

INDEPENDENT REVIEW OF SAFEWORK NSW

By

The Hon Robert McDougall KC

INTERIM REPORT

Dated: 31 May 2023

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Introduction

1. I have been appointed, by Terms of Reference dated 7 November 2022, to undertake a review of the performance by SafeWork NSW (**SafeWork**) of its functions under the *Work Health and Safety Act 2011* (NSW) (**WHS Act**). My appointment was made following criticisms of SafeWork's activities that had been advanced in print and other media. Although there has been a change of Government since my appointment was effected, there has been no indication that I am not to pursue this review.
2. A copy of my Terms of Reference may be found at Appendix 1 to this Interim Report.
3. It was a term of my appointment that I provide an Interim Report by 31 May 2023, and a Final Report by 29 November 2023¹. This is my Interim Report.

SafeWork's legislative status

4. The WHS Act contemplates the existence of a "regulator", which has the functions and powers conferred upon it by the Act. However, that "regulator" is not an independent statutory or other body. Section 4 of the WHS Act, which appears in Division 3 "Interpretation", defines the regulator to be "the regulator established under Clause 1 of Schedule 2". Schedule 2 provides:

Schedule 2 The regulator

1 The regulator

(1) *For the purposes of this Act, the **regulator** is—*

(a) the Secretary of the Department of Customer Service, unless paragraph (b) applies, or

*(b) in relation to a mine or petroleum site to which the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* applies or a workplace at which activities under the *Petroleum (Offshore) Act 1982* are carried out—the regulator under the *Work Health and Safety (Mines and Petroleum Sites) Act 2013*.*

(2) *The Secretary of the Department of Customer Service is, as the regulator under this Act, to be known as **SafeWork NSW**.*

(3)–(5) *(Repealed)*

(6) *SafeWork NSW is subject to the control and direction of the Minister except in relation to—*

(a) the contents of any advice, report or recommendation given to the Minister, or

(b) any decision that relates to proceedings for offences under this Act, or

¹ The latter date may be extended if it is necessary for reasons that are presently unforeseeable.

(c) any decision that relates to a WHS undertaking.

(7) Nothing in this clause limits section 12A of the Work Health and Safety (Mines and Petroleum Sites) Act 2013.

Note—

That section authorises both regulators to exercise their functions in relation to all workplaces.

5. The object intended to be achieved by the WHS Act is set out in section 3:

3 Object

(1) *The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by—*

(a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant, and

(b) providing for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety, and

(c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment, and

(d) promoting the provision of advice, information, education and training in relation to work health and safety, and

(e) securing compliance with this Act through effective and appropriate compliance and enforcement measures, and

(f) ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act, and

(g) providing a framework for continuous improvement and progressively higher standards of work health and safety, and

(h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.

(2) *In furthering subsection (1) (a), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of substances or plant as is reasonably practicable.*

6. The functions and powers of the regulator are set out Division 1 of Part 8 of the WHS Act, as follows:

152 Functions of regulator

The regulator has the following functions—

(a) to advise and make recommendations to the Minister and report on the operation and effectiveness of this Act,

- (b) *to monitor and enforce compliance with this Act,*
- (c) *to provide advice and information on work health and safety to duty holders under this Act and to the community,*
- (d) *to collect, analyse and publish statistics relating to work health and safety,*
- (e) *to foster a co-operative, consultative relationship between duty holders and the persons to whom they owe duties and their representatives in relation to work health and safety matters,*
- (f) *to promote and support education and training on matters relating to work health and safety,*
- (g) *to engage in, promote and co-ordinate the sharing of information to achieve the object of this Act, including the sharing of information with a corresponding regulator,*
- (h) *to conduct and defend proceedings under this Act before a court or tribunal,*
- (i) *any other function conferred on the regulator by this Act.*

153 Powers of regulator

- (1) *Subject to this Act, the regulator has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions.*
- (2) *Without limiting subsection (1), the regulator has all the powers and functions that an inspector has under this Act.*

154 Delegation by regulator

- (1) *The regulator may, by instrument in writing, delegate to an authorised person a power or function under this Act other than this power of delegation.*
- (2) *A delegation under this section—*
 - (a) *may be made subject to such conditions as the regulator thinks fit, and*
 - (b) *is revocable at will, and*
 - (c) *does not derogate from the power of the regulator to act.*
- (3) *In this section—*

authorised person *means—*

- (a) *a member of staff of the regulator, or*
- (b) *a person of a class prescribed by the regulations or of a class approved by the regulator.*

