
Vic	s4(1) of the <i>Occupational Health and Safety Act 2004</i>	The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.
NSW	s135(4)(c) of the <i>Occupational Health and Safety Act 2000</i>	Various powers and functions under the Act (eg investigations and notices) are extended to 'plant affecting public safety' such as boilers and pressure vessels, lifts and scaffolding.
Qld	s6 of the <i>Workplace Health and Safety Act 1995</i>	This Act applies to— (a) everyone who may affect the health and safety of others because of workplaces, workplace activities or specified high risk plant; and (b) everyone whose health and safety may be affected by workplaces, workplace activities or specified high risk plant.
SA	s3(c) of the <i>Occupational Health and Safety Act 1986</i>	The chief objects of this Act are to protect the public against risks to health or safety arising out of or in connection with: (i) the activities of persons at work; or (ii) the use or operation of various types of plant.
Cwth	s17 of the <i>Occupational Health and Safety Act</i>	An employer must take all reasonably practicable steps to ensure no exposure to risk to the health and safety of persons who are not the employer's employees or contractors and who are at or near a workplace under the employer's control.
Tas	<i>Workplace Health and Safety Act 1995</i>	An Act to provide for the health and safety of persons employed in, engaged in or affected by industry, to provide for the safety of persons using amusement structures and temporary public stands and to repeal certain enactments

State	Section	Provision
NT	s3(c) of the <i>Workplace Health and Safety Act</i>	The objects of this Act are to make workplaces safe not only for workers but also for others.
WA	s21(2) of the <i>Occupational Health and Safety Act 1984</i>	An employer or self-employed person shall, so far as is practicable, ensure that the safety or health of a person, not being (in the case of an employer) an employee of the employer, is not adversely affected wholly or in part as a result of — (a) work that has been or is being undertaken by — (i) the employer or any employee of the employer; or (ii) the self-employed person; or (b) any hazard that arises from or is increased by — (i) the work referred to in paragraph (a); or (ii) the system of work that has been or is being operated by the employer or the self-employed person.
ACT	s85(1) of the <i>Occupational Health and Safety Act 1989</i>	Where, at or near a workplace at which an undertaking is being conducted by an employer, there is, arising out of the conduct of the undertaking— (a) an accident that causes— (i) the death of a person; (ii) an injury to a person other than an employee of the employer; or (iii) an injury to an employee as a result of which the employee is incapacitated for work for the prescribed period; or (b) a dangerous occurrence; the employer shall, in accordance with the regulations, give to the Registrar notice of the accident or dangerous occurrence, as the case may be.

2. For this reason, the *National Review into Model Occupational Health and Safety Laws* did not question whether the model WHS Act should protect public safety. Instead, it focused on how wide this protection should be in the context of the application of the model WHS Act to public safety.
3. The Second Report from this review noted that stakeholders ranged in their level of support for the application of the model WHS Act to public safety from a narrow operation to a wider operation. A selection of stakeholder views from this review are noted below:
  - there should be a clearly identifiable link between the conduct of a business or undertaking and the risk to the public;
  - there should be some situations where members of the public are seen to have voluntarily assumed a risk to their health and safety (for example, where actively participating in a high-risk activity using their own equipment);
  - there should be a duty of care to members of the public in situations where hazards generated in a workplace extend to persons outside of that workplace;

- there should be limitations on the scope of duty owing to the public because public safety is more appropriately dealt with by public liability and common law and these duties could overlap in a potentially problematic way;
  - while there should be a duty to control risks to persons other than workers resulting from the performance of work, this should not stray into areas such as food safety and medical practices;
  - the touchstone should be preventing exposure to risk arising from the conduct of an undertaking, regardless of whether the person placed at risk by the duty holder is at the workplace or away from it, and regardless of whether the person exposed to risk is working or not working.
4. As a result of this review, a recommendation was made to establish a clearer application of the model WHS Act to public safety (Recommendation 77 of the Second Report). In part, this was to be done by the underlying objectives of the model WHS Act being clearly articulated to include the protection of all persons from work-related harm.
  5. In accordance with this recommendation, the object of the model WHS Act is clearly expressed to include “protecting workers *and other persons* against harm to their health, safety and welfare through the elimination or minimization of risks arising from work” (see section 3(1)(a)).
  6. The Explanatory Memorandum to the Work Health and Safety Bill 2011 (Cth) also addressed the application of the Bill to public health and safety, stating as follows:

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

*The duties under the Bill are intended to operate in a work context and will apply where work is performed, processes or things are used for work or in relation to workplaces. It is not intended to have operation in relation to public health and safety more broadly, without the necessary connection to work.*

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

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

7. These statements do not, however, provide a simple formula for determining when and how an appropriate boundary should be drawn between the scope of the model WHS Act and the wider protection of public safety.

8. In fact, it is arguable that if such a boundary was able to be drawn, this might remove the flexibility required to adapt to ever increasing changes in the workforce and any associated changes in health and safety hazards and risks.
9. The Commonwealth has received legal advice from the Solicitor General that suggests, however, that there is an underlying principle that can be applied to determine the extent of the duty to ensure the health and safety of other persons as far as is reasonably practicable. This principle is that the duty is designed to cover the case where it is *the carrying out of work* as part of a business or undertaking, at a designated workplace, which poses a risk to the health and safety of other persons. A distinction must be made between this situation and the case where *the end product or result of the work* may itself, when it passes into commerce or the wider community, pose a risk to the health and safety of other persons.

#### *Public safety*

10. In terms of the wider protection of public safety, the common law imposes a duty to take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor.<sup>1</sup> This duty of care is not limited to specific relationships but commonly exists between employers and their employees, teachers and their pupils, doctors and their patients, occupiers and their visitors and manufacturers and their consumers. The common law duty of care coexists with the statutory duty of care under work, health and safety legislation.
11. While businesses and organisations pay premiums for workers compensation for their employees, it is also usual for them to take out public liability insurance to protect against the financial risk of being found liable for failure to uphold the common law duty of care, in particular, from a finding of negligence on their part resulting in death or injury to a third party. This is particularly the case in industries focused primarily in dealings with the public, such as tourism and hospitality.
12. The existence of public liability insurance may suggest that that the scope of involvement of work, health and safety regulators should be limited, given this provides for payments to third parties harmed by activities carried out in connection with that business or organisation.
13. However, the question remains as to whether regulators should be involved regardless of this in order to determine whether businesses or organisations should be prosecuted under work, health and safety legislation for breaching their duty of care to other persons. Businesses or organisations might argue that this results in 'double jeopardy' for them in relation to the payment of premiums for workers compensation and public liability as the one incident is then taken into account in the calculation of both premiums.

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<sup>1</sup> Donoghue v Stevenson (1932)

## ISSUES

14. Recent circumstances have lead NSW, in particular, to question whether the scope of the model WHS Act is creeping into territory that should more appropriately be considered the domain of public safety (and, subsequently, of public liability and common law remedies).
15. NSW would therefore like to discuss whether a boundary line could be drawn between the scope of the model WHS Act and the wider protection of public safety.
16. This questioning highlights an underlying concern that workers' compensation resources might be diverted to the protection of public safety to the detriment of protecting work health and safety and to those paying workers' compensation premiums. Another concern is that too broad a scope for the model WHS Act in relation to public safety will stretch the resources of regulators and impact on the overall effectiveness and impact of the model WHS Act.
17. The following case studies are provided to facilitate discussion on this issue.

### Case Studies

A decision is made by a PCBU to reduce the funding for an electricity network provider in a bushfire prone area of the state. As a result of that decision, the electricity network provider is unable to manage the hazard of vegetation around electricity poles to the same extent as it had previously, with more funding. Vegetation around the electricity pole causes a fire and members of the public are injured.

