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2018 Review of model WHS Laws

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2018 Review of model WHS Laws

Thank you for the opportunity to contribute to the 2018 Review.

I provide these observations and comments as an individual with over 30 years' experience in work health and safety (WHS), in operational and policy roles. While I was Director Work Health and Safety and Workers Compensation Policy at the Australian Chamber of Commerce and Industry, I was also its representative on Safe Work Australia (SWA) when the WHS regulatory package was being developed. I am currently consulting and I am an independent member of the Asbestos Safety and Eradication Council.

I started my involvement with the model WHS legislation in 2010 and indeed remember well the hours spent wrangling over the policy intent and interpretation of the wording for the legislative package and its guidance documents. In my role representing industry, I was involved in many of the SWA Committees, working groups and workshops.

I offer these comments as an experienced professional with an interest in improving health and safety and fostering a flourishing, healthy community.

It seems to me that the WHS framework is working reasonably but certainly needs refinement. The consolidation of legislation, the harmonisation through model legislation and guidance and the impact on the community have been broadly successful. But a law does not of itself deliver the desired outcomes and more law doesn't necessarily help. The model WHS laws now need to be applied consistently and in a way that is timely and relevant to users. Put simply, there needs to be more effective, targeted information and consistent communication with only a few changes.

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1. Policy Intent: It's more than compliance – it's about culture

All of us want a community with thriving individuals and thriving businesses. In essence, the policy intent of WHS Laws is to foster good, healthy and safe work practices and workplaces.

With this work culture in mind, much of the model WHS Act helps promote good corporate governance. The WHS framework promotes a proactive approach with broad outcomes and it is this that can result in rewards beyond compliance; rewards that benefit the whole community. The obligations outlined in model WHS Laws were developed to

1. **eliminate the risks to work health and safety, so far as reasonably practicable**
2. provide a framework for a **consistent approach to WHS across Australia and to consolidate existing legislation**
3. describe the **shared mutual responsibilities** of stakeholders and the consultation, cooperation and coordination required
4. emphasise a **proactive approach**
5. be **risk based legislation, rather than prescriptive legislation**
6. be mindful of **the future and changing nature of work**

And these original aims are as vital now as they were then and I believe they should remain the focus.

To this end, the harmonised WHS framework was widely welcomed and on the whole, these aims have been achieved. These findings were supported by a recent review of Safe Work Australia's roles and functions.¹ Although not the only measure of success, Safe Work Australia statistics show a continued improvement too.²

¹ Review of Safe Work Australia's Role and Functions (2016) Executive Summary pvi <https://www.jobs.gov.au/review-safe-work-australia-s-role-and-functions-0> accessed 10 March 2018

² [Safe Work Australia website](https://www.safeworkaustralia.gov.au/system/files/documents/1712/comparative-performance-monitoring-report-19th-edition-part-2_0.pdf) reports, as at 2 March 2018, that *there have been 19 Australian workers killed at work in 2018. In 2017, the preliminary data show there were 180 Australian workers killed at work, compared with 182 workers in 2016.* Work-related traumatic injury fatalities have continued to decrease. Between 2007 and 2015 there was a 44 per cent decrease in recorded worker fatalities. There were 1.6 fatalities per 100,000 workers in 2015. Accessed 2 March 2018. Also SWA 2017 https://www.safeworkaustralia.gov.au/system/files/documents/1712/comparative-performance-monitoring-report-19th-edition-part-2_0.pdf (CPM Report 19th Ed)

The stated objectives of developing the harmonised WHS laws were to

- Improve health and safety outcomes for all
- Reduce compliance costs where possible and appropriate
- Improve efficiency for regulators and share information and costs while providing support services
- Provide a uniform, equitable and effective regime that aims to minimise the WHS risks

In “Review of Safe Work Australia’s Role and Functions” (2016) the Executive Summary noted that improvements in WHS outcomes and arrangements in Australia, included:

- *Significant reductions in the rates of workplace fatalities and serious injuries across the nation*
- *The negotiation and development of model WHS laws, including an Act and regulations which has been implemented in seven of the nine Australian jurisdictions, and various codes of practice*
- *Development of a national policy to support a consistent approach to compliance and enforcement of the model legislative framework*
- *Development of over 150 supporting publications and advisory guidance material*
- *The introduction of a revised national WHS strategy in 2012, which is aligned with the model WHS laws*
- *The continued provision of national data, and a central point for prioritising and leading research for the purpose of informing WHS and workers’ compensation policy.*³

The WHS framework has largely been successful. Ultimately sustainable success of WHS starts with the **work culture and attitude and not with a raft of legislation**. While fundamental change to the intent of WHS Laws and its principles is not recommended, **some further refinements are needed for its consistent application, communication and operation**.

³ Review of Safe Work Australia’s Role and Functions (2016) Executive Summary <https://www.jobs.gov.au/review-safe-work-australia-s-role-and-functions-0> accessed 10 March 2018

2. Consistent national approaches to manage WHS Risks

Previously, the differences in legislation and approaches across States and Territories were not just confusing but also counterproductive. In some cases, the inconsistencies had been undermining the proactive steps needed for improvements to work health and safety.

In 2011 Deloitte prepared the Decision Regulation Impact Statement (DRIS) for National Harmonisation of WHS regulations and Codes of Practice⁴. The DRIS noted that

...previous multiple WHS regimes resulted in confusion and complexity for workers and businesses, inconsistency in record keeping, notification and reporting requirements, similar breaches resulted in different enforcement activities and penalties and created incentives to seek lower cost jurisdictions or competition between jurisdictions and disincentive to participate in multiple markets across jurisdictions. (p9)

Although much was made of the benefits to organisations operating in more than one state, the benefits have reached a wider audience – as they should. Much on what works, the sources of information and barriers can be found in a SWA report Evaluation of model work health and safety (WHS) laws: non-employing, small and medium business interviews.⁵

The WHS package has resulted in increased awareness generally, a higher profile and greater acceptance for WHS, and broader application to Australian work here and internationally. For example, New Zealand has since adopted a similar WHS package. In fact, Council of Australian Governments initiated an evaluation of model laws and found *general support for harmonisation of WHS laws* and that *there are a number of areas where the WHS laws are having a positive impact, such as the duty placed on officers*. The review resulted in revised WHS Act (2016), WHS Regulations (2016) and recommendations on Codes of Practice.⁶

⁴ Deloitte, Access Economics Decision Regulation Impact Statement for National harmonisation of WHS regulations and Codes of Practice, (2011) <https://www.safeworkaustralia.gov.au/doc/decision-regulation-impact-statement-national-harmonisation-work-health-and-safety-regulations> accessed 10 March 2018

⁵ SWA Evaluation of model work health and safety (WHS) laws: non-employing, small and medium business interviews by R. Mercer Instinct and Reason 2014

⁶ Council of Australian Governments, Improving the model work health and safety laws (2017) <http://ris.pmc.gov.au/2017/01/18/improving-model-work-health-and-safety-laws> accessed 10 March 2018

The Intergovernmental Agreement (IGA) for regulatory and operational reform in OHS, 2008⁷, set out the principles and processes for cooperation between the Commonwealth, states and territories and authorised WHS ministers to make decisions about a model WHS Act, regulations and Codes of Practice and develop a consistent compliance and enforcement policy.

Recent amendments have not been adopted by jurisdictions. Jurisdictions should be accountable with some **sanctions for not adopting model WHS framework**. The IGA provides the basis for consistency. It is time to strengthen the cooperation, reporting and accountability of each government, and strengthen the IGA. Each government should be held to account to this agreement.

In the Review of Safe Work Australia's Role and Functions 2016⁸ it was noted that there is

no mechanism for Safe Work Australia to enforce adoption of the laws, nor are there any consequences for jurisdictions that do not adopt the model WHS laws or take unilateral action to amend them. (p28)

...In the absence of monitoring it is possible that jurisdictions will make changes and variations to the laws without other jurisdictions knowing about it. This is especially the case with codes of practice and other guidance, which is less transparent.

And p34 considered the comment from a stakeholder that:

National leverage is important and the message on safety needs to be universal. This should continue as a function although Safe Work Australia needs to be more selective and pick the issues that have an impact in all jurisdictions.

Furthermore, this review found that SWA's role should change (which it did) to **evaluation and review of the effectiveness of the model WHS laws**. But without commitment and accountability from each regulator this is a difficult task for everyone involved.

Even SWA website itself notes

⁷ COAG [Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety](http://www.coag.gov.au/content/intergovernmental-agreement-regulatory-and-operational-reform-occupational-health-and-safety) 3 July 2008 <http://www.coag.gov.au/content/intergovernmental-agreement-regulatory-and-operational-reform-occupational-health-and-safety> accessed 28 March 2018

⁸ Review of Safe Work Australia's Role and Functions 2016 Executive Summary <https://www.jobs.gov.au/review-safe-work-australia-s-role-and-functions-0> accessed 10 March 2018

The [model WHS laws](#) were amended on 21 March 2016. As at 30 November 2016, no jurisdiction had implemented these amendments.⁹

Individuals and organisations are faced with a range of Legislation

What most people, individuals and organisations, face is a range of legislation of which WHS is just one. They need to comply with it all. Every jurisdiction has a range of agencies or departments to oversee each of them. Many of the requirements cross over, for example finding asbestos in the built environment involves environment protection, local government requirements and often WHS requirements.

A confusing range of agencies and legislation operate in this area. Some are

- Safe Work Australia (SWA)
- Asbestos Safety and Eradication Agency (ASEA)
- State and Territory Work Health and Safety regulators
- The Heads of Workplace Safety Authorities - Working Group on Imported Asbestos and the Rapid Response Protocol
- Department of Health
- Department of Treasury
- Fair Work Commission
- Australian Competition and Consumer Commission (ACCC)
- Environment Protection Authorities
- National Heavy Vehicle Regulator

For chemicals, there is a web of agencies and laws involved. And in the case of asbestos, there is also the Department of Immigration and Border Protection (DIBP) that administers the prohibitions on imports at the border along with the Australian Border Force (ABF).¹⁰ In this situation, the onus for avoiding importation of prohibited asbestos remains with the importer but has been known to affect each participant in the supply chain. Under the Building Products Safety Act 2017 in NSW, a banned building product e.g. flammable cladding, has further and wider ramifications on duty holders. This Act also prevails over the National Construction Code (NCC). As another example, workplace bullying crosses over with industrial relations, criminal law, anti-discrimination law and workers' compensation schemes. The new Chain of Responsibility (CoR) laws under the National Heavy Vehicle Regulator include safety issues too.

⁹ Safe Work Australia <https://www.safeworkaustralia.gov.au/law-and-regulation/law-your-state#amendments-not-implemented-by-jurisdictions> accessed 26 March 2018

¹⁰ Australian Border Force Fact Sheet - Managing the risk of asbestos at the border <https://www.homeaffairs.gov.au/Search/Pages/Results.aspx?k=managing%20the%20risks%20of%20asbestos%20at%20the%20border> accessed 27 March 2018

In addition, where two or more laws apply, any inconsistency needs to be identified. It seems, but is not always clear that this is judged on what is considered reasonably practicable. Even deciding which agency is best to advise can be difficult.

In other words, it's complicated, and there are layers of laws and obligations.

This makes it especially difficult for micro or small businesses. They are not going to read, absorb, interpret and understand the implications of the WHS Act, its regulations and all attendant Codes of Practice and other guidance, let alone all other layers of legislation that may be involved. In fact, not all organisations need all the information in the model WHS regulations. For example, information on hazardous atmospheres will not apply to a small data service.

But what each person is keen to know is what **they need to know for their own operations.**

Recent amendments have not been adopted by jurisdictions. Jurisdictions should be accountable with some **sanctions for not adopting model WHS framework.**

The **IGA needs to be strengthened.** Each government should be held accountable. In the interests of consistency jurisdictions could provide reports to SWA regarding adherence to the model WHS package – not just interventions. A coherent and strategic approach is needed. It would be useful if SWA would collate and analyse and report on what interventions are working, what are not working and why (not quite same as CPM Report 19th Ed).

Any proposed changes and variations must **first be considered at SWA – this must continue.** And any changes made must be reasoned, transparent and communicated to all stakeholders. More regulation should not be the first choice. The resultant regulatory creep has undermined harmonisation and public confidence in the framework.

All stakeholders in SWA would benefit from a **database of relevant cases and SWA Agency 's evaluation of cases** (a 'case book').

The whole community needs to have confidence – consistent approaches help. The range of legislation that all people involved in a business face needs to be recognised, simplified and appropriately translated and communicated. This is especially true for small to micro businesses. **Industry-specific guidance** based on what they need to know would be helpful. This could be **joint guidance with other agencies and strong engagement with social partners.** What is important is getting it right for those undertaking work.

3. It Works - Early Evaluations

A WHS Cost of Compliance (Regulatory Burden) Survey was undertaken in 2013.¹¹ Also a Perceptions of WHS Survey in 2012- 2013.¹² And a third study on impact on multistate businesses was undertaken.¹³ These studies evaluated the model WHS Laws at an early stage and looked at whether they were meeting the objectives of the Intergovernmental Agreement (IGA). Each of the reports admitted some limitations. Some extracted comments from the findings of each include

The regulatory burden survey: (1,663 businesses responded out of 10,000) made many findings. It was also compared with 2009 Productivity Commission national survey of SME's. *This showed that increase in awareness from 2009 to 2012 and businesses were in general more likely to be undertaking WHS activities. There was some increase in costs associated but this maybe the initial requirements to transition to WHS.*

Perceptions of WHS Survey: *1052 employers and 520 sole traders responded out of 10,000. Multijurisdictional large businesses suggested benefits of WHS laws outweighed the costs and that there would be improvement (decrease) in work related injury and illness and death.*

And Focus groups (28 participants) showed that these participants were *positive about need for WHS Laws and welcomed improved consistency, it increased awareness and focus on WHS.*

Impact of Harmonisation on very large businesses: *105 participants were recruited. Overall, at least in the eyes of senior WHS managers in most large organisations operating interstate, the benefits of the model WHS Act substantially outweigh its costs and there is reason to anticipate that over time it will achieve significant reductions in work related disease, injury and death*

¹¹ KPMG, WHS Cost of Compliance (regulatory burden) Survey 2013 SWA 2014 unpublished

¹² Social Research Centre, Perceptions of WHS Survey in 2012- 2013 SWA 2014 unpublished

¹³ Gunningham and Associates, Impact of harmonisation on very large businesses with multi-state operations, SWA 2014 unpublished

The surveys undertaken in these reports were intended as baseline surveys. It would be useful to **undertake further surveys now**, five (5) years later, to determine if the improvements found have been sustainable and what has worked and what hasn't worked. This can inform what might need to be addressed now.