- 7. Inspectors are appointed under Division 1 of Part 9. Their functions and powers are set out in general terms in Division 2 of Part 9:

Division 2 Functions and powers of inspectors

160 Functions and powers of inspectors

An inspector has the following functions and powers under this Act—

(a) to provide information and advice about compliance with this Act,

(b) to assist in the resolution of—

(i) work health and safety issues at workplaces, and

(ii) issues related to access to a workplace by an assistant to a health and safety representative, and

(iii) issues related to the exercise or purported exercise of a right of entry under Part 7,

(c) to review disputed provisional improvement notices,

(d) to require compliance with this Act through the issuing of notices,

(e) to investigate contraventions of this Act and assist in the prosecution of offences,

(f) to attend coronial inquests in relation to work-related deaths and examine witnesses.

161 Conditions on inspectors' compliance powers

An inspector's compliance powers are subject to any conditions specified in the instrument of the inspector's appointment.

162 Inspectors subject to regulator's direction

(1) An inspector is subject to the regulator's directions in the exercise of the inspector's compliance powers.

(2) A direction under subsection (1) may be of a general nature or may relate to a specified matter or specified class of matter.

162A (Repealed)

8. There are then further specific powers provided. It is not necessary at this point to set them out.
9. Legislative regimes relating to workplace health and safety have been in force in this State for a long time, and inspectors have been a feature of those regimes. Appendix 2 to this Interim Report contains a summary of the legislative history.
10. The regulation of workplace health and safety was initially undertaken on a state by state basis. However, as section 3 of the WHS Act indicates, the present legislative position in this State is a response to the establishment of a nationally consistent framework. The benefits of national regulation are obvious. One is that employers who carry on business in more than one state will, in general, know that their obligations in respect of workplace health and safety are consistent no matter where their business may be transacted.

Proceedings to date under the Terms of Reference

11. As I have noted, my Review was commissioned in response to criticisms of SafeWork that had appeared in various media. Those criticisms may be summarised as follows:
 - a. that SafeWork is slow to act on safety warnings;
 - b. that on-site inspections are too slow and too rare;
 - c. that serious safety breaches are not investigated adequately;
 - d. that inspectors are subject to pressure or interference directed at their decisions regarding investigations, fines, notices and recommendations for prosecution;
 - e. that the process for deciding on whether matters should be prosecuted is flawed. Related to this, that inspectors' recommendations regarding prosecution or other enforcement action are ignored;
 - f. that there is inadequate resourcing of enforcement and prosecutions;
 - g. that there is a high turnover and a shortage of inspectors;
 - h. that there is a culture of bullying in the organisation and that employees are not listened to;
 - i. that SafeWork has lost its identity and is not independent.

12. I determined that it was appropriate to start by calling for submissions. Accordingly, a call for submissions was made on 2 December 2022, followed by print media notices. The call for submissions was renewed on 24 January 2023. To date, I have received in excess of 45 submissions.

13. Upon consideration of the submissions that had been received, I determined that it was appropriate to call for the production of documents from SafeWork. That was done on 20 January 2023. Documents were produced in tranches. A further call for documents was made on 12 May 2023 and I expect to receive these documents next month. It may be necessary for me to make further calls for documents as my review progresses.

14. I conducted interviews with a number of those who made submissions. They included present or former inspectors of SafeWork, and representatives of employees (specifically, trade unions) and employer groups. Interviews with individuals whose lives have been affected, one way or another, by SafeWork's performance of its functions are scheduled to take place next month. There will be more interviews thereafter.