18. The decision of the PCBU to reduce the funding of the electricity network provider is an end product of its business or undertaking at a designated workplace (as compared to the carrying out of work as part of the business or undertaking). There is no duty to ensure that this end product, when it passes into the wider community, does not pose a risk to the health and safety of other persons.

A fire brigade attended a site to respond to a report of spontaneous combustion in a silo. They did not supervise the employees at this site, allowed them to enter areas of the site unaccompanied and to act independently of fire brigade personnel.

19. The actions/omissions of the fire brigade constitute a breach of the duty to other persons because it was *the carrying out of work* as part of the fire brigade's business, at a designated workplace, which posed a risk to the health and safety of other persons.

A professional Australian cricketer is hit by a bouncer during a Sheffield Shield game and dies.

20. The PCBU (Cricket Australia) has a duty to ensure, as far as reasonably practicable, the health and safety of the cricketer as a worker at a workplace. The fact that the workplace is a public venue and the work is sport is irrelevant.

[NSW to insert other examples].

**HEADS OF WORKPLACE SAFETY AUTHORITIES**      **AGENDA ITEM: 4a**  
**MEETING NO: 61**  
**DATE: 8 September 2016**  
**HOST: WorkSafe Victoria - Sydney**

## **REGULATORY SCOPE CREEP WORKING PARTY**

### **PURPOSE**

Provide an update on the progress of the regulatory scope creep working party.

### **COMMENTS/ISSUES**

- The working party has met twice by teleconference, on 16 May and 23 June 2016.
- Working party representatives have provided -
  - feedback on the draft Guiding Principles prepared by NSW
  - regulatory scope creep examples / scenarios within their jurisdiction
  - details of agreements (i.e. MOUs) or arrangements with other regulators
  - general comments for consideration by the working party.
- A research paper for submission to HWSA is currently in draft form and under review by the working party members.
- The next meeting of the working party is yet to be scheduled.

### **RECOMMENDATION**

That HWSA members:

- (i) Note the information.

**Prepared by:**      s 22(1) [REDACTED]  
**Jurisdiction:**      NSW  
**Date:**              15 August 2016

## HWSA Meeting (60) – 8 September 2016

### REGULATORY SCOPE CREEP WORKING PARTY - AGENDA ITEM 4A

#### RECOMMENDATION

- **Note** the update on the progress of the regulatory scope creep working party.

#### COMCARE INTEREST

- There is concern among work health and safety regulators that the scope of the model Work Health and Safety Act is 'creeping' into territory that should more appropriately be considered the domain of public safety, or to fall within the jurisdiction of more relevant agencies.

#### RELEVANT BACKGROUND

- At the Safe Work Australia Member's meeting on 24 April 2015, there was agreement that regulatory scope creep was an emerging issue, particularly involving public safety, consumer safety, high profile sporting injuries and other incidents on the fringes of legislative coverage where it may be unclear who is the lead agency.
- At the February 2016 HWSA Planning Day, members agreed that HWSA would develop guiding principles in respect to regulatory scope creep, and that NSW would lead a working party to complete the work. Mr s 22(1) is the nominated Comcare representative.
- The Working Party has met twice, on 16 May and 23 June 2016. On 14 June 2016, you approved a response to the Working Party. Comcare and the Department of Employment jointly prepared the Commonwealth response to the Working Party on the NSW draft Guiding Principles.
- A research paper for submission to HWSA is currently under review by the working party members.