The issues of consistency remain. To some extent there is still inconsistent application across the jurisdictions or across the agencies within a jurisdiction.¹⁴ There are now slight but widening differences in interpretation, in guidance and in application.¹⁵

Other early work includes "Attitudes towards Risk Taking and Rule Breaking in Australian Workplaces".¹⁶ Some consideration should be given to Victoria's recent review of its compliance and enforcement findings where rather than fundamental change some "incremental" recommendations were made.¹⁷

The policy intent has been successful and the aims of the WHS Laws should be retained.

To be effective, there must be **consistent application of the model WHS requirements and communication** of its messages across all jurisdictions and target groups.

The IGA needs to be strengthened and each government held accountable.

¹⁴ Effectiveness of Work Health and Safety Interventions by Regulators: A Literature Review (2013) <https://www.safeworkaustralia.gov.au/doc/effectiveness-work-health-and-safety-interventions-regulators-literature-review> accessed 10 March 2018

¹⁵ "Conflicting interpretation of WHS compliance codes and rules often meant higher costs for the business and clients. This was particularly true for businesses working across multiple industries or jurisdictions or who moved from site to site and were uncertain about which regulations took precedence" and "Inconsistencies in how WHS requirements are interpreted... There needs to be more effective communication of what documentation is required and specific examples of 'what is reasonably practical'". from **Evaluation of model work health and safety (WHS) laws: non-employing, small and medium business interviews** by Instinct and Reason for SWA 2014

¹⁶ Attitudes towards Risk Taking and rule breaking in Australian Workplaces (2014) <https://www.safeworkaustralia.gov.au/doc/attitudes-towards-risk-taking-and-rule-breaking-australian-workplaces> accessed 10 March 2018

¹⁷ Refer also Appendix 2 Independent Review of Occupational Health and Safety Compliance and Enforcement. Report, Nov 2016 <https://www.dtf.vic.gov.au/.../Independent-Review-of-OHS-Compliance-and-Enforce...> accessed 10 March and 5 April 2018

A particular challenge is to ensure small to micro businesses, specific industries, migrant workers and others are recognised as specific target groups and have specific information in appropriate language and format for effective, **nationally consistent communication**. This could be **joint guidance with other agencies and strong engagement with social partners**.

4. Current legislative framework – a risk-based approach

The WHS legislative package consists of

1. **WHS Act** – outlining duty of care
2. Detailed **WHS Regulations** to meet the requirements of the Act
3. **WHS Codes of Practice** and other guidance, fact sheets or information sheets
4. A **National Compliance and Enforcement Policy** – that includes a range of tools from advice, education and inspection to enforceable undertakings, infringement notices with penalties and eventually prosecution if necessary

It is rightly a risk-based approach. The duties outlined in the WHS Act are based on managing the risks so far as is reasonably practicable, by eliminating or minimising the risks. The model WHS Regulations looked at general risk management principles required to meet this aim but it also includes chapters on specific risk management requirements (high risk activities) and triggers applicable.

Managing the risks requires four (4) main steps

1. identifying risks
2. assessing risks
3. controlling risks
4. reviewing effectiveness

Controlling the risks is the desired outcome and to do this the recommended control hierarchy involves the following

1. Eliminate or substitute
2. Minimise Risks - Engineering control measures
3. Minimise Risks - Administrative control measures
4. Minimise Risks - Personal protective equipment

One of the key issues debated in early stages was that a documented full risk assessment may not always be needed. If control measures are known and

can be implemented, go straight to the control step in the control hierarchy. A formal documented risk assessment should not be required for every case.

In fact, even before these discussions the Maxwell Review 2004¹⁸ found

that risk could be successfully managed without mandating hazard identification and risk assessment in all cases, particularly where the hazards are well known and have universally accepted controls.

Maxwell recommended then, that the Victorian OHS Act support a systematic approach to risk management without mandating the risk assessment step of the process in every case.

It is strongly recommended **that the risk-based approach continue** but that a formal documented risk assessment should not be required in all cases. So that where control measures are known and can be implemented; go straight to the control step in the control hierarchy. Note that **control hierarchy for physical hazards does not apply directly to psychological hazards.**

The structure of the model WHS framework is appropriate although **WHS regulations should be simplified and more emphasis given to targeted industry or specific operational guidance materials.**

High-risk work – the exception

To minimise legislation or in this case simplify the regulations is a challenge where there is high-risk work. High-risk work includes such activities as electrical work, major hazardous facilities, chemicals and construction. In these cases, specialised regulation may be necessary to ensure a particular standard.

Finding the right balance between ‘carrot and stick’ is difficult. Responsive regulation that’s commensurate with risk is often tricky to define and compile. What is needed is to determine how effective the legislation is for these matters and whether, what is deemed high-risk work, requires more than the ‘state of knowledge’ and rigors of guidance materials.

Indeed, I believe more evidence of what works or doesn’t work for safety-critical or high-risk work is needed before relying entirely on guidance.

¹⁸ Chris Maxwell, Victoria, Occupational Health and Safety Act Review (2004) paragraph 786 accessed 10 March 2018

5. Previous findings and policy interventions

In 2013 a literature review was undertaken of the effectiveness of WHS interventions by regulators.¹⁹ The findings suggested

Voluntary partnerships and incentives schemes are more likely to be effective ways of changing businesses behaviour. These work best when there is a high level of trust between businesses and the regulator and businesses can see an advantage in participating.

Specific items for consideration listed in this review included

- *Treating guidance as a policy intervention and building evaluation into the development cycle*
- *Enforceable Undertakings (EU) that were showing potential for changing behaviours*
- *Considering restorative justice*
- *Ensuring users understand consequences of non-compliance*

I would also add to this list; **strengthening the understanding and application of dispute (or issue) resolution and the 3 Cs already stipulated** in the model WHS framework. I see these as fundamental. Dispute resolution and 3 Cs are the cornerstones of WHS and the success of WHS framework.

In the literature review 2013 the mechanisms that influence business response to new regulations were found to be

- **Awareness:** business needs to be aware of regulations if they are to be effective
- **Understanding:** what's needed to comply
- **Reputation:** positive image for businesses
- **Relevance** (application) to the regulation

This 2013 review also acknowledged that responses can be influenced by contextual factors such as economic climate, workforce demographics and business variables.

¹⁹ The effectiveness of WHS Interventions by regulators: A literature review SWA April 2013 <https://www.safeworkaustralia.gov.au/doc/effectiveness-work-health-and-safety-interventions-regulators-literature-review> accessed 10 March 2018

The review noted (with my emphasis in bold)

*... this suggests that rather than a one-size-fits-all approach regulators may want to consider providing **different kinds of advice and support for large and small businesses.** (p21)*

*....inspections play **different roles for large and small businesses....***

*...The threat of **enforcement may work better for larger businesses, advice and support better for smaller business.***

Although limited, the evidence suggested

*that Campaigns that include enforcement and education are more likely to be effective than those using only enforcement or education. Effectiveness may work by triggering both **concern for consequences and knowing what is needed to comply.** Achieving change may need a longer timeframe than is often the case in campaigns.*

Enforceable Undertakings

One of the policy interventions available are Enforceable Undertakings (EU). The Maxwell Report 2004²⁰ notes below that Enforceable Undertakings are useful and are already used elsewhere. For example, they are used effectively by Australian Competition and Consumer Commission (ACCC) and Australian Securities and Investments Commission (ASIC).

An enforceable undertaking enables a tangible, forward-looking outcome to be achieved, such as the implementation of an appropriate health and safety management system.

With regard to ACCC, Burchett and Kiefel JJ, note that

“When corporations acknowledge contraventions, very lengthy and complex litigation is frequently avoided, freeing the courts to deal with other matters, and investigating officers ... to turn to other areas ... that require their attention.”

²⁰ Chris Maxwell, Victoria, Occupational Health and Safety Act Review (2004) accessed 10 March 2018

Although EUs needed a longer-term evaluation to determine sustainability of any change, the review listed the possible mechanisms for EUs leading to changes in WHS practice, as

- Shame – concern for reputation
- Understanding Compliance - what's actually needed to comply
- Legally binding nature of intervention (or authority of the law)

A summary table of the context and the mechanisms for each intervention was listed on p47 of the review. In conclusion, the review found that **voluntary partnerships and incentives can be effective**, but further research is needed on the **kinds of incentives**.

As an example, Ambulance Victoria has recently pleaded guilty to two Health and Safety Act charges. A paramedic had taken a fatal overdose of painkillers in January 2015. Ambulance Victoria could be fined more than \$2.6 million. Certainly, in this case the organisation (and its systems) can be found wanting; but I agree with others that it may be better to apply an EU rather than pay money from one department to another and affect the already limited resources of Ambulance Victoria.

Even earlier findings, the Maxwell Report 2004, concluded

*that there are enormous potential OHS benefits from implementing a system of incentives and rewards. Incentives may be able to encourage or engender a compliance culture, or safety culture, which is vital to the success of the scheme.*²¹

In this 2018 review of the WHS Laws, it would be good to think wider about policy interventions and effectiveness; and think more deeply about the target audiences and what is relevant to them. Such programmes as the mentoring of small to medium businesses in NSW has proved to be welcome and successful.

Other interventions for improvement in WHS

In 2014 Council of Australian Governments (COAG) investigated and made recommendations to improve WHS laws.²² This considered

- **Directors (officers' liability)** (findings showed some confusion in Small to medium enterprises or SMEs)

²¹ Chris Maxwell, Victoria, Occupational Health and Safety Act Review (2004) accessed 10 March 2018

²² Improving The Model Work Health And Safety Laws – COAG Consultation Regulation Impact Statement – Council Of Australian Governments (2014) <http://ris.pmc.gov.au/2014/07/04/improving-model-work-health-and-safety-laws-%E2%80%93-coag-consultation-regulation-impact> accessed 10 March 2018

- **Union official's powers** It did not address that issues were often taken to Fair Work Commission rather than involving the recommended WHS issue resolution process)
- **HSR powers** (change PIN to recommendations and to competency based training with flexible mode of delivery) Note that issues around the capacity to request any person to assist remains controversial
- **Improving the model regulations** Simplify regulations and support with industry specific guidance
- **Improving CoP** (findings showed national guidance materials were the preferred format. It also found need to use criteria to determine if a CoP is required and for CoP to be concise, on a specific hazard, and should use a simple, easy-to-understand style)

In 2014-2015²³ further work was undertaken on options and impact of issues where no change had been made to the model WHS regulations. As a result, some changes were indeed made to WHS regulations and the resulting amended regulations were published in November 2016. But not all governments adopted all the changes.

Although voluntary partnerships and incentives can be effective, mentoring or other peer-to-peer programmes should be explored. Restorative justice is another option. **Further research is needed on the kinds of incentives that might be effective.**

All governments should be encouraged to **adopt the changes made to model WHS Act and regulations**. Strengthening of accountability and application of the incentives for implementers and enforcers is needed.

With strong affirmation of the policy intent and strengthening of the WHS framework the **next step is timely, practical, targeted information communicated effectively that can influence sustainable culture and attitude.**

6. Meeting the object of the WHS Act

A **consistent unified approach** from all governments and stakeholders is important. Consistent approaches also need to be communicated in the most effective way. Given the future of work and what we know are the most effective mechanisms, what is needed are the **tailored tools in the hands of**

²³ Decision Regulation Impact statement (DRIS) Improving the Model Work Health and Safety Laws, December 2014, <https://ris.pmc.gov.au/2017/01/18/improving-model-work-health-and-safety-laws> accessed 16 March 2018

users. In most cases the technology is already available to support communicating in a timely manner and support those that need guidance.

A **national secretariat** (Safe Work Australia) that convenes and guides the deliberations on WHS is essential. It is also important that its **structure should be tripartite and the social partners have strong voice that balances with regulators.**

In Review of Safe Work Australia's Role and Function (2017) ²⁴ p15, a participant noted:

“This function remains important. The challenge now is how consistently jurisdictions adopt, interpret and apply the model laws. Going forward the function should be about monitoring the model laws to identify if they are effective and relevant, whether there are any deficiencies which need to be addressed, and revising the laws accordingly.”

In this same review, it states that SWA should provide *an inclusive tripartite forum for representatives of governments, workers and employers to*

- a) **collaborate** on national WHS and workers' compensation matters; and
- b) **lead** the development of evidence based national WHS and workers' compensation policies and strategies; and
- c) **promote consistency** in WHS and workers' compensation arrangements across Australia

In addition, Australia is signatory to International Labour Organisation (ILO) Convention 155 (1984 – 2024). Article 15 of ILO Convention 155 states that

. each Member shall, after consultation at the earliest possible stage with the most representative organisations of employers and workers, and with other bodies as appropriate, make arrangements appropriate to national conditions and practice to ensure the necessary

²⁴Safe Work Australia Amendment (Role and Functions) Act 2017
<https://www.legislation.gov.au/Details/C2017A00086> accessed 13 March 2018

co-ordination between various authorities and bodies called upon to give effect to Parts II and III of this Convention.²⁵

WHS policy makers need to recognise a **genuine tripartite structure**. There needs to be a better balance between the implementers (employer associations and unions) and the regulators so that decisions are not just outweighed by the machinations of governments.