15. I intend also to obtain and review reports on the operation of the relevant workplace health and safety legislation in other jurisdictions in Australia. That will be done in the next phase of the conduct of this Review.
16. At a high level, the material provided to me by way of submission and by way of interview covered the following topics:
 - a. the role and treatment of SafeWork inspectors both within SafeWork and with respect to investigation and enforcement;
 - b. safeWork's engagement with and of recognition of Health and Safety Representatives (HSRs) (linked to training);
 - c. experience and process of reporting matters to SafeWork through the website and by phone (customer service);
 - d. conflict (perceived or otherwise) between the enforcement and educative functions of SafeWork NSW;
 - e. enforcement: use of enforceable undertakings and issues to do with prosecutions.
17. More specifically, I have received complaints or comments as to:
 - a. accessibility and responsiveness, including perceived difficulties encountered during the process of reporting matters to SafeWork, perceived lack of expertise of those receiving and triaging matters and perceived inadequate response to serious matters, including by use of administrative response letters rather than inspector visits;
 - b. transparency of decision-making, including decision-making about investigations, prosecutions and the use of enforceable undertakings;
 - c. independence, including concerns about the approach to investigation and enforcement of work health and safety matters within government agencies, about SafeWork being housed within the Department of Customer Service (**DCS**) and about constraints on inspectors;
 - d. accountability, including concerns about how SafeWork deals with bullying and other allegations, its approach to HSRs and other work health and safety issues within the organisation;
 - e. workforce issues such as high turnover, burnout, micromanagement and lack of support;
 - f. expertise and training, including training of new inspectors and at management level, training provided to HSRs, the quality of training materials and

involvement of other stakeholders in developing training and educational materials;

- g. a lack of support for and enforcement of the rights of HSRs and entry permit holders, including, on sites.

18. I have determined that it is appropriate to call for expert advice on matters relevant to my Review. I asked that funding be provided for independent consultants to give me advice on the following matters:

- a. SafeWork's performance of its educational function, with particular reference to the New Inspector Training Program (**NITP**), the training of Health and Safety Representatives (**HSRs**) and Entry Permit Holders, and training of staff involved in performing triage functions;
- b. SafeWork's current Triaging and IDMP processes, including whether complaints and incidents are handled appropriately under those processes and whether the processes include appropriate measures to ensure that workers and their representatives (including HSRs), and the families of injured and deceased workers, have a genuine voice;
- c. the handling of complaints as to alleged unlawful or undesirable conduct in the workplace including:
 - i. whether the complaint mechanisms and processes are made clear and accessible to complainants;
 - ii. whether complaints have been handled appropriately;
 - iii. what mechanisms are or should be in place for oversight of the handling and resolution of such complaints;
- d. SafeWork's operational, governance and management structures including:
 - i. SafeWork's current existence as a unit within the Department of Customer Service;
 - ii. the current division of SafeWork into teams or units, and how this affects SafeWork's handling of reports, complaints and notifiable incidents;
 - iii. oversight of SafeWork, including comparative analysis of oversight arrangements for equivalent work health and safety regulators in other jurisdictions.

19. DCS has agreed that it will provide funding, and I am presently in discussions with DCS in relation to the identity of the independent consultants to be retained and the tasks they will be asked to undertake.

20. In relation to the NITP, DCS has indicated it had proposed to conduct a review of this programme. To avoid two separate reviews undertaking the same process, I have agreed with DCS that it should have input into the work to be undertaken by the independent consultants retained for my Review.
21. In relation to the fourth topic, DCS has advised that consideration is being given to a structural review of SafeWork. Until I have more details of what is proposed, I am not certain of the precise nature of the work that I would expect the independent consultants to undertake. Obviously enough, that work should be relevant to the structure of SafeWork as it is proposed to exist.

Separate inquiry by the Auditor-General of NSW

22. The Auditor-General of NSW (**Auditor-General**) has determined to conduct a "performance review" of SafeWork pursuant to Division 2A "Performance audits of activities" of the *Government Sector Audit Act 1983* (NSW) (**GSA Act**). I have communicated with the Auditor-General and her staff with a view to ensuring that our separate activities will be complementary rather than duplicative, and that, within the appropriate limits established under the GSA Act², we can provide information and assistance to each other. However, as will be noted from a study of Division 2 of the GSA Act, the task of the Auditor-General in conducting her performance audit is quite distinct to the task that I am to perform pursuant to my Terms of Reference.