#### COMCARE CONTACT

**Name:** s 22(1)

**Position:** Director

**Phone:** s 22(1)



## HWSA Meeting (62)– 24 November 2016

### REGULATORY SCOPE CREEP – AGENDA ITEM 4B

#### RECOMMENDATION

- **Note** the definition of the main issues the guiding principles will seek to address
- **Approve** the redefined scope of the working group
- **Approve** changing the working group name to *Regulatory scope and overlap*
- **Approve** the revisions made to the work plan for the working group, including an extension to the timeframes

#### COMMONWEALTH INTEREST

- There is concern among WHS regulators that the scope of the model WHS Act is 'creeping' into territory that should more appropriately be considered the domain of public safety, or falls within the jurisdiction of more relevant agencies.
- A HWSA working group led by NSW with representatives from Victoria, Queensland, SA, WA, Tasmania, Comcare and the Department of Employment has been examining this issue and is responsible for delivering a paper, a set of guiding principles and communication tools for use by regulators.

#### RELEVANT BACKGROUND

- At the SWA members' meeting on 24 April 2015 NSW raised regulatory scope creep as an emerging issue, particularly involving public safety, sport and recreation and incidents on the fringes of legislative coverage where it may be unclear who is the lead agency. SWA members agreed to take this matter to HWSA to develop guiding principles.
- In December 2015, HWSA identified regulatory scope creep as a key area which was subsequently included on the HWSA Work Plan 2016-17.
- An update provided at the last HWSA meeting informed members that the working group had circulated a research paper for comment with feedback due by 5 September 2016.
- On 5 October 2016 the working group held a teleconference to discuss feedback on the research paper. At this meeting concerns were raised with the name of the working group and the main issues trying to be resolved were also discussed. It was agreed the working group would develop a definition of the main issues to inform its approach.
- As a result the research paper is still to be finalised and the working plan has been amended including to extend the timeframes, with the research paper due by March and the guiding principles and communication tools due by July next year.

#### DEPARTMENT CONTACT

Name: s 22(1)

Position: Assistant Director, WHS Policy Branch, Department of Employment

Phone: s 22(1)

Department of Employment and Workplace Relations  
Documents released by FOI - LEX 729

Page 49 of 86

**SAFE WORK AUSTRALIA MEMBERS' MEETING 27****AGENDA ITEM x****REGULATORY SCOPE CREEP****DECISION**

**Members** to discuss how the model laws apply to the protection of public safety, and how they applied in jurisdictions prior to harmonisation.

**Background**

1. At SWA Members' Meeting 25 on 24 April 2015 NSW raised regulatory scope creep as an emerging issue particularly involving public safety, high profile sporting injuries and incidents where it may be unclear who is the lead agency.
2. There was agreement that regulatory scope creep has been identified as an emerging issue for other jurisdictions.
3. NSW and the Commonwealth agreed to provide a paper to SWA Members' on regulatory scope creep.
4. Prior to the harmonization of Australia's work health and safety laws, each jurisdiction had provisions within their own legislation that sought to protect persons other than workers (such as members of the public) from harm occurring from the performance of work or from the escape of harmful things at or from a workplace.
5. For this reason, the *National Review into Model Occupational Health and Safety Laws* did not question whether the model WHS Act should protect public safety. Instead, it focused on how wide this protection should be in the context of the application of the model WHS Act to public safety.
6. The second report of the *National Review into Model Occupational Health and Safety Laws* contained the following recommendation (number 77):  
*To establish a clearer application of the model Act to public safety:*
  - *the underlying OHS objectives of the model act should be clearly articulated, including the protection of all persons from work-related harm; and*
  - *when the model Act is drafted and when it is amended after it is in operation, care must be taken to avoid giving it a reach that is inconsistent with those objectives.*
7. In some jurisdictions, Schedule 1 of the corresponding WHS law applies that law to work health and safety issues arising from the storage and handling of dangerous goods and the operation or use of high risk plant.
8. Further background information is contained at Attachment 1.