In the Review of SWA Role and functions 2016-2017 it was also noted that

The tripartite forum is particularly important and Safe Work Australia provides a useful mechanism for consultation on critical workplace matters'.²⁶

The **current tripartite structure should remain** although Safe Work Australia (SWA) should give more weight to the voices of those that implement through their most representative employer associations and unions. There needs to be a **better balance between the implementers (employer associations and unions) and the regulators**.

There must be **mechanisms for making sure there is consistent application** of model WHS framework across all governments.

Ultimately it is the workers and PCBU's, the implementers, that are responsible for the work. Their role in developing the policies and procedures they need, and that works for them, is now more vital than ever. Having established minimum requirements in WHS Laws and with the evaluations showing that these laws are effective, the regulators should be focused on providing advice, and acting as advisors. Many jurisdictions have already strengthened their advisory role.²⁷ The time and place for enforcement is where and when things go really wrong.

²⁵ International Labour Organisation (ILO) Convention 1984 – 2024.
http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C155
Accessed 10 March 2018

²⁶ Safe Work Australia Amendment (Role and Functions) Bill 2017
http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:legislation/summary/summary.w3p;query=MajorSubjectId_Phrase%3ALIV accessed 10 March 2018

²⁷ Effectiveness of Work Health and Safety Interventions by Regulators: A Literature Review (2013)
<https://www.safeworkaustralia.gov.au/doc/effectiveness-work-health-and-safety-interventions-regulators-literature-review>

Good regulation should provide a balance between the costs and the benefits. It must also be commensurate with the risk for the community (individuals, businesses and environment). Refer Appendix 1 Australian Government Guide to Regulation 2014.

To achieve the objects of model WHS Act

1. **Recognise the value of the voice of the implementers**, that is workers and PCBU's, in enacting the requirements outlined in the model WHS framework
2. Give more weight to these stakeholders in SWA on the policy deliberations and effectiveness of model WHS framework – **balance the SWA voting allocation by increasing the weight of social partners vote**
3. **Simplify regulations**, where the model WHS Act sets the objectives, and very simple regulation is then **supported by a range of targeted guidance material**. This guidance should outline how the implementers can enact the WHS objectives for their industries. So have a very simple "middle" tier of regulations.
4. Any **guidance** must also be flexible enough to recognise that one-size-fits-all does not fit all and that the vast majority of businesses are small. The large cumbersome Codes of Practice are not readily accessible to those actually undertaking the tasks.
5. **Communicate consistently and effectively** using technology rather than weighty documents to facilitate and normalise decision making in everyday life
6. **Strengthen the accountability for jurisdictions to adopt change or seek change**
7. Increase the **value of the regulators advisory role even further**

7. Role of Model WHS Regulations

One of the useful outcomes of the model legislative package is that it **consolidated** hundreds of pieces of legislation from across Australia; a laudable and effective outcome. But in so doing the model WHS Regulations have attempted to meet all needs of all areas of work.

The Model WHS Regulations endeavored to provide more detail to fulfill the general obligations of the model WHS Act. In trying to detail everything there are inevitably gaps, exclusions and more scenarios and more situations that require even more details. This is the inherent danger of trying to create definitive lists. The other dangers arise from the more literal interpretations – everything needs to be regulated, so everything needs to be black and white in order that it can be ‘regulated’.

The Model WHS Act and model WHS Regulations are not industry specific. In fact, much work went into designing the regulations to be applicable to all industries as far as possible.

But it is the general duty of care in the Model WHS Act that is the “stick” used for compliance and enforcement. The key duty that gives effect to this objective is the primary duty of care (s 19). Most prosecutions rely on Section 19 of the Model WHS Act. If this continues to be so there remains a genuine need to communicate to duty holders exactly how to comply with this duty of care and achieve the desired outcomes in their particular type of operations.

The desired outcome is actually more than just compliance, it’s about normalising the decision-making of individuals and PCBU’s (and other duty holders). Again, the aim is to identify and control the risks to improve health and safety outcomes both physical and psychological; an outcome focus rather than a process focus. **It is very difficult to have general regulations for every specific foreseeable risk in every situation.**

By now, the focus should have changed from prescriptive and detailed requirements to more outcomes focus and performance based requirements. The 2016 model regulations themselves are cumbersome (total 523 pages) and at times difficult to follow and interpret or apply for workers and PCBU’s alike. **Most just want to know what that means for their daily operations.**

In 2011 Deloitte²⁸ sought to compare the one-off adjustment costs of implementing the model WHS package against the flow of expected benefits over next ten years. The Decision Regulation Impact Statement (DRIS) for National Harmonisation of WHS Regulations and Codes of Practice found that

“the reduction of red tape and greater certainty for duty holders should allow business to focus more proactively on health and safety improvements rather than compliance....

And found there should

²⁸ Deloitte Access Economics Decision Regulation Impact Statement for National harmonisation of WHS regulations and Codes of Practice, SWA 2011

.... Be more scope for regulators to actively improve safety in workplaces”

The DRIS used both qualitative and quantitative information to develop a cost benefit analysis. Deloitte surveyed 4,500 firms across industries, jurisdictions and range of sizes although response rate was low. In addition, they considered 1343 public comment submissions. They noted that there would be some adjustment cost to businesses, some costs to government regulators and a net benefit to workers.

On the whole, they expected that there would be an *overall net benefit for individuals and businesses arising from harmonisation and net social benefits for society.*

The Productivity Commission 2010²⁹ report noted that many small and medium enterprises (SMEs) are either not aware or only somewhat aware of their WHS obligations. Since then with the success of the WHS package, awareness has improved for both large organisations and SME's. Further work undertaken in 2015 by SWA³⁰ shows that whilst there has been an increase in awareness people and businesses remain uncertain as to how to best address their **own** WHS issues.

In Queensland, The Red Tape Reduction Advisory Council (the Council) was established in August 2015 to provide the Queensland Government with advice on red, green and blue tape areas of most concern to small business, and to assist the Queensland Government in providing a business environment conducive to strong, profitable and globally competitive businesses.

The resulting Red Tape Reduction Advisory Council Report 2016³¹ noted particularly for small to medium enterprises (SMEs) that

²⁹ Productivity Commission. *Performance benchmarking of Australian business regulation: occupational health and safety*. Research Report. 2010

³⁰ SWA Sources of work health and safety information in Australian workplaces 15 Jul 2015 <https://www.safeworkaustralia.gov.au/doc/sources-work-health-and-safety-information-australian-workplaces> accessed 28 March 2018

³¹ Queensland Red Tape Reduction Advisory Council Report (2016) <https://publications.qld.gov.au/dataset/red-tape-reduction-advisory-council-report-2016> accessed 14 March 2018

SMEs are likely to feel the burden of regulation more than other businesses. As a result, poorly designed regulations often have a disproportionately high impact on SMEs (p4)

...constant changes to WHS requirements and ongoing duplication between the different levels of government is a significant source of regulatory burden (p38)

...The regulatory framework that applies to their respective markets plays an important role in facilitating both competition and innovation (p7)

...poor communication of compliance obligations and changes to regulations from regulatory agencies to businesses which increases administrative costs and the compliance burden for businesses. The necessary information is often inaccessible or dispersed across several sources. This is particularly relevant for workplace health and safety (WHS) and industrial relations obligations (p17)

Further that

there is insufficient consideration of the level of risk posed by the activities of a business, particularly in relation to WHS, liquor licensing and food safety, which results in regulations being overly burdensome for low-risk businesses (p10)

Industrial relations and WHS are continually identified by businesses, including SMEs, as a key source of regulatory burden. In the 2015 ACCI National Red Tape Survey, compliance with WHS requirements was identified as a key area of over-regulation and was reported as the most complex area of regulation. Several previous reviews have also found WHS issues to be a key driver of regulatory costs for SMEs (e.g. KPMG 2013³²). (p37)

There remains a need to communicate how to achieve the WHS duty of care and achieve the desired outcomes. The desired outcome is actually more than just compliance, it's about normalising the decision-making of individuals and PCBU's (and other duty holders). This requires **ongoing national communication to target audiences.**

³² KPMG (2013). Cost to business – regulatory burden case studies. Final Report. Prepared for the NSW Better Regulation Office.

It is very difficult to have regulations for every foreseeable risk in every situation. Simplifying the regulations and supporting them with industry-specific guidance material is required.

8. Targeted consistent information and education

To meet WHS obligations, the model WHS Laws require identification and control of the risks to improve health and safety outcomes both physical and psychological.

The workers and PCBUs are the implementers, the “doers” – this is where any actions take place. To take the necessary actions and help do this well, there are requirements under WHS laws and much guidance material. The focus must remain on what these implementers need, and where possible what they would find helpful beyond basic compliance.

Any policy intervention should be focused on what they, the implementers, need to improve practices and make sustainable changes. Rather than more and more regulation for enforcement, there is an **ongoing need for education and training, for messages on social media to reach the target audience and prompt at the right time.**

For example, the National Review Report 2009³³ identified the need to provide specialised assistance to small business to assist with WHS implementation. The challenges in reaching this target audience remain and will intensify in the future. Trends indicate that there will be more and more small and micro businesses, with more and more specialised needs.

Incorporating the best possible method of work as part of normal business and normal daily decision-making for each and every task, requires **skills, education, training and nationally-consistent information.** It requires the usual four stages - genuine consultation, gaining of consensus, collaboration

³³ Department of Education, Employment and Workplace Relations, National Review into Model Occupational Health and Safety Laws, First Report (2009)

and then gaining the commitment needed to make a difference. It is this commitment that's needed to embed a respectful and positive culture that recognises WHS as part of daily decision making.

The other parties involved are those that regulate by advising and enforcing the laws – the regulators in each jurisdiction. **Whilst the aims are the same, the drivers for the enforcers and the implementers are slightly different.**

What remains in WHS is, as noted by Data 61 (2016)³⁴ *a need for targeted investment in skills, education and training.*

SWA Source of WHS information 2015³⁵ notes that

Training courses are the most common and quite likely preferred source from which workers learn about work health and safety and have been since the mid-1990s. This indicates that governments and regulators could focus on the development of practical and high-quality training courses in order to deliver work health and safety information to workers.

We all want **good healthy and safe work, good healthy and safe workplaces, good healthy and safe people and good healthy and safe businesses.**

This means work should incorporate good health and safety as a normal part of daily decision-making. This does not necessarily mean more regulation.

More could be done to communicate with each of the duty holders and engage each target group. One-size-fits-all does not apply here. The aim is to normalise WHS as part of the good governance required.

To ensure actions taken are effective, there needs to be **targeted, practical advice**, not just to ensure compliance to legislation but to help everyone work well.

³⁴ Stefan Hajkowicz, Andrew Reeson, Lachlan Rudd, Alexandra Bratanova, Leonie Hodgers, Claire Mason, Naomi Boughen January 2016 Tomorrow's Digitally Enabled Workforce: Megatrends and scenarios for jobs and employment in Australia over the coming twenty years <https://data61.csiro.au/en/Our-Work/Future-Cities/Planning-sustainable-infrastructure/Tomorrows-Digitally-Enabled-Workforce> accessed 13 March 2018

³⁵SWA Sources of work health and safety information in Australian workplaces 15 Jul 2015 <https://www.safeworkaustralia.gov.au/doc/sources-work-health-and-safety-information-australian-workplaces> accessed 28 March 2018

9. Cornerstones: Shared Mutual Responsibilities, Proactive obligations & Consultation, Cooperation and Coordination (Three C's)

To achieve the policy intent **to eliminate the risks to work health and safety so far as reasonably practicable**, the model WHS legislation recognises that there are **shared responsibilities** between workers, persons in control of business or undertaking (PCBU) and others such as volunteers and visitors etc.

The model WHS Act provides for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to work health and safety. 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 safe working environment.

This is essential. These mutual responsibilities, the proactive approach required and consultation and cooperation are the cornerstones for WHS.

The laws emphasised the **need for consultation, cooperation and coordination (in shorthand, 3C's)** and outlined each stakeholders' responsibilities. It is especially true for those duty holders with overlapping work health and safety duties. Under the WHS Act they must, so far as is reasonable practicable, consult, co-operate and co-ordinate activities with each other. And this has to be proactive.

The model WHS Laws specify the duties of the range of duty holders and emphasise the **proactive role of the officers and directors of an organisation**. Furthermore, exercising due diligence or taking reasonable steps is in everyone's interest – it promotes good corporate governance.³⁶

There are 'normally expected duties' for corporations - not specifically on WHS risks but on a broader definition of risk. The ASX Corporate Governance Council recognises that managing risk is a crucial role of the board and management. Its Principles and Recommendations are *structured around, and seek to promote, 8 central principles* including Recommendation 3 *Act ethically and responsibly* and Recommendation 7. *Recognise and manage*

³⁶ "corporate governance" describes the framework of rules, relationships, systems and processes within and by which authority is exercised and controlled within corporations. It encompasses the mechanisms by which companies, and those in control, are held to account." Corporate Governance Principles and Recommendations 3rd Edition 2014 ASX Corporate Governance Council p5
<https://www.asx.com.au/regulation/corporate-governance-council.htm> accessed 13 March 2018

risk. A listed entity should establish a sound risk management framework and periodically review the effectiveness of that framework. In my view, this includes WHS risks. It's in everyone's interest to include WHS in decision-making.

The ASX Corporate Governance Council also recognised that

A failure by a listed entity to recognise or manage risk can adversely impact not only the entity and its security holders but also many other stakeholders, including employees, customers, suppliers, creditors, consumers, taxpayers and the broader community in which the entity operates.