Structure and organisational separation of SafeWork

23. A number of submissions made to my Review have advanced the proposition that SafeWork's effective performance of its functions is hampered by its being, in substance, a unit within the Better Regulation Division of the Department of Customer Services (**DCS**). This echoes the comment made as long ago as 1981, referred to at [6] of Appendix 2. As I have noted in Appendix 2, Commissioner Williams expressed "a strong view of the undesirability of administration becoming the responsibility of a subdivision or branch of some existing Government department". Commissioner Williams recommended the establishment of a separate Commission with responsibility for regulation of occupational health and safety.
24. Commissioner Williams' recommendation was not adopted when, two years after he made it, the legislature passed the *Occupational Health & Safety Act 1983* (NSW) It was, however, adopted belatedly when, on 1 January 1990, the WorkCover Authority of NSW (**WorkCover**) came into existence as a separate statutory body, with

² There are no equivalent limits to sharing information gathered in the course of my Review.

responsibility for the regulation of occupational health and safety and related matters, pursuant to section 4 of the *WorkCover Administration Act 1989* (NSW).

25. Thereafter, as explained in Appendix 2 at [9] to [12], WorkCover continued in existence, and remained the regulator of matters relating to occupational health and safety, through a succession of legislative changes: the *Workplace Injury Management & Workers Compensation Act 1998* (NSW), the *Occupational Health & Safety Act 2000* (NSW), and the WHS Act itself, as originally enacted in 2011. It was not until the enactment of the *State Insurance & Care Governance Act 2015* (NSW) (**SICG Act**) that WorkCover was abolished and replaced by three new agencies: SafeWork itself, Insurance & Care NSW (usually known by its statutory nickname, iCare), and the State Insurance Regulatory Authority (SIRA). Although iCare and SIRA were constituted as separate bodies corporate³, SafeWork was not.
26. In short, so far as the regulation of workplace health and safety as a separate subject is concerned, both the recommendation made by Commissioner Williams in 1981, and its belated legislative recognition in 1990, have been overturned. The workplace health and safety regulator is, once again, a unit within a NSW Government Department.
27. There appear to be valid reasons why SafeWork should be excised from the DCS and constituted as a body corporate, in the same way as iCare and SIRA have been. Those reasons include, among other things, that there could be structures for governance, such as by an independent board of directors, and for operational oversight by an appropriate external agency.
28. Those reasons include also that, although SafeWork might (if the example of iCare and SIRA were adopted) remain a NSW Government Agency, it would nonetheless be structurally separate from the Executive Government of this State, and would be independent of DCS and indeed of the Minister. Given that the activities of SafeWork extend to the investigation of the activities of other NSW Government Agencies, it is strongly arguable that structural independence of the kind to which I have referred would promote public confidence in those aspects of SafeWork's performance of its functions.
29. That is not to say that an independent SafeWork should operate at large, without supervision and without some form of external oversight. There are a number of ways in which this could be achieved. They include regulation by an agency such as

³ See sections 4 and 17 respectively of the SICG Act. iCare and SIRA are expressed to be "for the purposes of any Act, a NSW Government Agency" but nothing of present moment turns on this.

SIRA (which performs that function for iCare), and oversight by a committee of the NSW Parliament (as is also the case with iCare and SIRA). There may be other ways in which this could be achieved without unduly and inappropriately trammelling the independence and effectiveness of SafeWork.

30. I have not come to a concluded view on these matters. There is more to be done by way of inquiry before I would be confident in expressing a recommendation.
31. First, it is necessary to have the considered view of the DCS, SafeWork itself and other affected or potentially affected agencies: for example, SIRA.
32. Next, it is necessary that I conclude my schedule of interviews and my review of reports from other jurisdictions as referred to at [15] above.
33. Further, and importantly, I would wish to have the benefit of independent expert advice on the management and governance of SafeWork as an independent body corporate on the model of iCare and SIRA, and as to possible oversight mechanisms. That advice should relate both to the concept of structural separation and to the most effective way in which that might be done, including the details of the structure to give effect to it and the appropriate governance and supervisory mechanisms. Those and more are all matters that require further detailed study and consideration before I could properly come to a concluded view.

Other matters

34. The incomplete state of my inquiries makes it impossible for me to express even a tentative view as to the other topics that I have identified. It is too early to say whether, and if so to what extent, any of those topics are made good, far less to consider and recommend ways in which, if they have been made good, they might be addressed.