## Issues

9. Recent circumstances have lead NSW, in particular, to question whether the scope of the model WHS Act is creeping into territory that should more appropriately be considered the domain of public safety (and, subsequently, of public liability and common law remedies). Prior to harmonisation the NSW OHS Act only extended certain functions and powers to 'plant affecting public safety' such as boilers and pressure vessels, lifts and scaffolding. The scope of the NSW Act was generally narrower than other jurisdictions (see table at Attachment 1).
10. NSW would therefore like to discuss whether a boundary line could be drawn between the scope of the model WHS Act and the wider protection of public safety.
11. This questioning highlights an underlying concern that workers' compensation resources might be diverted to the protection of public safety to the detriment of protecting work health and safety and to those paying workers' compensation premiums. Another concern is that too broad a scope for the model WHS Act in relation to public safety will stretch the resources of regulators (especially in NSW, Victoria and Queensland where regulators are funded solely through premiums for workers' compensation) and impact on the overall effectiveness and impact of the model WHS Act.
12. The following case studies and examples are provided to facilitate discussion:
  - a) A decision is made by a PCBU to reduce the funding for an electricity network provider in a bushfire prone area of the state and as a result, the provider is unable to manage the hazard of vegetation around electricity poles to the same extent as it had previously. Vegetation around the electricity pole causes a fire and members of the public are injured. The decision of the PCBU to reduce the funding of the electricity network provider is an end product of its business or undertaking at a designated workplace (as compared to the carrying out of work as part of the business or undertaking). There is no duty to ensure that this end product, when it passes into the wider community, does not pose a risk to the health and safety of other persons.
  - b) A fire brigade attended a site to respond to a report of spontaneous combustion in a silo. They did not supervise the employees at this site, allowed them to enter areas of the site unaccompanied and to act independently of fire brigade personnel. The actions/omissions of the fire brigade constitute a breach of the duty to other persons because it was *the carrying out of work* as part of the fire brigade's business, at a designated workplace, which posed a risk to the health and safety of other persons.
  - c) A professional Australian cricketer is hit by a bouncer during a Sheffield Shield game and dies. The PCBU (Cricket Australia) has a duty to ensure, as far as reasonably practicable, the health and safety of the cricketer as a worker at a workplace. The fact that the workplace is a public venue and the work is sport is irrelevant.
  - d) Professional sporting incidents. ie. where players are injured while they are playing sport in a professional capacity.
  - e) Incidents involving public safety. ie. a recreational activity at a workplace where a member of the public is injured while undertaking the activity.
  - f) A member of the public is seriously injured in a shopping centre whilst shopping. The PCBU has a duty to ensure, as far as reasonably practicable, the health and safety of others (such as customers) at a workplace. The fact that the workplace is a public venue is irrelevant.

- g) A member of the public is exposed to second hand smoke at a workplace. The PCBU has a duty to ensure, as far as reasonably practicable, the health and safety of others at a workplace. The PCBU also has a duty to ensure, as far as reasonably practicable, the health and safety of its workers who might be exposed to second hand smoke at a workplace.
- h) A paying patron at an indoor trampoline arena is critically injured after diving head first from a trampoline into a foam pit. The PCBU has a duty to ensure, as far as reasonably practicable, the health and safety of others at a workplace, such as customers. However, the customer also has a duty to take reasonable care for their own health and safety and to comply with any reasonable instruction that is given by the PCBU.
- i) Spectators at a motor racing event are injured when a race car loses control and crashes into the crowd. If a structure had been installed to protect the crowd, the PCBU who installed the structure has a duty to ensure that the way in which the structure was installed or constructed is without risks to the health and safety of persons who are at or in the vicinity of a workplace and whose health or safety may be affected by the installation or use of the structure at the workplace.
- j) At a pony club event a rider is seriously injured. If the event is conducted by a volunteer association, it is not a PCBU. Otherwise, the PCBU has a duty to ensure, as far as reasonably practicable, the health and safety of others at the workplace, such as riders.
- k) A rugby league doping scandal which involves professional players. The workers' duty will apply to professional rugby players at work so that the club must ensure, so far as reasonably practicable, their health and safety, and they must take reasonable care of their own (and others) health and safety. They would also be required to comply with any reasonable instruction in relation to the use of drugs and cooperate with any reasonable policy or procedure relating to health and safety at the workplace.
- l) An experienced and professional skydiver is killed following a mid-air incident. A self-employed person must ensure, so far as is reasonably practicable, their own safety while at work. A workplace is a place where work is carried out for a business or undertaking and includes any place where a worker goes, or is likely to be, while at work.