This is an opportunity for **joint messaging** between agencies such as SWA and ASX or AICD and others. Joint communications that ensure there is a common understanding of roles and responsibilities and targeted consistent messaging.

There are some parties that had originally raised concerns on how far these proactive duties could be taken especially given the potential for individual liability. The Maxwell Review (2004) had noted that directors should not be held liable unless they had actual knowledge of the breach.³⁷ The Explanatory Memorandum to the model WHS Bill expressly notes that 'where the officer relies on the expertise of a manager or other person, that expertise must be verified and the reliance must be reasonable'.³⁸

The obligations and limitations on all the duty holders need to be made much clearer. Education and training should be seen as part of continual process.

Despite the guidance produced by SWA³⁹ the duties for each duty holder are still not universally understood. For example, **the ability to rely on expert advice needs further communication and an explanation about limits of the control and influence must be transparent to all.**

The WHS Laws also stipulate requirements for those that support these stakeholders – the regulators. It is rightly the role of those that govern to ensure effective communication. This is an ongoing role.

More nationally consistent communication and education are still needed.

³⁷ Chris Maxwell, Victoria, Occupational Health and Safety Act Review (2004) paragraph 786 accessed 10 March 2018

³⁸ Explanatory Memorandum, Model Work Health and Safety Bill 2010 paragraph 127 and also Corporations Act 2001 (Cth) ss 190 and 198D;

³⁹ Safe Work Australia, Interpretive Guideline – Model WHS Act. The Health and Safety Duty of an Officer under Section 27 (2011) www.safeworkaustralia.gov.au .

Indeed, social media may be an effective way of reinvigorating messages and communicating relevant and targeted messages. SWA report in 2015⁴⁰ noted that

The Media is an important source of work health and safety information for Australian businesses and workers and has been since the mid-1990s. This suggests that work health and safety campaigns that are run through the media (print and television) will have the best chance of reaching Australian business owners and workers.

The WHS package has gone a long way to reinforcing the importance of a culture of safety. And it has highlighted that those who make decisions are well placed to influence this culture and the safety outcomes.

Consultation and the proactive nature of these duties are vital parts of the model package and should be retained but more could be done to **communicate with each of the duty holders on their obligations and the aims of these duties and the limitations of their control and influence.**

More nationally-consistent communication and education are still needed.

10. Reasonably Practicable and Control

The duties to **eliminate the risks to work health and safety are qualified by ‘so far as reasonably practicable’.**

‘Reasonably practicable’ is defined as what a person is reasonably able to do, taking into account and weighing up all relevant matters including:

- the **likelihood** of the hazard or the risk occurring
- the **degree of harm** that might result from the hazard or risk
- what the person concerned **knows or ought reasonably to have known** about the hazard or risk
- **ways of eliminating or minimising** the hazard or risk
- the **availability and suitability of ways** to eliminate or minimise the risk
- **the cost** (within reason*) of eliminating or minimising the risk ⁴¹

⁴⁰ SWA Sources of work health and safety information in Australian workplaces 15 Jul 2015 <https://www.safeworkaustralia.gov.au/doc/sources-work-health-and-safety-information-australian-workplaces> accessed 28 March 2018

⁴¹ Section 18 of the model WHS Act provides meaning and guidance about what is ‘reasonably practicable’ and How to Determine what is Reasonably Practicable to meet a Health and Safety Duty

*... noting that only after taking into account all these matters, can the person consider the cost associated with available ways of eliminating or minimising the risk - including whether the cost is grossly disproportionate to the risk.

The 2009 National Review Report⁴² intended that the definition of reasonably practicable should be *simple and easy to understand* and that it provided an outcome or *standard to be met*, rather than a **process** to be followed.

The concept of reasonably practicable should remain and should take into account the matters listed above. More could be done to communicate with the range of stakeholders involved and what it means to the work they are undertaking. The limitations to control and influence of duty holders needs clarification, consistent application and national communication.

In fact, 'an officer' must take **reasonable steps** but what is considered reasonable will depend on the circumstances, ***including the role and influence able to be exercised by the individual officer***. One of the matters that has long been debated is how much 'control' a person has and whether a definition was required in the laws. It is also subject to interpretation as to how that control relates to multiple or concurrent duty holders. More clarity is required on limits to this control and influence. This is especially true for circumstances with multiple or concurrent duty holders e.g. in construction or mining.⁴³

A recent case highlights an interpretation of what could be "reasonable"; on the face of it, surely a training organisation cannot reasonably foresee violence from one participant to another.⁴⁴ National guidance and a national tribunal might help provide some consistency.

The issue was recognised and some change made in the model WHS Act revised as at 21 March 2016⁴⁵ So it now states

(2013)<https://www.safeworkaustralia.gov.au/doc/how-determine-what-reasonably-practicable-meet-health-and-safety-duty> accessed 13 March 2018

⁴² Department of Education, Employment and Workplace Relations, National Review into Model Occupational Health and Safety Laws, First Report (2009)

⁴³ Boland v Trainee and Apprentice Placement Service *Inc* [2016] SAIRC 14, Particularly relevant where a PCBU has limited control over day to day work environment say for labour hire company or when sending workers to a clients' site and also relevant when planning offsite events for workers <http://www6.austlii.edu.au/cgi-bin/viewdoc/au/cases/sa/SAIRC/2016/14.html> accessed 9 April 2018

⁴⁴ [Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright \[2017\] NSWCA 21 \(17 February 2017\)](#)

⁴⁵ Model WHS Bill revised as at 21 March 2016 accessed 10 March 2018

(b) must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity.

The policy and intent of WHS law is to identify and minimise the risks and to improve health and safety outcomes both physical and psychological. The law has a focus on outcomes rather than a focus on process. It sensibly relies on what is reasonably practicable under the circumstances.

The **amendments from 2016 should be adopted** by each jurisdiction with some urgency.

Rather than any additional legislative change, these matters require **further education and consistent ongoing communication to the target audiences.**

11. Future and changing nature of work

The world of work was and still is changing rapidly. The development of the original WHS package was **mindful of the changing nature of work and of the expectations from the community**; hence the move from the traditional employer and employee contractual arrangements to persons in control of business or undertaking (PCBU) and workers. In fact, this was recognised in National Review 2009⁴⁶

recognising the changing nature of work relationships, we have recommended a primary duty of care that is not reliant on the traditional employment relationship. Consistent with that change in the duty holder, is a change that we have recommended that a broad definition of 'worker' be adopted, in place of 'employee'.

The model WHS framework is based on coverage for all those undertaking work including volunteers, work experience students and others. This includes the growing "gig economy" of short-term contracts or freelance work – anywhere work is undertaken. And the same legal principles apply to other types of 'work arrangements' such as franchisors/franchisees or professional sports.

⁴⁶ Department of Education, Employment and Workplace Relations, National Review into Model Occupational Health and Safety Laws, First Report (2009)

Tomorrow's Digitally Enabled Workforce: Megatrends and scenarios for jobs and employment in Australia over the coming twenty years (Data61, 2016), notes that

Regulation needs to accommodate the changing nature of work while providing reasonable protections. There is a need for targeted investment in skills, education and training. Supporting individuals in applying general and transferable skills will be a key priority as we foster a sustainable and more productive economy. ⁴⁷

Even if Australian workers become *portfolio workers and freelancers* and there are changes to *how private and public sector organisations and individual employees connect with the newly arriving peer-to-peer (P2P) labour markets...* or people are working from 'home': all seems to be covered thanks to the flexibility of the model WHS Laws and the '**work being undertaken**'.

With the flexibility of terms such as 'work undertaken', the scope of the WHS laws and its duties seem **adequate to cover foreseeable trends in the nature of work.**

It is **important to show how** the WHS Law already covers the changing nature of work and its terminology. It is also important to **communicate** this to the appropriate target audiences.

Changing regulations is cumbersome and takes time. Use of guidance materials developed through the SWA tripartite process enables agile change and review in response to the changing landscape of work. Work is and will continue to be dynamic. It is appropriate that the framework for improving and protecting WHS be responsive. **Nationally consistent information materials along with communication, education and advice is the simple, practical and effective way to respond to changing nature of work.**

⁴⁷ Stefan Hajkowicz, Andrew Reeson, Lachlan Rudd, Alexandra Bratanova, Leonie Hodgers, Claire Mason, Naomi Boughen (January 2016) Tomorrow's Digitally Enabled Workforce: Megatrends and scenarios for jobs and employment in Australia over the coming twenty years <https://data61.csiro.au/en/Our-Work/Future-Cities/Planning-sustainable-infrastructure/Tomorrows-Digitally-Enabled-Workforce> accessed 13 March 2018

Future of Work (CSIRO)⁴⁸ identifies changing nature of work relationships, and with it, new and emerging risks.

The changing nature of work and work relationships means that there will often be more than one employer, or supplier of labour, in respect of a single workplace.

Of note in the document, is the idea that the linear chains of responsibilities are likely to develop in more circular ways in the future. This means that the relationship between duty holders especially the overlapping duties will become even more complex and hence will need to be clarified.

It may be this can be achieved by defining further the degrees of control over the work. How far does the reach of obligations extend? For a director of a large company to a third layer of contractors in a different location especially for example for their psychological health, does seem a bit far to stretch. There will always be areas of control or influence or even leverage but there have already been a range of interpretations that take this control to the nth degree. No doubt the leverage of the contracting organisation is important and can be used to influence good practices but this is a different social construct to full WHS legal obligations.

Again, the National Review 2009 commented that

*an officer could not be held liable for a safety breach which he/she could not reasonably have been expected to know about, or over which he/she had no control. It continues to be the case that the prosecution needs to show that the duty was breached.*⁴⁹

There have been many cases that try to further delineate or that test the degree of control for duty holders. SWA could usefully provide a **consolidation of relevant cases** – not just under WHS but include those with interactions with Fair Work Commission and Australian Competition and Consumer Commission or Environment Protection Authority, and provide some evaluation. Using these cases to communicate with duty holders and provide further clarity and would be beneficial.

Options for regulating the “gig economy” is subject of much debate.⁵⁰ The model WHS Laws have focused on the **outcomes** and **on the duties around**

⁴⁸ CSIRO, Tomorrow's Digitally Enabled workforce: Megatrends and scenarios for jobs and employment in Australia over the coming twenty years 2016 accessed 10 March 2018

⁴⁹ Department of Employment National Review into Model Occupational Health and Safety Laws Second Report to the Workplace Relations Ministers' Council 2009

⁵⁰ Stuart A., Stanford J., Regulating work in the gig economy: what are the options? The Economic

the work undertaken. It has a risk-based approach rather than being overly prescriptive. This does seem to give enough flexibility to cope with change. And if regulations are kept relatively high-level (simplified) with more emphasis on guidance materials, then the guidance can be reviewed to accommodate any future change to work and work practices.

The principles outlined in the model WHS Act still apply. If regulations are simplified, the **attendant guidance materials can provide the flexibility to accommodate any future change to work if needed.**

The **risk-based approach and focus on outcomes should result in less prescription and less emphasis on process.**

The support and development of **skills with ongoing education and training remain the key.** So, use of new technologies is important for the future of work. Such as: rapid adoption of technology especially in communication, and use of broader channels to help communicate effectively, being relevant to target audience and being used in a timely manner. Any technology that can improve identification and assessment and can enhance the use and sharing of data is also important.

With the changing nature of work, it is even more important to **clearly communicate the level of control and influence of each of the duty holders.**

The future is also about data. As recognised in the 2016 Review of Safe Work Australia's Role and Functions p44⁵¹ SWA has an important national role to

Collect, analyse and publish relevant national workplace data and undertake and publish research to inform the development and evaluation of work health and safety and workers' compensation policies and strategies across Australia.

Importantly the *data collection and research needs to be strategically targeted to focus on those things that are impacting on the health and safety of workers or improving workers' compensation arrangements.* A case book including analysis would be beneficial.

and Labour Relations Review, Volume: 28 issue: 3, page(s): 420-437, August 7, 2017
<https://doi.org/10.1177/1035304617722461> accessed 5 April 2018

⁵¹ Review of Safe Work Australia's Role and Functions, August 2016. <https://www.jobs.gov.au/review-safe-work-australia-s-role-and-functions-0> Accessed 13 March 2018

12. Codes of Practice and benefit of targeted information

In addition to the regulations there are Codes of Practice (CoP). These CoP have been designed to provide “practical” guidance in support of the WHS laws. CoP are not mandatory but do have evidentiary status, so a PCBU can use another equivalent approach but must show they have addressed WHS risk and achieved the ‘same level of risk’ as that in the CoP. The latter is not always definitive nor measurable and can be difficult to prove. Ideally CoP should support the regulations and not create further obligations.

A CoP represents what is known about specific hazards and the risks and known controls. This ‘evidence’ is used to determine what is reasonably practicable in the circumstances. However CoP have been used as the “minimum” standard - most recently in Queensland.

To have evidentiary status a CoP must be enforceable, must achieve improvement in level of risk, it should not be open ended and should show necessity. It must also

- Be updated regularly – ensure relevance
- Provide flexibility – less prescriptive
- Avoid duplication
- Be easily understood and applied by target audience

Time and again there is more than one control method available and so compliance may not actually be ‘black or white’. Hence targeted guidance with easy-to-implement range of solutions in the form of information sheets or other materials is more relevant and more workable. Information as targeted materials still form the “state of knowledge”. It is an obligation to be aware of this information and to make decisions about its application.

Businesses report that the range of existing Codes of Practice (CoP) are cumbersome and complex. Often these Codes are all-encompassing.

A person must be aware of the regulations and all of the available CoP and be able to interpret and apply these requirements. There are 24 model CoP and some specific to a state or territory (There are also 252 guides and 34 Fact Sheets)⁵². A series of targeted information sheets or other materials on particular aspects may be more useful for safety outcomes and provide the desired sustained healthy and safe work culture. Either way the documents need to be rationalised.