Robert McDougall

Dated: 31 May 2023

Appendix 1

Terms of Reference

The scope of the Independent Review is to inquire into, report on and where thought desirable make recommendations as to:

1. The performance and effectiveness of SafeWork NSW's compliance and enforcement functions. This part of the Review will consider complaints, inspections, investigations, and prosecutions, and will include consideration of SafeWork's Triaging and Investigation Decision Making Panel processes.
2. The performance and effectiveness of SafeWork NSW's educational functions.
3. The governance and culture of SafeWork NSW, including complaints as to alleged unlawful or undesirable conduct in the workplace.
4. Appropriate measures to ensure that workers and their representatives (including Health & Safety Representatives), and the families of injured and deceased workers, have a genuine voice in the complaints, investigation, and enforcement processes.

Appendix 2

Summary of the legislative history of inspectors and the Workplace Health and Safety Regulator in New South Wales

1. Inspectors of work health and safety have operated in NSW for more than 125 years. Under the *Factories and Shops Act 1896* ('the 1896 Act'),¹ inspectors of factories and shops were appointed by the Governor.² Inspectors had powers of entry and inspection including, in appropriate cases, with "an officer of health or inspector of nuisances" or, if needed, with a constable.³ Occupiers of factories and shops were required to allow such entry and inspection⁴ and it was an offence under the 1896 Act to obstruct an inspector.⁵ Contraventions of the 1896 Act or related regulations were to be reported to the Minister for Labour and Industry by the inspector and prosecution instituted with the Minister's consent.⁶ Each inspector was required to provide an annual report to the Minister for submission to Parliament.⁷
5. In 1909 a power was added whereby an inspector could notify in writing that an office, building or place was unfit to be used as a factory, with the notice recipient able to appeal to the Minister.⁸ Inspectors were also given the power to conduct prosecutions in connection with offences against the 1896 Act and to attend and examine witnesses at any inquest into the cause of the death of any employee while employed in a factory or shop.⁹ The consolidating *Factories and Shops Act 1912* broadly continued these arrangements, while repealing the 1896 Act.
6. In 1936 the Minister was given authority to appoint committees comprising representatives of employers and employees in any trade or industry for the purpose of investigating, considering and reporting upon conditions of work and means to be adopted for the prevention of accidents in factories.¹⁰ This was replaced in 1941¹¹ by the Factory Welfare Board, comprising the Chief Inspector of Factories, a

¹ The *Factories and Shops Act 1896* came into force on 1 January 1897: s 1

² *Factories and Shops Act 1896*, s 4

³ *Factories and Shops Act 1896*, s 7

⁴ *Factories and Shops Act 1896*, s 8

⁵ *Factories and Shops Act 1896*, s 9

⁶ *Factories and Shops Act 1896*, s 44

⁷ *Factories and Shops Act 1896*, s 17

⁸ *Factories and Shops (Amendment) Act 1909*, s 4, inserting s 6B into the 1896 Act

⁹ *Factories and Shops (Amendment) Act 1909*, s 5, inserting s 7 (V A) into the 1896 Act

¹⁰ *Factories and Shops (Amendment) Act 1936* ('the 1936 Act'), s 1(q), inserting s 36C into the 1912 Act. The 1936 Act also gave responsibility for annual reports to the Minister for transmission to the Under Secretary of the Department of Labour and Industry: s 2(i).

¹¹ *Factories and Shops (Further Amendment) Act 1941*, s 3(b), inserting s 36C into the 1912 Act

representative of employers and a representative of employees. Broadly, the Board had powers to investigate, report and make recommendations regarding the safety or health of employees and to encourage, assist in the establishment of and direct and supervise welfare committees in factories.¹² The Governor was also empowered to appoint factory welfare officers.¹³ In 1943 further amendments were made to give the Factory Welfare Board power to enter and inspect any premises used as a factory and any work being carried on there.¹⁴ In 1956, the Factory Welfare Board changed its name to the Factory and Industrial Welfare Board.¹⁵