**List of attachments**

Attachment A

**Title**

Additional background information

**Attachment 1 – additional background information**
*Work health and safety legislation*

- Table 1 below provides examples of protection of public safety in jurisdiction work health and safety related legislation, some of which are now repealed.

**Table 1:**

<b>State</b>	<b>Section</b>	<b>Provision</b>
<b>Vic</b>	s4(1) of the <i>Occupational Health and Safety Act 2004</i>	The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.
<b>NSW</b>	s135(4)(c) of the <i>Occupational Health and Safety Act 2000</i> s135(a) of the <i>Occupational Health and Safety Act 2000</i>	Various powers and functions under the Act (eg investigations and notices) are extended to 'plant affecting public safety' such as boilers and pressure vessels, lifts and scaffolding. Extends the provisions of the Act to dangerous goods even if the goods are not at a place of work or are not for use at work.
<b>Qld</b>	s6 of the <i>Workplace Health and Safety Act 1995</i>	This Act applies to— (a) everyone who may affect the health and safety of others because of workplaces, workplace activities or specified high risk plant; and (b) everyone whose health and safety may be affected by workplaces, workplace activities or specified high risk plant.
<b>SA</b>	s3(c) of the <i>Occupational Health and Safety Act 1986</i>	The chief objects of this Act are to protect the public against risks to health or safety arising out of or in connection with: (i) the activities of persons at work; or (ii) the use or operation of various types of plant.
<b>Cwth</b>	s17 of the <i>Occupational Health and Safety Act</i>	An employer must take all reasonably practicable steps to ensure no exposure to risk to the health and safety of persons who are not the employer's employees or contractors and who are at or near a workplace under the employer's control.
<b>Tas</b>	<i>Workplace Health and Safety Act 1995</i>	An Act to provide for the health and safety of persons employed in, engaged in or affected by industry, to provide for the safety of persons using amusement structures and temporary public stands and to repeal certain enactments
<b>NT</b>	s3(c) of the <i>Workplace Health and Safety Act</i>	The objects of this Act are to make workplaces safe not only for workers but also for others.
<b>WA</b>	s21(2) of the <i>Occupational Health and Safety Act 1984</i>	An employer or self-employed person shall, so far as is practicable, ensure that the safety or health of a person, not being (in the case of an employer) an employee of the employer, is not adversely affected wholly or in part as a result of — (a) work that has been or is being undertaken by — (i) the employer or any employee of the employer; or (ii) the self-employed person; or (b) any hazard that arises from or is increased by — (i) the work referred to in paragraph (a); or (ii) the system of work that has been or is being operated by the employer or the self-employed person.

State	Section	Provision
ACT	s85(1) of the <i>Occupational Health and Safety Act 1989</i>	Where, at or near a workplace at which an undertaking is being conducted by an employer, there is, arising out of the conduct of the undertaking— (a) an accident that causes— (i) the death of a person; (ii) an injury to a person other than an employee of the employer; or (iii) an injury to an employee as a result of which the employee is incapacitated for work for the prescribed period; or (b) a dangerous occurrence; the employer shall, in accordance with the regulations, give to the Registrar notice of the accident or dangerous occurrence, as the case may be.