With this range and variation in information, it is easy to be confused. Queensland commissioned a Best Practice Review of the WHS Laws in

⁵² SWA https://www.safeworkaustralia.gov.au/resources_publications/model-codes-of-practice https://www.safeworkaustralia.gov.au/resources_publications/guidance-materials and https://www.safeworkaustralia.gov.au/resources_publications/fact-sheets accessed 4 April 2018

2016⁵³. The Best Practice Review 2017 found that *duty holders experience uncertainty about whether codes of practice need to be followed to demonstrate compliance with their WHS obligations*. This doesn't mean CoP need to be law or seen as minimum legal requirement. CoP were not designed for that purpose.

A person must also apply other laws and any applicable Australian Standards (AS). There can be a suite of AS involved or listed in a CoP. A consequential issue is that the AS are expensive, particularly when you factor in the cost of keeping them up-to-date. Where technical Australian Standards are determined to be useful or mandatory they should be freely available and free to those involved in the work.

Where specific industries had special regulatory requirements, such as specific safety management systems, safety cases or accreditation this could be addressed through targeted industry-specific guidance material. For example, in mining or major hazardous facilities, the regulations could be simple, with guidance materials that are more detailed and targeted. After all, these requirements do not affect the majority of organisations.

There is some concern as to the limitation of what is considered to be reasonably known and therefore what would be included as state of knowledge. Courts may use any number or quality of guidelines as an expected level of knowledge. This could (and does) discourage some from providing "advice" or "codes of conduct". Consideration should be given to indicating the documents or level of information that would form "state of knowledge".

Most people just want to know what applies to them and what they have to do. Therefore, keep any advice simple. Keep it relevant and targeted and timely – use technology rather than documents.

Benefits of targeted Guidance

According to International Labour Organization (ILO) Occupational Safety and Health Convention, 1981 (No.155) Article 10

*Measures shall be taken to provide guidance to employers and workers so as to help them to comply with legal obligations.*⁵⁴

⁵³ The Government-commissioned report, "A Best Practice Review of Workplace Health and Safety Queensland" (the Report), conducted by independent reviewer Tim Lyons, made 58 recommendations to improve WHS across the state.(2017) <https://www.worksafe.qld.gov.au/laws-and-compliance/best-practice-review-of-workplace-health-and-safety-queensland> accessed 10 March 2018

⁵⁴ International Labour Organization, (1981) Occupational Safety and Health Convention 1981 (No.155) <https://www.google.com.au/search?q=International+Labour+Organization+Occupational+Safety+and+>

Under the current WHS regime, guidance can take the form of a CoP or Guide, Fact Sheet or Information Sheet. All these forms of guidance reflect the **state of knowledge** and are therefore deemed to be part of what is reasonably practicable. A CoP however has evidentiary status and can be cited by inspectors.

Guides provide the **flexibility** to recognise the dynamic nature of work and variety of arrangements for work, the size and number of workers and their workplaces, or for example temporary and remote work. Flexibility is required to **meet the duty of care and match the dynamic** nature or circumstances of the work, while ensuring that people are still bound by the duties in the WHS Act. National information materials can still be used to indicate minimum requirements and what is considered to be **reasonably practicable without being prescriptive**. Currently there is a regulation and then a suite of CoP and sometimes other guidance all addressing the same topic.

The provisions on managing the physical work environment and facilities is an example of where information materials rather than regulation are able to provide direction on the risk management approach. Risk management is a proactive process, it should assist response to change and should facilitate continuous improvement. The process should be dynamic and systematic, but any actions taken should also be commensurate with the risk. It should therefore be relevant to particular circumstance. So, provision of facilities or tailoring an emergency plan can best be done under general obligations with specific targeted information materials.

In addition, in many cases control measures are well-known and effective control measures, or combination of control measures, can be implemented quickly and easily. Again, it is the **outcome** that should be the focus not the **process**.

For example – management of the physical work environment and facilities is a requirement in WHS Regulations ⁵⁵ and there is a corresponding CoP. Both the regulation and CoP include Emergency Plans and First Aid. Both of these are best covered by flexible approaches that recognise diversity of work, and are therefore more appropriate in guides. Often where there are a number of duty holders involved, for example in a shopping centre, consultation across the range of duty holders is required to ensure access to first aid facilities or appropriate emergency plans. This consultation is already required under the WHS Act. Advice in the form of information material does not obviate the need

[Health+Convention%2C+1981+No.155&og=International+Labour+Organization+Occupational+Safety+and+Health+Convention%2C+1981+No.155&ags=chrome..69i57.1313j0j7&sourceid=chrome&ie=UTF-8](#) Accessed 10 March 2018

⁵⁵ Part 3.2 General Workplace Management Division 2, General working environment, Division 3 First Aid, Division 4 Emergency plans

for such equipment and facilities and still identifies the requirements for appropriate access and adequate training for both first aid and emergency planning.

A simple overarching law with supporting targeted information material would still fulfill all the requirements.

In Review of SWA Roles and Functions p16 notes that

There is consensus among stakeholders that the development of other (supporting) WHS material is important and should continue as a function of Safe Work Australia.

Information materials have the benefit of targeting a particular audience with specifics that are relevant to them in a way that is relevant to their operations. Such information material could encompass the range of known information (Australian Standards etc.) that applies to that operation. Thus, identifying the level of knowledge applicable. This would also help show national consistency or illustrate any departures from this “state of knowledge” and if done properly, become the go to for that operation.

Information materials should

- Encourage compliance
- Provide duty holders with relevant practical ways to comply (not just repeat laws)
- Be targeted specific guidance that allows for industry-specific information and can provide flexibility that accounts for the diverse nature of work and workers. All-encompassing documents are not user friendly
- Focus on WHS matters, and not on industrial relations or human resources or public health or environmental or property issues
- Use accessible language and should be framed as positively as possible with a focus on outcomes not process
- Use technology to communicate actions
- Not create new duties or requirements beyond those specified in the Act or Regulations. Of course, where relevant they should refer to these obligations
- Clearly show interaction with Australian Standards (AS) where appropriate. It is important to avoid duplication and therefore possible contradiction. Often this has meant using a suite of AS. These are expensive to purchase and people may require many AS. AS that are regulated should be provided free (including updates).

- Clearly identify the purpose and justification for guidance materials. Before development ask - is it necessary, is it effective - does it improve the safety outcome, is it guidance or should it be law, to what extent is it enforceable?
- Be applied consistently across jurisdictions and across agencies within jurisdictions and be used to encourage and advise on good practices

Information materials already form a ‘state of knowledge’ but they allow more flexibility than regulation. Rather than the ‘one-size-fits-all’ of the current CoPs, information materials can be **targeted and relevant**. Targeted information materials can **best apply to the circumstances of a range of audiences**. Using information materials also enables information that **suits the particular situation**. They can **encompass information from other areas or other requirements** such as Australian Standards or other legislation or required standards e.g. National Construction Code (NCC).⁵⁶

Joint information materials are to be encouraged where appropriate rather than different agencies with differing advice. Joint materials with the industry stakeholders (social partners) is ideal.

Information materials can be **updated quickly**, where updating legislation is more difficult and takes much longer. Given the **rapidly changing nature of work and of technology there is increasing pressure to remain up to date and relevant**.

Consideration should be given to **indicating documents or level of information that would form “state of knowledge”**. Again, information materials lend themselves well to incorporating the range of knowledge.

⁵⁶ The NCC provides the minimum necessary requirements for safety, health, amenity and sustainability in the design and construction of new buildings (and new building work in existing buildings) throughout Australia. It covers the Building Code of Australia and Plumbing Code of Australia and is managed by the ABCB. <https://www.business.gov.au/info/plan-and-start/develop-your-business-plans/industry-research/national-construction-code> accessed 14 March 2018

In essence, **targeted practical information materials should be used as the default allowing the regulations to be kept very simple.**

Targeted Information encourages compliance. “This is relevant to me; I am comfortable using it”. Such targeted information can use **accessible (rather than legalistic) language and be framed as positively as possible with a focus on outcomes not process.** Decision trees can be very useful.

Targeted guidance needs to be timely, relevant information; so ideally its communication should **use technological channels.**

13. Other particular issues in model WHS Act or Regulations

The WHS Regulations 2016 outlines obligations for PCBUs in relation to specific hazards.⁵⁷ Chapter 4 covers Hazardous Work which includes noise, hazardous manual tasks, confined spaces, management of risk of falls, high-risk work (licensing for a diverse range of activities such as cranes, hoists, forklifts, dogging, scaffolding rigging etc.), demolition work, electrical safety and diving work. There is Chapter 5 Plant and Structures and Chapter 6 Construction Work (including Excavation Work, general construction induction training), Chapter 7 Hazardous Chemicals (including lead), Chapter 8 Asbestos, Chapter 9 Major Hazardous Facilities (MHF), Chapter 10 Mines and another on ‘General’ which is administration, fees and charges, notifications etc.

In creating such a list there is always a danger of missing something.

Surely these specifics lend themselves better to specific practical guidance. Keep the regulation very high level and simple and use targeted guides/information materials that indicate what is considered compliance with steps relevant to the specific activities.

Construction work

The definition of construction work, and the definition of plant and structures, have both been contentious. Given that WHS uses a risk-based approach it may be that targeted information materials that use steps or decision trees would give more benefit to users. Any such information materials need to be consistent with and align with other bodies involved in construction, not overlay and add yet another level. The definition and how this regulation chapter is working should be re-evaluated. A tripartite SWA forum was held in September 2015. The findings from this and the research undertaken on construction definitions (and on use of Safe Work Method Statements or

⁵⁷ Model Work Health and Safety Regulations as at 28 November 2016
<https://www.safeworkaustralia.gov.au/doc/model-work-health-and-safety-regulations> accessed 20 March 2018

SWMS) should be further considered. More work needs to be done for construction work.

Asbestos

These clauses should be amended to ensure that asbestos removal work is only carried out by licensed asbestos removalists and/or transported by licensed transport workers. A national register and database of licensed practitioners would greatly help. This along with reduction in fees for local council waste sites would help minimise illegal dumping, but this is outside the jurisdiction of WHS. WHS regulators need not be accountable for all aspects. Working with other agencies such as EPA or ACCC is important. Consistent communication across Australia on working with asbestos is urgently needed. I strongly recommend continuing close collaborations with Asbestos Safety and Eradication Agency whose work encompasses more than the work health and safety aspects.

Remote or isolated work under the regulations requires *a system of work that includes effective communication*. The general duty of care already encompasses remote or isolated work but much would be gained by providing further SWA guidance.⁵⁸ This is another opportunity to tailor information materials to specific industries or situations. A recent case of a nurse in South Australia highlights the difficulties. In this case initially it was found that WHS laws did not apply. These findings were reported widely and seen to be counterproductive.⁵⁹ Under the model WHS Act there is no requirement for an immediate temporal connection between the place or premises and the work to be performed.⁶⁰ Since then SafeWorkSA has declared it had erred and nurse was 'at work'. Difficult indeed to apply regulations, better to have industry specific materials. It should be noted that as a result of this tragedy, remote work procedures have been changed. It would be useful for all involved to detail in such industry information materials what is considered work and to show the differences with other legislation, such as workers compensation or Fair Work Commission findings.

Likewise, regulations on **hazardous atmospheres** require the PCBU to manage the risks but do not apply in many workplaces. This requirement could benefit from tailoring to specific industries in the form of information materials rather than as part of an omnibus regulation.

⁵⁸ Safe Work Australia remote and Isolated work – definition, workers, facilities, updated 2017 <https://www.safeworkaustralia.gov.au/remote-work> accessed 29 March 2018

⁵⁹ SafeWork SA: "Safe Work SA re-opens Gayle Woodford investigation" <https://www.safework.sa.gov.au/functionpages/news.jsp> assessed 27 March 2018

⁶⁰ SWA <https://www.safeworkaustralia.gov.au/doc/model-work-health-and-safety-act-explanatory-memorandum> Note: reference to *Telstra Corporation Ltd v Smith* [2009] FCAFC 103

The issue of falls and falling objects to some extent has been harmonised so there is better consistency, but it is not complete. Selecting a national minimum threshold for fall protection or risk-based assessment was heavily debated when developing the WHS regulations. In accordance with the objects of the Act, guidance on a risk-based approach rather than setting a 2m or 3 m threshold would be more consistent with general WHS approach. There are other factors that contribute to the risk not just a 2m or 3m height. Assessing the risk is key. And issues around assessing risk and controlling the risk of “small” falls still remains. The regulation relies on the general principles of risk management. It may be, again, that **industry specific materials** written in simple terms that can be easily understood and are accessible at the time, would have more effect and success. **A decision tree and use of technology would help target the audience and provide timely checks.**

Representation and participation are fundamental to the success of any approach to minimise WHS risks. The individual workplace should be able to work out the best possible method for consultation, representation and participation. It may be formal or informal but should be relevant to that particular organisation or location. The model Act already prescribes representation participation and issue resolution. Guidance does already exist but that guidance (including interpretive guidelines) and the Act could be checked for complete coverage: there may be no need for a middle tier of regulations as well. Either **way national, consistent education and communication is vital**. And again, a **decision tree and use of technology would help target the audience and provide timely checks.**

It is also important to note that SWA should remain the appropriate forum for deliberations on any guidance material. **Jurisdictions should not independently prepare their own codes and guidelines. Each government should be held to account to adopt the model WHS framework.**

There does seem to be some unnecessary repetition across the tiers – the model Act, Regulations, Codes and other guidance. Simplifying the regulations where possible and supporting the model WHS Act with specific, targeted, practical guidance would surely be an improvement.

We need nationally consistent information materials. As mentioned above they can be timely, flexible and they must of course, be relevant to the user.

