

SafeWork NSW

AND

Secretary, Department of Regional NSW

**MEMORANDUM OF UNDERSTANDING FOR
THE MUTUAL REFERRAL AND
INVESTIGATION OF MATTERS BY A WORK
HEALTH AND SAFETY REGULATOR - 2020**

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1. PARTIES

The Secretary, Department of Customer Service (DCS), known as SafeWork NSW (and its successors)

AND

The Secretary, Department of Regional NSW (DRNSW) (and its successors)

“the Parties”

2. RECITALS

- 2.1 Pursuant to clause 1 of Schedule 2 to the *Work Health and Safety Act 2011* (WHS Act), the Secretary of DCS (known as SafeWork NSW) is the regulator of work health and safety in all workplaces across NSW except Mining Workplaces.
- 2.2 DRNSW is the NSW government agency responsible for building resilient regional economies and communities, strengthening primary industries, managing the use of regional land, overseeing the state’s mineral and mining resources and ensuring that government investment into regional NSW is fair and delivers positive outcomes for local communities and businesses, and administers the *Work Health and Safety (Mines and Petroleum Sites) Act 2013* and the *Petroleum (Offshore) Act 1982*. Pursuant to clause 1 of Schedule 2 to the WHS Act, the Secretary of DRNSW is the regulator of work health and safety in Mining Workplaces.
- 2.3 The Parties are committed to ensuring the health and safety of workers in their agencies.
- 2.4 The Parties as Regulators recognise that there may be a conflict of interest, perceived or actual, if either Regulator was to investigate certain work health and safety (WHS) matters involving its own or associated workplaces. In the case of the Secretary of DRNSW, as the work health and safety regulator at Mining Workplaces, this means Mining Workplaces where the Secretary of DRNSW is a person conducting a business or undertaking (PCBU). In the case of SafeWork NSW, the workplace potentially includes any place where the Secretary of DCS is a PCBU.
- 2.5 The Parties agree that where necessary to avoid an actual, potential or perceived conflict of interest it is desirable to assist each other by undertaking transparent and accountable investigations of certain WHS matters involving the other Party’s workplaces.
- 2.6 The Parties recognise that each has the resources to give effect to this MOU.

3. DEFINITIONS

- 3.1 In this MOU:

Mining Workplaces means 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;

MOU means this Memorandum of Understanding;

Party means either SafeWork NSW or the Secretary of DRNSW;

Parties mean SafeWork NSW and the Secretary of DRNSW;

Regulator means either the Secretary of DCS as SafeWork NSW or the Secretary of DRNSW;

WHS Act means the *Work Health and Safety Act 2011*;

WHS legislation means the: *Work Health and Safety Act 2011*; *Work Health and Safety Regulation 2011*; *Work Health and Safety (Mines and Petroleum Sites) Act 2013*; and *Work Health and Safety (Mines and Petroleum Sites) Regulation 2014*;

WHS matters means the inspection and enforcement of compliance with WHS obligations of either Regulator;

WHS obligations means obligations and duties of the Regulator as a PCBU created by the WHS legislation.

4. TERM

- 4.1 This MOU commences on the date this MOU is signed and continues until terminated in writing.
- 4.2 Either Party may terminate this MOU by giving 30 days' notice in writing to the other Party.

5. PURPOSE

- 5.1 The purpose of this MOU is to establish a framework for the referral to the extent permitted by law of WHS matters by one Regulator to the other Regulator for investigation and enforcement with respect to compliance with WHS obligations.

6. LEGAL INTENT

- 6.1 This MOU is a voluntary statement of intent by the Parties at the time of execution and for the duration of the MOU.
- 6.3 This MOU is not legally or contractually binding; nor is it enforceable.
- 6.3 This MOU does not limit either Party from fully exercising its statutory powers.
- 6.4 This MOU replaces the previous Memorandum of Understanding between the Regulators of the *Work Health and Safety Act 2011*; *Work Health and Safety Regulation 2011*; *Work Health and Safety (Mines and Petroleum Sites) Act 2013*; and *Work Health and Safety (Mines and Petroleum Sites) Regulation 2014* signed on 20 December 2016 relating to the referral of WHS matters by one Regulator to the other Regulator for investigation and enforcement. However, all referrals and actions done, performed and authorised under the prior MOUs continue in force.