7. The 1912 Act (and subsequent amending legislation) was repealed and replaced by the *Factories, Shops and Industries Act 1962* ('the 1962 Act'). The 1962 Act broadly kept in place the existing arrangements for inspectors (under the supervision of the Chief Inspector of Factories, Shops and Industries), the Factory and Industrial Welfare Board, welfare or safety committees and an annual report by the Under Secretary of the Department of Labour and Industry for submission to Parliament.
8. In 1977 the role of Deputy Chief Inspector of Factories, Shops and Industries was created.¹⁶ This was followed in 1979 by the creation of the role of Chief Inspector of Boilers.¹⁷
9. In 1981 the report of T.G. Williams, Commissioner, of the Commission of Inquiry into Occupational Health and Safety was presented to the Honourable P.D. Hills, MP, then Minister for Industrial Relations.¹⁸ In his report Commissioner Williams recommended that there be a single administering authority for all legislation pertaining to occupational health and safety,¹⁹ expressing "a strong view of the undesirability of administration becoming the responsibility of a subdivision or branch of some existing Government department".²⁰ While considering that it was proper that Ministerial control and responsibility should exist, the report stated that a measure of independence was "certainly desirable, provided there is reporting to the responsible

¹² *Factories and Shops (Further Amendment) Act 1941*, s 3(b), inserting ss 36C(2) into the 1912 Act

¹³ *Factories and Shops (Further Amendment) Act 1941*, s 3(b), inserting ss 36C(4) into the 1912 Act

¹⁴ *Factories and Shops (Amendment) Act 1943*, s 4(d)(iv), inserting ss 36(5) into the 1912 Act

¹⁵ *Factories and Shops (Amendment) Act 1956*, s 2(d)(i), 2(e)(i)

¹⁶ *Factories, Shops and Industries (Amendment) Act 1977*, s 5 and sch 5

¹⁷ *Factories, Shops and Industries (Amendment) Act 1979*, s 4 and sch 2

¹⁸ T.G. Williams, Esq., Commissioner: *Report of Commission of Inquiry into Occupational Health and Safety*, 27 August 1981

¹⁹ T.G. Williams, Esq., Commissioner: *Report of Commission of Inquiry into Occupational Health and Safety*, 27 August 1981, para 4.270, p 88

²⁰ T.G. Williams, Esq., Commissioner: *Report of Commission of Inquiry into Occupational Health and Safety*, 27 August 1981, para 4.248, p 84

Minister of the progress of activities".²¹ The Inquiry made the following recommendations:

4.277 There should be established a Commission of the type existing in the United Kingdom. Its members, including the Chairman, should be drawn from government, management, labour, and one or more of the branches of the industrial and allied sciences (engineering, hygiene, medicine). Its functions and powers should be clearly defined. Its Chairman should be a full-time appointment. Subcommittees of members could be formed for particular purposes. Members other than the Chairman need not necessarily be full time appointees. Numbers should not exceed six, with the Chairman having, if required, a casting vote.

4.278 The Commission should be supported by an executive of salaried officers, of whom one should be the Chief Executive Officer. Determination of needs, programmes, projects, and allocation of finance should be reserved to the Commission to whom the Chief Executive Officer should report.

4.279 The Commission should report regularly to the Minister within whose portfolio its activities fall. Its determination of the size necessary for the executive should require Ministerial approval.

4.280 The Executive should contain a number of divisions sufficient to encompass all of its operations, including the use of training, education, research, statistics, occupational health and safety services, codes of good practice, standards, enforcement, joint committees, tribunals, occupational health policies, and the inspectorate.

4.281 The Minister whose portfolio is most closely connected with relevant matters is the Minister for Industrial Relations, and the Inquiry recommends that he should have responsibility for the operations of the Commission.

10. The next legislative reform was the *Occupational Health and Safety Act 1983* ('the 1983 Act'), which created the Occupational Health, Safety and Rehabilitation Council of NSW, abolished the Factory and Industrial Welfare Board and made provision for occupational health and safety committees in workplaces, among other changes. As explained by Adrian Brooks in his text on occupational health and safety law in

²¹ T.G. Williams, Esq., Commissioner: *Report of Commission of Inquiry into Occupational Health and Safety*, 27 August 1981, paras 4.246-4.247, p 83

Australia, the 1983 Act “*did not make any attempt to comply with Williams’ recommendation that the various units exercising inspectorial functions under different pieces of safety legislation be brought together into a single body. However, this was achieved administratively, to some extent, by the bringing together of the various inspectorates within the Division of Inspection Services of the Department of Industrial Relations*”.²² This Department became known as the Department of Industrial Relations and Employment in 1986.