WHS Entry permit

Workplace entry by WHS Permit owners is fundamental to the consultative approach and widely recognised as valuable. All Health and Safety

representatives (HSRs) and workers are an essential part of the consultation, cooperation and coordination required, and bring practical and directly helpful information.

The intent of any legislative obligations should be to **ensure identified risks are managed effectively and that the actions taken are reasonably practicable**. The laws should not create or encourage opportunities for adversarial approaches to WHS matters. The principle must always be “Let’s all work together to get this right”.

The Right of Entry is an example where interpretation can lead to some differences in application. Indeed, some jurisdictions have chosen not to make a change at all.

Section 117 (5), model WHS Act now requires a WHS Entry Permit Holder to give notice

The notice must be given during usual working hours at that workplace at least 24 hours, but not more than 14 days, before the entry, (p94 model WHS Act 2016)

Despite final agreement at SWA, disappointingly not every jurisdiction has adopted this.

Currently authorised persons for right of entry are elected officers and/or employees of unions and must hold current authorisation:

- a) under the WHS Act or OHS Act; **and**
- b) under Fair Work Act.

Only those who have received the WHS training and hence a WHS Permit should be allowed entry for WHS purposes. There are listed restrictions on all parties regarding unreasonably refusing, hindering, delaying or obstructing entry. Additionally, there are listed restrictions on *intentionally disrupting work*. Those with permits must respect the requirements to restrict entry and must adhere to any reasonable requests to comply with any WHS requirements.

Even with these requirements, WHS Entry Permits do still give rise to issues in the workplace. The “crossover” with permit holders under the Fair Work Act, also still causes confusion. The SWA Interpretive Guideline 2016 provides necessary guidance on the WHS Act and regulations on this.

Getting the most out of WHS Entry Permits relies heavily on constructive input from all parties to meet the objectives of the WHS Act. But there needs to be

- Widespread consistent and effective communication on how this is to work
- Encouragement for workers, HSRs and those with entry permits to use these permits legitimately for WHS purposes and not let these issues cross into industrial matters
- A process to alert everyone to legitimate concerns and to distinguish these from industrial matters
- National communication and education that is consistent. This communication is vital

In addition, section 68 (2)(g), model WHS Act) provides that a **health and safety representative (HSR)** can seek assistance from any person whenever necessary in exercising a power or carrying out a function under the legislation. **There are no limitations in the model WHS laws on the types or categories of people from whom assistance can be sought.** This also has the potential to be misunderstood and misused. The assistance should be those with WHS training who can provide advice and expertise on the issue under consideration, not just anyone.⁶¹

WHS should be disentangled from the requirements of Fair Work Act and industrial matters wherever possible.

Workplace entry by WHS Permit owners is fundamental and recognised as valuable. These rights should not create an opportunity for adversarial approaches to WHS matters. They should be exercised in accordance with policy intent and consultation, cooperation and coordination as stipulated in the model WHS Act.

Widespread consistent and effective communication on how this system is designed to work and its intent must continually be provided. Communication of the steps involved should help to confirm eligibility of holders with both permits and that as early as possible, grounds for reasonable concern about a WHS matter is provided in writing. Technology for this is currently available - 'there is an app for this'. A decision tree would also be helpful.

Only those who have received the WHS training and hence a WHS Permit should be allowed entry and only for WHS purposes. Ongoing consistent education of all parties reinforcing existing requirements would greatly assist.

⁶¹ [Australian Building and Construction Commissioner v Powell \[2017\] FCAFC 89 \(2 June 2017\)](#)

Should union officials need entry permits to enter workplaces to assist elected HSR?

Immediate threat to health and safety – cease work

It must be remembered that **any worker can cease work where there are reasonable grounds to suspect an immediate threat to health and safety.**

The legislation includes the requirement that a worker has to notify the relevant PCBU as soon as practicable afterwards. It also means workers should remain available to carry out 'suitable alternative work. A notice to enquire about a suspected contravention or inspect documents or consult and advise relevant workers on WHS is a special right in addition to the opportunity for every worker to cease work.

The ability to cease work and the extra rights accorded to those with entry permits and capacity of HSRs have already been reviewed resulting in amended laws and some new publications.⁶² The requirement for 24-hour notice, would make it consistent with other legislation (e.g. Fair Work Act) and its right of entry provisions. It is a great pity that no jurisdiction has implemented the 2016 amendments to these sections of the model WHS Act.

There have been reports of entanglement of the WHS right to cease work with industrial relations issues and the distinction is important. **The adversarial approach of industrial relations contrasts with the intent of WHS laws** – where there is acceptance of shared responsibilities and consultation and co-operation to resolve any issues. At the least the adversarial approach creates uncertainty.

Written notice on reasonable grounds of the suspected contravention helps everyone in addressing the issue and helps any misunderstanding or misrepresentation of authority. This notice delivered as early as possible enables consultation, cooperation and coordination towards resolution. This notice should also be the province of only those who are **trained** in WHS and who have a current permit.

Certainly, the intent of this section must be clear about any legal requirement and should provide clear information. It should be applied consistently across Australia. A decision tree might again be very useful.

Principle contractor and definition of construction work, high risk construction work and construction project

⁶² <https://www.safeworkaustralia.gov.au/doc/model-work-health-and-safety-act-amendments> and <https://www.safeworkaustralia.gov.au/doc/model-work-health-and-safety-regulations-amendments>

The WHS Regulations allow only one principal contractor for a construction project at any given time.⁶³ The duties of a principal contractor (PC) generally involve the management and coordination of activities concerning health and safety at a particular workplace (there are slight differences in WA and Victoria). Definition of principle contractor⁶⁴ is still problematic. Work is not always linear or sequential. It will continue to be misunderstood or misused because the work relationships now, and in the future, are more and more complex. Limitations of their responsibilities are not clear. A PC must be able to rely on the expertise of specialist contractors and may have limited control over their work. So far, there is a range of cases with varying views on PC control and influence.

The duties of the PCBU are outlined but more could be done to provide nationally consistent easy to understand information that is readily accessible.

Also problematic is the definition of **construction work and high-risk construction work**⁶⁵ and its overlay with National Construction Code. The opportunity to ensure good design occurs well before construction, and this role has been considered in model WHS regulations. Again, more could be done to communicate what this means to the designers, planners, procurement and project teams in their own terms.

Under WHS Regulations Part 6.1 r 292⁶⁶, a **construction project** is any contract that includes construction work valued at \$250,000 or more, and r289 defines construction work *to include work carried out in connection with the construction, alteration, conversion, fitting-out, commissioning, renovation, repair, maintenance, refurbishment, and demolition, decommissioning or dismantling of a structure.*

The term “**structure**” is also defined in the WHS Regulations and includes a ship and a submarine. The list of what is considered a structure has also been subject of some debate. **More, clear, accessible information would help.**

⁶³ Sub-regulation 293(4) -there is only one principal contractor for a construction project at any specific time.

⁶⁴ Under Regulation 293 principal contractor for a construction project is the PCBU that commissions the construction project, or a person engaged by the PCBU to have management or control of the workplace and to discharge the duties of a principal contractor.

⁶⁵ Regulation 289 defines construction work and its exclusions. such as *the manufacture of plant, the construction or assembly of a structure that once constructed or assembled is intended to be transported to another place, testing, or mining in the exploration for or extraction of minerals.* Regulation 291 defines high risk construction work as construction work *that involves a risk of a person falling more than 2 metres, that is carried out on a telecommunications tower, or construction work that involves the demolition of an element of a structure that is load-bearing or otherwise related to the physical integrity of the structure*

⁶⁶ Model Work Health and Safety Regulations **construction project.** as at 28 November 2016 <https://www.safeworkaustralia.gov.au/doc/model-work-health-and-safety-regulations> accessed 20 March 2018

Principal contractors are required to obtain **Safe Work Method Statements (SWMS)**⁶⁷ from sub-contractors and to take active steps to check that they are being complied with and updated. Even though there is a template for SWMS in the model guidance, some have mis-used or misapplied these requirements resulting in disproportionately lengthy record keeping. **Good SWMS are valuable and deserve more effective communication and education.**

In summary, challenges and uncertainties are still encountered in interpreting and implementing the principal contractor provisions and the construction definitions.

We need to simplify if possible the definitions and their interrelationships. **Consistent, targeted, national communication, training and education are key.** A case book and a national tribunal that considers WHS cases would also help.

Cooperation, sharing of information and mutual recognition across jurisdictions

Good regulation should balance the costs and the benefits, whilst also ensuring it is commensurate with the risk for the community (i.e. individuals, businesses and environment). The Australian Government's Ten Principles of Best Practice Regulation⁶⁸ p5 (also see the extract in Appendix 1) requires that

Regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option

Deloitte noted in 2011⁶⁹ p219

⁶⁷ Regulation 299 provides that a PCBU that carries out high risk construction work must prepare, or ensure that another person has prepared, a safe work method statement before the work is carried out.

⁶⁸The Australian Government Guide to Regulation 2014 <https://www.pmc.gov.au/regulation/best-practice-regulation> and <https://www.pmc.gov.au/resource-centre/regulation/australian-government-guide-regulation>

⁶⁹ Deloitte, Access Economics Decision Regulation Impact Statement for National harmonisation of WHS regulations and Codes of Practice, (2011) <https://www.safeworkaustralia.gov.au/doc/decision-regulation-impact-statement-national-harmonisation-work-health-and-safety-regulations>

reduction of red tape and greater certainty for duty holders should allow business to focus more proactively on health and safety improvements rather than compliance

In an important report, the Productivity Commission in 2013 assessed the effect of regulation on small business.⁷⁰ It stated that

small businesses spend up to five hours per week on compliance with regulatory requirements and deal with an average of six regulators per year. The report also found that the approach adopted by regulators has a significant impact on the level of regulatory burden imposed on SMEs.

.... while regulators are generally committed to effective engagement and to minimising unnecessary burdens, many do not have the necessary frameworks in place to ensure this translates to good practices on the ground.

Minimise the regulation and ensure it is commensurate with the risk; target any information; ensure that the information is consistent; share across jurisdictions and the agencies within jurisdictions.

Ensure use of terminology that is used by those that work in the area and that they have easy timely access.

14. Cross-jurisdictional cooperation (Extra-territorial)

Cross-jurisdictional cooperation does not simply mean inspectors operating across all borders. The concept's intention is for sharing data, analysis and other resources.

I don't believe any additional authority should be required for inspectors to operate outside of their own jurisdiction. Information or a "secondment" for a specific purpose can be administratively arranged as was done to assist New Zealand after the quakes in Christchurch in 2011. Much cooperation has been achieved, much sharing of information and joint responses and approaches on particular issues have occurred and should continue. The Heads of Workplace Safety Authorities have made great progress on sharing and providing joint responses – keep up the good work, but consult with social partners more.

In my view, cross jurisdictional cooperation does not require a legislative head of power to share the inspectorate across Australia.

⁷⁰ Productivity Commission (2013). Regulator Engagement with Small Business.

<https://www.pc.gov.au/inquiries/completed/small-business/report> accessed 10 March and 5 April 2018

Mutual agreements can be used if necessary on a case-by- case basis. There is no need for specific legislation providing all inspectors with the ability to act in all jurisdictions. Co-operation is fundamental.

More agreement/s are needed to enhance cross-jurisdictional cooperation. In the National Review 2009 ⁷¹ the panel noted

genuine cross-jurisdictional cooperation at all levels of government is the key factor which will determine the success of efforts to harmonise OHS.

At the first periodic review of the model Act, the issue of whether mutual right-of-entry authorisations (able to be exercised across jurisdictions but subject to the same limitations) should be considered.

OHS functions spread across several agencies should have in place appropriate mechanisms for coordinating the OHS effort within those jurisdictions.

In the Review of Safe Work Australia's Role and Functions⁷² p18

There is a majority view that Safe Work Australia should have involvement in the development of a national policy dealing with compliance and enforcement of model WHS legislation and this should continue in some form as a function of Safe Work Australia. However, the focus should shift to monitoring, reviewing and refining the National Compliance and Enforcement Policy

And in the same review stakeholders supported

facilitating resource sharing, and partnering with states and territories to support and promote jurisdictional campaigns at the national level consistent with the Australian WHS strategy

..... develop and implement national education and communication strategies and initiatives

.....'collaboration' is in line with Safe Work Australia's role of driving

⁷¹ Department of Employment, National Review into Model Occupational Health and Safety Laws Second Report to the Workplace Relations Ministers' Council January 2009

⁷² Safe Work Australia Amendment (Role and Functions) Bill 2017

http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:legislation/summary/summary.w3p;query=MajorSubjectId_Phrase%3ALIV accessed 10 March 2018

improvements in WHS outcomes and workers' compensation arrangements.

NSW noted even then that they needed extra-territorial powers to gain access to records or documents. This change is intended to address inefficiencies created by regulators needing to subpoena information located interstate after the commencement of court proceedings.⁷³

Surely this could have been tackled administratively rather than with more legislation.

More significant is what happens when work is undertaken overseas or under maritime jurisdiction? For businesses currently, it is not clear how the WHS Act and Regulations apply in practice outside of Australia e.g. application for licensing for high-risk work may not be feasible nor for electrical work and others. More detailed guidance is required on its application.

It was envisaged that some provisions would have some extra-territorial application. In particular, some issues arose between agencies over maritime work but mutual agreements were put in place.

Application to work being undertaken by placement or through a supply chain certainly should be subject of clear guidance and much consultation with stakeholders.

One of the aims of the model WHS laws is to promote cooperative relationships with and between regulators.

Cooperation across jurisdictions is vital. The inspectorate does not need specific WHS legislation to gain appropriate authority. It should be that mutual agreements, 'secondments' or other administrative measures are already part of powers of each regulator.