7. PROTOCOLS

- 7.1 Protocols may be agreed between the Parties for the purpose of identifying the circumstances in which WHS matters will be referred from one Regulator to the other Regulator.

- 7.2 The protocols will ensure that neither Party is excessively burdened by the other's referrals.
- 7.3 The protocols may provide for the circumstances in which the granting of any appropriate delegations, authorisations and appointments will be made.

8. MAKING REFERRALS

- 8.1 To the extent permitted by law:
- a) SafeWork NSW or delegate may, in accordance with its protocol, refer WHS matters to the Secretary of DRNSW; and
 - b) The Secretary of DRNSW or delegate may, in accordance with its protocol (if any), refer WHS matters to SafeWork NSW.

9. ACCEPTING REFERRALS

To the extent permitted by law:

- 9.1 If a referral is made in accordance with Clause 8.1 a) and is accepted, the Secretary of DRNSW, or delegate, may investigate, take any appropriate compliance action, or exercise any other appropriate regulatory functions or powers.
- 9.2 If a referral is made in accordance with Clause 8.1 b) and is accepted, SafeWork NSW, or delegate, may investigate, take any appropriate compliance action, and exercise any other appropriate regulatory functions or powers.
- 9.3 If a referral is accepted by a Regulator, the referring Regulator will cooperate (in accordance with obligations and rights specified in the WHS Act) with any subsequent investigation.
- 9.4 To the extent that a Regulator may legally undertake an investigation in the workplace of another Regulator, when investigating accepted referrals, each Regulator retains full autonomy in the exercise of their statutory and administrative functions.
- 9.5 A Regulator will make its decision as to any action to be taken in relation to a referred matter (including whether or not to prosecute the other Regulator for breaches of the WHS legislation):
- a) in the public interest;
 - b) consistent with the requirements of the Premier's Memorandum relating to litigation between Government authorities; and
 - c) consistent with the investigating Regulator's relevant policies and procedures.

10. FUNDING AND COST RECOVERY

- 10.1 Each Party will bear its own costs incurred in relation to the preparation, execution and implementation of this MOU.
- 10.2 Where a Regulator accepts a referral in accordance with Clauses 9.1 or 9.2, cost recovery funding arrangements for that referred matter will be determined based on:

- a) a calculation of chargeable hours multiplied by an hourly cost equivalent to the hourly pay rate of those undertaking the investigation and/or enforcement actions; plus
- b) actual expenses incurred by that Party's agency over and above its investigative costs.

10.3 An alternate cost recovery method may be used if accepted by both Parties.

11. DISPUTE RESOLUTION

11.1 In the event of any dispute arising pursuant to this MOU, the Parties will act in good faith to reach a prompt negotiated resolution by designating officers of appropriate authority as determined by the Secretaries to resolve the dispute.

12. AMENDMENTS AND VARIATIONS

12.1 All amendments and variations to this MOU must be agreed to by both Parties, evidenced in writing and signed by the Parties.

13. REVIEW

13.1 The Parties agree that this MOU will be monitored and reviewed every 3 years from the date it is signed (or as otherwise agreed).

14. REPORTING

14.1 Within 3 months of 30 June each year, the Parties agree to provide each other with an annual report detailing the referrals made and received under this MOU during the preceding 12 months and reporting on the current position with regard to each referral.

15. SIGNATORIES TO THIS MOU

This MOU is executed on the

..... day of 2020

Executed by Emma Hogan
in her capacity as SafeWork NSW

.....

(signature of Emma Hogan)

.....

Date

in the presence of:

.....

(insert name of witness)

.....

(signature of witness)

Executed by Gary Barnes
Secretary of the Department of Regional NSW

.....
Gary Barnes

(signature of Gary Barnes)

.....
5/6/20

Date

in the presence of:

.....
SUZIE FOVLDS

(insert name of witness)

.....
Suzie Fovlds

(signature of witness)