11. The next significant reform was the creation of WorkCover, which commenced operations on 1 January 1990 when the *WorkCover Administration Act 1989* came into force. In his Second Reading speech for the WorkCover Administration Bill and WorkCover Legislation (Amendment) Bill, John Fahey MP, then Minister for Industrial Relations and Employment and Minister Assisting the Premier, informed Parliament that a consultants’ report found that the organisation structure of the occupational health and safety units of the Department of Industrial Relations and Employment had impeded the effectiveness of the delivery of occupational health and safety services to the state. It was recommended that all divisions of occupational health and safety within the department be amalgamated with the Workers Compensation and Rehabilitation Authority (which had been established under the *Workers Compensation (Amendment) Act 1988*), to form a new self-funding WorkCover Authority. Under the new arrangements inspectors remained appointed under the 1962 Act, but were attached to the Workcover Authority, under the control of a Chief Inspector.²³ WorkCover’s policies were determined by a Board of Directors, consisting of the General Manager and six part-time directors appointed by the Governor on the recommendation of the Minister.²⁴

12. The *WorkCover Administration Act 1989* was replaced by the *Workplace Injury Management and Workers Compensation Act 1998*, which continued WorkCover’s role and functions.

13. The *Occupational Health and Safety Act 2000* (‘the 2000 Act’) followed a review of the 1983 Act by a panel chaired by Professor Ron McCallum²⁵ and the reports of the Legislative Council Standing Committee on Law and Justice’s inquiry into workplace

²² Adrian Brooks, *Occupational Health and Safety Law in Australia*, 4th Edition, 1993, ¶1045 p 490

²³ Adrian Brooks, *Occupational Health and Safety Law in Australia*, 4th Edition, 1993, ¶1147, p 570

²⁴ *WorkCover Administration Act 1989*, ss 5-6

²⁵ See Professor Ron McCallum, “Reflections on the role of the Panel which reviewed the OH&S Act 1983” in Parliament of New South Wales, Legislative Council, Standing Committee on Law & Justice, *Proceedings of the Public Seminar on Workplace Safety*, Report No. 4, 12 March 1997, pp 4-10

safety, which made various recommendations for the regulatory reform of workplace safety.²⁶ The 2000 Act repealed the 1983 Act and also the provisions of the 1962 Act concerning occupational health and safety. The 2000 Act contained new provisions governing the appointment of inspectors by WorkCover, the powers of inspectors (continuing their existing powers), the issuing of investigation, improvement and prohibition notices and criminal and other proceedings. Also at this time, WorkCover issued a compliance and prosecutions policy.²⁷

14. WorkCover remained the regulator of work health and safety following the *Work Health and Safety Act 2011* ('the 2011 Act'), which implemented in NSW the model work health and safety laws which had been developed by Safe Work Australia. Those model laws had specified the functions of the regulator, and accordingly section 152 of the 2011 Act provided that WorkCover had the following functions:

- (a) *to advise and make recommendations to the Minister and report on the operation and effectiveness of this Act,*
- (b) *to monitor and enforce compliance with this Act,*
- (c) *to provide advice and information on work health and safety to duty holders under this Act and to the community,*
- (d) *to collect, analyse and publish statistics relating to work health and safety,*
- (e) *to foster a co-operative, consultative relationship between duty holders and the persons to whom they owe duties and their representatives in relation to work health and safety matters,*
- (f) *to promote and support education and training on matters relating to work health and safety,*
- (g) *to engage in, promote and co-ordinate the sharing of information to achieve the object of this Act, including the sharing of information with a corresponding regulator,*
- (h) *to conduct and defend proceedings under this Act before a court or tribunal,*
- (i) *any other function conferred on the regulator by this Act.*

15. Under section 11 of the *Safety, Return to Work and Support Board Act 2012*, the NSW Legislative Council's Standing Committee on Law and Justice was designated as the Legislative Council committee to supervise the exercise of WorkCover's functions. This

²⁶ Parliament of New South Wales, Legislative Council, Standing Committee on Law & Justice, *Report on the Inquiry into Workplace Safety: Interim Report*, Report No. 8, 22 December 1997; Parliament of New South Wales, Legislative Council, Standing Committee on Law & Justice, *Final Report of the Inquiry into Workplace Safety*, Report No. 10, 26 November 1998