The National Compliance and Enforcement policy has a fundamental role. It should have consistent application across all jurisdictions. It already forms the basis for the work of Heads of Workplace Safety Authorities (HWSA). Surely the NCE and HWSA can be used, and strengthened, to ensure cooperation across governments.

⁷³ NSW Work Health and Safety Act 2011 Statutory Review Report - June 2017 accessed 16 March 2018

15. Authorisations – Licensing, registrations and notifications

Authorisations may vary but most jurisdictions require licenses, registrations and permits. Licenses are required for some work such as

- High-risk work (e.g. scaffolding and rigging, operating cranes and forklifts, using pressure equipment)
- Removing specific types and amounts of asbestos (Amendments made in 2016)⁷⁴
- Demolition
- Using scheduled carcinogens
- Operating a major hazard facility

A national licensing system should include

- consistent administration and compliance practices across jurisdictions
- national database that automatically recognise equivalent licenses, permits and registrations
- equivalent competency across jurisdictions
- sharing of information across jurisdictions

Recent cases of licensing fraud and fraudulent right of entry authorisations show that a national regime for authorisation is needed especially regarding WHS Entry permits.

⁷⁴Work Health and Safety Amendment (Licensing of Asbestos Removalists and Other Measures) Regulation 2016 <https://www.legislation.gov.au/Details/F2016L01805>

Part 13 of WHS Act sets out authorisations around prosecutions. Further details are set out in Part 4 of WHS Act and Section 7.1 and 7.3. In 7.3 the WHS Act recognises the sharing of information with corresponding regulators relating to the grant, issue, renewal, variation, suspension or cancellation of authorisations.

In the National Review into model OHS Laws 2009⁷⁵ the appropriate sharing of information and expertise was recognised

strategic data, compliance information, and general intelligence and expertise that assists in enforcement was recommended (R148)

There remains some issue with the application of a consistent national scheme in that the Commonwealth, mostly but not always, relies on state and territories legislation. This can and should be clarified in guidance for those organisations and their workers.

There should be a publicly available national register of licensees. A national database should be maintained. This would assist the administration of the national licensing system and provide confidence in the process.

Notifiable Incidents

Notifiable incidents' may relate to any person—whether an employee, contractor or member of the public. It is intended that only the most serious work-related health or safety incidents are notifiable. Although the definition of a serious incident is detailed in a SWA information sheet, this needs to be communicated more effectively. The definition includes a death, serious injury or illness and a dangerous incident, it is not clear how this works with psychological health or serious illnesses with lengthy gestation. But of course, it needs to be clear – and communicated.

Similar to licensing, a consistent and simplified incident notification regime is required. In general, the current Incident Notification⁷⁶ provisions are successful; although for best effect the “triggers” should be simplified.

⁷⁵ Department of Education, Employment and Workplace Relations, National Review into Model Occupational Health and Safety Laws, First Report (2009)

⁷⁶ SWA Information Sheet—Incident Notification November 2015
<https://www.safeworkaustralia.gov.au/doc/incident-notification-fact-sheet> accessed 20 March 2018

These definitions may need to be reviewed to ensure that it sets the right threshold for notification. Work should be undertaken to evaluate the notification system and its effectiveness. Before any changes are made, we need to know how many notifications each jurisdiction receives, what types of notifications and what the outcomes are, so that we can evaluate the current situation and recommend changes.

Other directions or cautions

Infringement notices have an important role but should only be issued for minor, strict liability offences where a determination of 'reasonably practicable' is not required. There have been situations where an infringement notice implies a guilty-until-proven-innocent approach, which can result in costly appeals processes and does nothing to instill a culture of trust and respect.

Voluntary enforceable undertakings (EUs) are another useful tool. They are an opportunity for the regulator and business (workers and PCBUs) to collaborate and ensure the activities are clear and achievable. Detailed comment on EUs has been made earlier. Other options such as restorative justice processes may also help.

Consistent Training requirements

A nationally recognised and accredited system for quality training is important for mutual recognition across jurisdictions. The nature of work is increasingly mobile; a national regime for training is important and should include refresher training. Some training has already been developed through tripartite forums of SWA but should be regularly reviewed. Quality of courses and trainers needs to be strictly maintained. A review of the process for maintaining quality is needed. Also, a national database of acceptable Registered Training Organisations, accessible from regulators websites, would link to acceptable qualifications and would greatly assist administration.

16. Psychological health

The policy intention to minimise harm arising from work undertaken (so far as reasonably practicable) in this case is **about the effect of work on psychological health**. Importantly, this is distinct and different from being responsible for an individual's healthy state of mind or an individual's well-being.

The **different interpretations of 'psychological health' add another layer of complexity. It is nearly impossible to determine and isolate the causal factors for psychological health.** Work is but one of the many factors that combine to contribute to psychological health.

A burgeoning industry has been established that **inappropriately mixes health promotion with WHS legislative duties for psychological health**. Fruit-boxes and yoga may be nice but are not WHS obligations. Not much of this industry is regulated. It is however undermining the original intent of the regulation; and it is directing resources away from genuine WHS outcomes.

Given the risk-based approach of WHS Laws, the focus should be on outcomes that **encourage good work design, and not on the imposition of direct responsibility for an individual's "well-being"**.

It is not always possible to determine if work is a significant contributor to psychological ill-health in any particular case, nor is it reasonable to allocate specific responsibility to particular duty holders. Who can say what is the extent to which other external factors have contributed to specific psychological health issues?⁷⁷

Some work contains inherent risks to psychological health such as military service, emergency services and other first responders, or health care work. It can still be hard to prove the nexus between work and the psychological health outcome for example to gain workers compensation. Perhaps some circumstances could be deemed as having 'potential for harm' and that require establishment of preventions, safeguards and alerts - like 'deemed diseases'. This might be possible where there is work exposure to violence or trauma, for example.

Psychological health is ever changing and multifaceted. It is complex and issues are often sensitive.

There has also been much concern expressed on **the "reach" of risks to psychological health at work and the responsibilities associated with duty holders**. The duty under section 27 of the WHS Act also has implications for those persons who sit on a board, or take up senior leadership positions within an organisation, because every officer is required to be familiar with, and understand both the physical and psychological health and safety issues within the organisation.⁷⁸ The potential reach or implications and responsibilities for third parties needs further clarification.

⁷⁷ In *Squires and Comcare* [2018] AATA 166 The Tribunal was asked to consider whether a claimed psychological condition was materially and/or significantly contributed to by employment

⁷⁸For example, in [Wearne v State of Victoria \[2017\] VSC 25 \(8 February 2017\)](#) it was found that the employer had been aware of the woman's work-related anxiety and stress, therefore it was a reasonably foreseeable risk that inappropriate supervision could cause further psychological injury

It may be in some instances (for example with an incident of violence in the workplace) that work is manifestly a significant contributing factor. Without specific events and without capacity to measure a person's constant state of mind (not that anyone should) it is difficult to apply the standard hierarchy of control required by the stipulated risk management approach. Certainly, problem analysis that **encourages early identification and action would be useful, but is different from the standard hierarchy of controls.**

It is of concern that **a person's well-being has been widely misinterpreted as a WHS responsibility; this has distracted attention towards well-being programmes and away from the importance of practical good work design.** Programmes such as these are no doubt good for some workplaces, but should not be the subject of regulation. In one workplace, it was deemed that as Manager of WHS Policy I was responsible for stretching exercises, the good health/fitness/diet of workers and even hygiene signs. Administrative and management effort on these things can be disproportionate to the marginal benefits, and can distract and undermine, even belittle, the more important direct benefits of good WHS design and practice.

Cyber bullying

Of course, an organisation needs to provide information and training on their cyber bullying policies, the behaviour expected and the consequences of a breach of policy. How much control a PCBU has over cyber bullying may not just be about having a policy either.

Are specific cyber prevention practices actually enough, especially if seen to be a WHS obligation? Surely it involves more of the organisation and its individuals. If a "post" that is aggressive or abusive, is shared with others and forwarded to a wider audience, to what extent can it be under a PCBU's control or if concurrent duties how does this apply?⁷⁹ More and more people can share it, even beyond the original person. It is very difficult to control and unreasonable to hold the PCBU liable for the extended effect. And it is there forever, the internet never forgets. Psychological harm can be done, reputational harm can be done and forever. Repercussions occur and all without natural justice. But in my view, it is not properly only a WHS issue unless or until there is a threat to health and safety directly associated with work. Certainly, Human Resources or the like needs to have a policy; certainly, effort should be made to minimise it and to manage cases early when they do occur.

⁷⁹ The model WHS Explanatory Memorandum 2016, Clause 16. Subclause 16(2) provides that each duty holder must comply with that duty to the required standard even if another duty holder has the same duty. If duties are held concurrently, then each person retains responsibility for their duty in relation to the matter and must discharge the duty to the extent to which the person has capacity to influence or control the matter or would have had that capacity but for an agreement or arrangement purporting to limit or remove that capacity (subclause 16(3)). Accessed 10 April 201

The limitations on control and influence under WHS laws must be made clearer especially for cyber bullying.

Measuring/Monitoring

WHS Act requires monitoring for the prevention of injury or illness and refers to physical hazards and work-related psychological health factors that may have potential to harm. Measuring and monitoring psychological health is very contentious. In my view, this can lead to substantial infringements on privacy and confidentiality, and can cause more harm.

Some businesses are promoting the need (obligation) for psychological testing before and during work experiences. In fact, some cases have shown the difficulty in using these sorts of assessments appropriately.⁸⁰

Widespread measuring of individual psychological health would be a regrettable and intrusive outcome. Measurement may be appropriate when identifying and assessing physical hazards but in seeking to address psychological health, the standard hierarchy for controls for physical hazards should not apply and neither should monitoring. How does one show elimination, substitution through to personal protective equipment in some cases? Testing may have some merit for organisational patterns or trends or known high-risk tasks, but **design measures or measures to assist are the desired outcome not psychological assessments**. The use of control hierarchy has been confused with a normal sensible approach to problem solving – identify as early as possible and act.

Psychological ill-health can be the result of a range of factors outside the control of work; it can be enormously complex, private and commonly relies heavily on perceptions. These are not matters that should be the province of legislation.

Early reporting and early interventions should be the focus. This means encouraging a culture where people are comfortable enough to share and express their thoughts about the effect of work being undertaken or issues that may impact on their work.

The PCBU cannot be held accountable for social, financial, domestic, environmental, biological and emotional factors that influence

⁸⁰ In this case an employer was found to have breached its duty of care to an employee when it offered him a job without assessing whether he was psychologically suited to its challenges. District Court of Queensland noted the *development of psychiatric symptoms as a result of his vulnerable personality*. Does this mean assessment should happen for all tasks or all challenges? [Keong v Queensland Rail Ltd \[2018\] QDC 31 \(15 March 2018\)](#)

psychological health. It is manifestly **inappropriate for a PCBU or other workers to diagnose or manage an individual's 'psychological health'**. Such tasks are the difficult role of psychology professionals and specific practitioners. They can where appropriate and reasonable provide support or specific assistance, but the absence of these actions should not be a breach of a WHS duty. So far as reasonably practicable **(SFAIRP) the PCBU can minimise risks involved in work related factors** such as the eight factors listed in SWA Guidance.⁸¹

Rather, the PCBU should develop a respectful, open and caring culture that encourages early reporting and provides appropriate supports. It is important to be able to identify signs and symptoms, but not to diagnose. Having good conversations is therefore fundamental. But not a legislated WHS duty.

The policy intent to minimise harm arising from work undertaken (so far as reasonably practicable) is about the effect of work on psychological ill-health.

The PCBU's and other duty holders cannot be held accountable for social, financial, domestic, environmental, biological and emotional factors that influence psychological health.

Identifying what is a work-related ill-effect can be overwhelming and is fraught. Screening and measuring is contentious, inaccurate and psychologically invasive in itself. There needs to be more clarity on what is done with information collected; it has implications for privacy and confidentiality. Issues arise with governance, contracts, record keeping as well as the management of risks.

It is possible to have **good work design (so far as is reasonably practicable) and to develop and maintain a culture that encourages early reporting so action can be taken to minimise risks to psychological health of work undertaken.**

A culture that fosters early interventions to prevent issues in the first place and that helps successful return to work are the result of good practices and strong education with an advisory focus.

There needs to be much clearer messaging (albeit in competition with the 'well-being' industry) that clearly outlines the actions required by duty holders to meet their duties on effect of work on psychological health.

⁸¹ Safe Work Australia Preventing psychological injury under work health and safety laws Fact Sheet, 2014 p2 <https://www.safeworkaustralia.gov.au/doc/preventing-psychological-injury-under-work-health-and-safety-laws-fact-sheet>

So far as reasonably practicable (**SFAIRP**) the **PCBU** can minimise risks involved in work related factors such as the eight factors listed in **SWA Guidance**.

Myth busters similar to that used by HSE in UK would be useful.

17. The question of industrial Manslaughter legislation

Any action or omission that results in serious harm is unacceptable - one workplace death is absolutely one too many. Any duty holder that places another person's health and safety at risk must be fully accountable. And as such, the model WHS Laws provides scope for prosecution (and imprisonment) where these acts or omissions are reckless or negligent.

Where there is assault or environmental damage or property damage there are already laws and processes that prevail and can be exercised. There already exists a criminal code. Common law principles continue to have application. If the action or omission was sufficiently willful or negligent and results in a death, then criminal law should apply with its established precedents and with the established flexibility to consider mitigating or extenuating circumstances. Establishing industrial manslaughter offences creates unneeded duplication, confusion and complication.

Manslaughter is the unlawful killing of a person without the intention of causing the death or grievous bodily harm of the person. Under common law the criminal test is "**beyond a reasonable doubt**". WHS law has its own objective test. Here the offence is committed whether or not harm is caused. Under criminal law "there may be more than one cause of death and that criminal liability may attach to a person even though the act was not the sole or even the "main" or "most substantial cause of death". And under criminal law the offence must prove beyond reasonable doubt the intent of those to be prosecuted. To prove the intent, there is a "mental" aspect (mens rea) involved; it is this conduct and the state of mind or **mental intention** that must be proven.