2. The Second Report from this review noted that stakeholders ranged in their level of support for the application of the model WHS Act to public safety from a narrow operation to a wider operation. A selection of stakeholder views from this review are noted below:
- there should be a clearly identifiable link between the conduct of a business or undertaking and the risk to the public;
  - there should be some situations where members of the public are seen to have voluntarily assumed a risk to their health and safety (for example, where actively participating in a high-risk activity using their own equipment);
  - there should be a duty of care to members of the public in situations where hazards generated in a workplace extend to persons outside of that workplace;
  - there should be limitations on the scope of duty owing to the public because public safety is more appropriately dealt with by public liability and common law and these duties could overlap in a potentially problematic way;
  - while there should be a duty to control risks to persons other than workers resulting from the performance of work, this should not stray into areas such as food safety and medical practices;
  - the touchstone should be preventing exposure to risk arising from the conduct of an undertaking, regardless of whether the person placed at risk by the duty holder is at the workplace or away from it, and regardless of whether the person exposed to risk is working or not working.
3. As a result of this review, a recommendation was made to establish a clearer application of the model WHS Act to public safety (Recommendation 77 of the Second Report). In part, this was to be done by the underlying objectives of the model WHS Act being clearly articulated to include the protection of all persons from work-related harm.



4. In accordance with this recommendation, the object of the model WHS Act is clearly expressed to include “protecting workers *and other persons* against harm to their health, safety and welfare through the elimination or minimization of risks arising from work” (see section 3(1)(a)).
5. The Explanatory Memorandum to the Work Health and Safety Bill 2011 (Cth) also addressed the application of the Bill to public health and safety, stating as follows:

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

*The duties under the Bill are intended to operate in a work context and will apply where work is performed, processes or things are used for work or in relation to workplaces. It is not intended to have operation in relation to public health and safety more broadly, without the necessary connection to work.*

*These elements are reflected in the model Bill by the careful drafting of obligations and the terms used in the Bill and also by suitably articulated objects. The intention is that further, nationally consistent guidance about the application of the work health and safety laws to public safety be made available by the regulator.*

6. These statements do not, however, provide a simple formula for determining when and how an appropriate boundary should be drawn between the scope of the model WHS Act and the wider protection of public safety.
7. In fact, it is arguable that if such a boundary was able to be drawn, this might remove the flexibility required to adapt to ever increasing changes in the workforce and any associated changes in health and safety hazards and risks.
8. The Commonwealth has received legal advice from the Solicitor General that suggests, however, that there is an underlying principle that can be applied to determine the extent of the duty to ensure the health and safety of other persons as far as is reasonably practicable. This principle is that the duty is designed to cover the case where it is *the carrying out of work* as part of a business or undertaking, at a designated workplace, which poses a risk to the health and safety of other persons. A distinction must be made between this situation and the case where *the end product or result of the work* may itself, when it passes into commerce or the wider community, pose a risk to the health and safety of other persons.

#### *Public safety*

9. In terms of the wider protection of public safety, the common law imposes a duty to take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbor.<sup>1</sup> This duty of care is not limited to specific relationships but

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<sup>1</sup> Donoghue v Stevenson (1932)



commonly exists between employers and their employees, teachers and their pupils, doctors and their patients, occupiers and their visitors and manufacturers and their consumers. The common law duty of care coexists with the statutory duty of care under work, health and safety legislation.

10. While businesses and organisations normally pay premiums for workers compensation for their employees, it is also usual for them to take out public liability insurance to protect against the financial risk of being found liable for failure to uphold the common law duty of care, in particular, from a finding of negligence on their part resulting in death or injury to a third party. This is particularly the case in industries focused primarily in dealings with the public, such as tourism and hospitality.
11. The existence of public liability insurance may suggest that that the scope of involvement of work, health and safety regulators should be limited, given this provides for payments to third parties harmed by activities carried out in connection with that business or organisation.
12. However, the question remains as to whether regulators should be involved regardless of this in order to determine whether businesses or organisations should be prosecuted under work, health and safety legislation for breaching their duty of care to other persons. Businesses or organisations might argue that this results in 'double jeopardy' where they have paid premiums for workers' and public liability as the one incident is then taken into account in the calculation of both premiums.