²⁷ Parliament of New South Wales, Legislative Council, 26 May 2000, p 5937, Second Reading of Occupational Health and Safety Bill

resulted in a review of WorkCover in 2014,²⁸ which recommended that consideration be given to establishing a separate agency or other administrative arrangements to clearly separate the roles of regulator and nominal insurer in the workers compensation scheme. The Review also considered WorkCover's multiple roles in the work health and safety sphere, noting that WorkCover acted as both the work health and safety regulator and as an advisor to workplaces. The Review commented that:

*While synergies can be achieved in having a single organisation perform both regulatory and advisory roles in the work health and safety sphere, clear protocols must exist to minimise the possibility of conflicts of interest occurring. The committee therefore recommends that WorkCover, in consultation with key stakeholders, review the procedures currently utilised to distinguish between the two functions and implement protocols to minimise conflicts occurring.*²⁹

16. This separation was achieved in 2015, when WorkCover was abolished and replaced by three new agencies: SafeWork NSW ('SafeWork'), Insurance and Care NSW ('icare') and the State Insurance Regulatory Authority ('SIRA'). Under the *State Insurance and Care Governance Act 2015*, WorkCover's functions as the regulator under the 2011 Act were transferred to SafeWork. In his Second Reading speech of the Workers Compensation Amendment Bill 2015 and the State Insurance and Care Governance Bill 2015, Dominic Perrottet MP, then Minister for Finance, Services and Property, noted that WorkCover had already implemented an operational separation of its regulatory and insurance activities but with the creation of the three new entities, Safework would be "an independent work health and safety regulator".³⁰ He said:

Finally, the role of WorkCover in enforcing work health and safety legislation will be transferred to a separate statutory regulator, which will be called SafeWork NSW. The relevant provisions establishing SafeWork NSW are contained in schedule 13 to the bill, by way of amendments to the Work Health and Safety Act 2011. SafeWork NSW will focus on harm prevention and improving the safety culture in New South Wales workplaces. It will also include the establishment of a centre of excellence for work, health and safety in New South Wales. The new structure will

²⁸ NSW Legislative Council Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority*, Report 54, 17 September 2014

²⁹ NSW Legislative Council Standing Committee on Law and Justice, *Review of the exercise of the functions of the WorkCover Authority*, Report 54, 17 September 2014, p xii; see also para 3.56 and recommendation 3, p 32

³⁰ Parliament of New South Wales, Legislative Assembly, 5 August 2015, p [insert], Second Reading of Workers Compensation Amendment Bill 2015 and State Insurance and Care Governance Bill 2015

be more transparent and accountable and, most importantly, lead to better outcomes for injured workers. There will be no job loss as a result of these improvements. The head office of WorkCover in Gosford and other regional offices will not be relocated as part of these changes. Staff moving to SafeWork NSW and SIRA will remain in the public service under the Government Sector Employment Act 2013 and in the Department of Finance, Services and Innovation. Their existing entitlements will be maintained.

17. As a consequence of the 2015 changes, the regulator became the Secretary of the Department of Finance, Services and Innovation, to be known as SafeWork NSW.³¹ The 2015 Act provided that SafeWork was subject to the control and direction of the Minister except in relation to the contents of any advice, report or recommendation given to the Minister, any decision that relates to proceedings for offences under the 2015 Act, or any decision that relates to a work health and safety undertaking.
18. SafeWork was housed within the “*Regulation Division*” of the Department of Finance, Services and Innovation and, from March 2019, within the “*Better Regulation Division*”, as the division became known.
19. The Department of Finance, Services and Innovation was abolished on 1 July 2019.³² SafeWork was transferred to the newly-formed Department of Customer Service, remaining within the Better Regulation Division. The Department of Customer Service was formally designated “*the regulator*” under the 2011 Act from 13 January 2023.³³ As previously with the Department of Finance, Services and Innovation, the Secretary of the Department of Customer Service is, as the regulator under the 2011 Act, to be known as SafeWork NSW.

³¹ In relation to matters or the exercise of a power or the performance of a function concerning a mining workplace, the regulator under the *Work Health and Safety (Mines) Act 2013*

³² Administrative Arrangements (Administrative Changes – Public Service Agencies) Order 2019

³³ Statute Law (Miscellaneous Provisions) Act (No 2) 2002, sch 3 [3.69]