In 2004 Maxwell report noted that

It is the breach of duty, not the causing of a death, which gives rise to the offence. With manslaughter, on the other hand, it is the causing of a death which constitutes the offence, and that properly remains within the

*province of the general criminal law. (p13-14)*⁸²

The penalties under WHS are scaled according to category. Category 1⁸³ applies to the most serious breaches and includes 5 years imprisonment. It must be substantiated that 'due diligence' was not exercised and 'reasonable precautions' were not taken. This standard of conduct is based on what a reasonable person in the position of the duty holder would do in the circumstances. The real question perhaps is the limitation or point at which their control or influence ends and what is a reasonable expectation. This "reach" particularly with changing nature of work relationships is important and is discussed earlier. There does remain a need to clarify the limitation or reach of control and influence.

Under the new Industrial Manslaughter laws in Queensland a person can be charged with industrial manslaughter and prosecuted under the Queensland Criminal Code for a workplace fatality.

But WHS Regulators (or Coroners) already have the power to refer to the police or refer to Director of Public Prosecutions (DPP) and seek prosecution for manslaughter under criminal law.

Rather than creating more complication that crosses more legislation, where there is a fatality arising from recklessness directly attributable to unreasonable, preventable and foreseeable acts or omissions, then this should be covered by existing WHS legislation. No new industrial manslaughter law is required.

For example, Category 1; Reckless and foreseeable harm was found in a case in February 2018 in NSW.⁸⁴ Judge Scotting found

The direction of an unqualified person to install the switchboard to save costs was an act devoid of social utility, so that the foresight of the possibility of the risk of serious injury or death arising was sufficient to constitute recklessness

⁸² Chris Maxwell, Victoria, Occupational Health and Safety Act Review (2004) paragraph 786 accessed 10 March 2018

⁸³ The maximum penalty for a category 1 offence is A\$3 million for a corporation; A\$600,000 and/or five years' imprisonment for an individual conducting a business or undertaking, or an officer of a person conducting a business or undertaking; and A\$300,000 and/or five years' imprisonment for an offence committed by any other individual.

⁸⁴ Stephen James Orr v Cudal Lime Products Pty Ltd; Stephen James Orr v Simon Shannon [2018] NSWDC 27 <https://www.caselaw.nsw.gov.au/decision/5a938eb9e4b074a7c6e1ca15#> accessed 28 March 2018

The company was fined \$1.2 million but with a guilty plea, this was reduced to a fine of \$900,000 (plus costs) imposed. And the fine for the individual was \$64,000, reduced to a fine of \$48,000 (plus costs).

There is no need for legislative amendment to deal with sentencing this is administrative and practical. Criminal legislation with its established sentencing regime can be used where appropriate. Or even use the WHS legislation appropriately.

Before any new regulations are adopted they must be justified and the benefits to the community clearly shown. It is difficult to see the benefits to the community with the introduction of Industrial Manslaughter laws.

The policy and intent of WHS is to identify and control the risks to improve health and safety outcomes both physical and psychological. It has an outcome focus rather than a process focus. Surely the objective tests set out in WHS laws already provide risk assessment and objective criteria.

Again, the Maxwell Report 2004 notes ⁸⁵

The prosecution of persons for criminal offences is a matter of the utmost seriousness and is properly the exclusive function of the State (Chapter 34).

The Report concludes that there is no justification for conferring on any other party a statutory right to bring a prosecution. At the same time, the Report recommends that there be greater transparency and accountability in respect of decisions by WorkSafe not to prosecute.

It also follows from the nature of OHS offences that no question of industrial manslaughter can arise under the OHS legislation. An employer may be in breach of its safety duties under the OHS legislation irrespective of whether death or injury results...

The inclusion of industrial manslaughter laws seems to have been driven by a failure in the process, rather than a justified regulatory response. Existing criminal laws on manslaughter are already refined and apply where there is gross negligence or recklessness. WHS Regulators already have the power to refer to the police or refer to Director of Public Prosecutions (DPP) to prosecute for manslaughter under criminal law.

Absolutely bring to bear the full force of those laws where appropriate. There is no need for duplication and the consequent confusion.

⁸⁵ Chris Maxwell, Victoria, Occupational Health and Safety Act Review (2004) paragraph 786 accessed 10 March 2018

A reduction in the number of prosecutions and fines over the last few years does NOT create a need to add industrial manslaughter legislation and/or change the onus of proof. It does suggest that the current regime with its focus on good health and safety practices and improvement in advice and compliance is working.

Sentencing

When sentencing there are a number of matters to consider. These matters include the:

- the circumstances and nature of the breach
- resulting injury, loss or damage
- degree of contrition
- degree of co-operation
- if there is a guilty plea
- the level of deterrence of proposed sentence
- the adequacy of the punishment

And the court has to ensure the sentence is proportionate to the offence.

Consistent guidance on sentencing might indeed be helpful. But mandatory sentencing itself, although popular, has its own particular issues.

According to an article in The Conversation 2017⁸⁶

Although obviously intended to improve community safety, mandatory minimum sentencing policies run counter to the significant body of evidence indicating that this approach to sentencing is costly, unlikely to improve public safety nor effective in deterring future offending.

...While policies that promise definite and lengthy terms of imprisonment for repeat violent offences may appear attractive within populist politics, they undermine long-established principles of proportionality and individualised justice.

⁸⁶ The Conversation <https://theconversation.com/mandatory-minimum-sentences-and-populist-criminal-justice-policy-do-not-work-heres-why-76142>

...Politicians will often promise tougher criminal justice policies, usually in the form of longer terms of imprisonment, or zero-tolerance policing. This is all sold as taking action to “keep the community safe”.

In fact, a Sentencing Advisory Council 2017 paper concludes,

on the basis of existing research, that mandatory and other prescriptive schemes are unlikely to achieve their aims. To the extent that such schemes achieve some of their aims, the research indicates that they are achieved at a high economic and social cost.⁸⁷

Existing WHS laws through national sentencing guidelines could consider such things as enforceable undertakings, improve relative outcomes on particular issues and could involve non-indemnification orders. Sentencing guidelines would also make a national database easier to maintain and add value to a "case" book.

In addition, a national tribunal would also minimise the variations in interpretations and practice currently experienced across the Courts and agencies involved.

Caution needs to be used in considering any sentencing guidelines and particularly mandatory sentencing. SWA needs to prepare a careful evaluation with legal opinion.

A national tribunal on WHS matters could also be considered.

Insurance

Insurance against legal costs, in general, is already available. Indeed, in a case in SA, a director sought indemnification for fines imposed for criminal conduct under SA WHS law. But, this is contrary to the principles and objectives of model WHS laws. Insurance for a category 1 offence may affect behaviour and encourage abuse of WHS matters.

Clearly this does nothing to encourage appropriate standards of behaviour. Insurance should not be used to avoid penalties for breaches of model WHS laws, especially for criminal conduct. Further insurance limits sentencing effectiveness by avoiding deterrence and this may in fact end up resulting in higher penalties. It is also likely to create more dispute, even litigation, where

⁸⁷ Sentencing Advisory Council © State of Victoria, 2017, Sentencing Trends for Manslaughter in The Higher Courts of Victoria 2011–12 To 2015–16 <https://www.sentencingcouncil.vic.gov.au/>

insurers refuse to pay. Many insurance policies may even exclude unlawful situations such as manslaughter.⁸⁸

The insurance industry needs to enforce industry standards and ensure communications and policies are clear on this matter. It may also be possible to consider non-indemnification orders. In a recent case in the Federal Court financial penalties were invoked on both the CFMEU and the individual official.⁸⁹ This was on basis that the Fair Work Act contained an implied power to ensure deterrent effect of penalty. Although Fair Work Act may be broader than WHS Acts it may be that non-indemnification orders could be considered.

WHS Laws need to be clear that insurance coverage for breaches of WHS laws especially Category 1 offences are not acceptable. Insurers could be discouraged from offering to provide indemnity. Existing WHS laws through sentencing guidelines could consider non-indemnification orders.

18. Public Health

A business (and its individual duty holders) have responsibilities for the health and safety of all workers, contractors, volunteers, visitors, customers or the public that may be affected by the work being undertaken. When incidents occur in the 'natural environment', common law and criminal law generally determine matters of public safety and liability. For example, if dust is released during a construction or mining activity environmental law applies. And there are requirements to protect the public by gantries/fencing and exclusion zones.

However, protecting and promoting public health is about populations. It is aimed at **protecting the maximum number of people often with minimum amount of funding.**

Public health⁹⁰ is considered

⁸⁸ Competition and Consumer Act 2010 - s77A and s199A(2)(b) of the Corporations Act 2001 (Cth) and s199B of the Corporations Act all seems to prohibit paying premiums for an insurance policy which indemnifies a director against liability for willful breaches of duty; or misuse of their position http://www5.austlii.edu.au/au/legis/cth/consol_act/caca2010265/s77a.html; accessed 1 April 2018

⁸⁹ *Australian Building and Construction Commission v Construction, Forestry, Mining and Energy Union & Anor* [2018] HCA3 <http://eresources.hcourt.gov.au/showCase/2018/HCA/3> accessed 9 April 2018

⁹⁰ Wikipedia, Public Health, accessed 7 March

"the science and art of preventing disease, prolonging life and promoting human health through organized efforts and informed choices of society, organizations, public and private, communities and individuals."^[1]

Analyzing the health of a population and the threats is the basis for public health.^[2]

Note that in this instance "Health" takes into account physical, mental and social well-being. It is not merely the absence of disease or infirmity, according to the World Health Organization.^[3] Public health is interdisciplinary – including for example; epidemiology, biostatistics and health services.

There are recognised social determinants of health. Some of the top ten public health issues include heart disease and other cardiovascular diseases, cancer, smoking, and suicide. They are influenced by a range of genetic, social and environmental factors.

For public health, there is a collective responsibility. It is the responsibility of "society" as a whole. Decisions are made on the risk to the population and not the risk for one individual. Whilst the premise for WHS is the health and safety of the individual undertaking work.

The focus of a public health intervention is to prevent and manage diseases, injuries and other health conditions through monitoring of medical 'cases'. It also involves the promotion of healthy behaviours.⁹¹ It recognises "public health" in Article 12 UN Office of the High Commissioner for Human Rights (OHCHR)

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

*Recognition of the right to health obviously does not mean that beneficiaries of this right have a right to be healthy. Rather, the Covenant stresses the obligation of States parties to ensure for their citizens "the highest attainable standard of . . . health".*⁹²

This is about population health. WHS actions are local and aim to minimise the WHS risk to individuals by the work undertaken. An evidence driven approach may recognise population statistics in identifying and assessing risks of the work being undertaken, but WHS law brings with it specific responsibilities and

⁹¹ O'Gostin, Wiley . Public health law: power, duty, restraint., 2016 Oakland, California: University of California Press. Preview <https://www.worldcat.org/title/public-health-law-power-duty-restraint/oclc/910309614> accessed 7 March 2018

⁹² Article 12 UN Office of the High Commissioner for Human Rights (OHCHR), *Fact Sheet No. 16 (Rev.1), The Committee on Economic, Social and Cultural Rights*, May 1996, No. 16 (Rev.1), available at: <http://www.refworld.org/docid/4794773cd.html> accessed 13 March 2018

duties. It is difficult to give direct association to work when there is a range of contributing social and environmental factors. **Work must be the significant contributing factor to trigger these duties and accountability.**

The model WHS Act includes minimising the risks so far as is reasonably practicable to others; this includes the “public at large”. The model WHS Act Explanatory Memorandum⁹³ contends that this obligation must relate to the work undertaken. The intent is not to be responsible for public health “broadly”. Safe product design, recreation or leisure and sports activities come under other legislation and should not imply accountability by WHS duty holders.

Simply because a risk exists and must be mitigated does not mean the WHS Laws apply.

If a recreational activity is a business e.g. a tourist operation that has employees then WHS has coverage for its workers and so far as is reasonably practicable limited coverage for visitors and others. For example, administrative methods are used to minimise the risks should a person have a heart attack while snorkeling. This is the province of good governance but does not imply a WHS responsibility for the heart attack. Similarly, quad bikes used for recreational purposes does not invoke WHS responsibilities. Where

⁹³ Explanatory Memorandum – Model Work Health and Safety Bill 2016 <https://www.safeworkaustralia.gov.au/doc/model-work-health-and-safety-act-explanatory-memorandum> accessed 20 March 2018. The WHS 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.*

this is a commercial tourist activity whilst the equipment must be selected and maintained and used in accordance with Consumer Laws, WHS and appropriate risk management also apply.

In National Review 2009⁹⁴ the “reach” into public safety was considered.

To establish a clearer application of the model Act to public safety:

a) the underlying OHS objectives of the model Act should be clearly articulated, including the protection of all persons from work-related harm; and

b) 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.

Under Consumer Laws

The *Competition and Consumer Act 2010* (CCA) covers the relationships between suppliers, wholesalers, retailers, and consumers. It's declared purpose is to *enhance the welfare of Australians by promoting fair trading and competition, and through the provision of consumer protections.*

It covers such things as:

- product safety and labelling
- unfair market practices
- price monitoring
- industry codes
- industry regulation – airports, electricity, gas, telecommunications
- mergers and acquisitions.

The Australian Consumer Law (Schedule 2 of the CCA) covers misleading or deceptive conduct, unconscionable conduct, unfair practices, conditions and warranties, **product safety** and information, liability of manufacturers for goods with safety defects offences and country of origin representations.

WHS laws apply where there is a link between work and public safety. The aim for WHS is to engender appropriate acceptable behaviours. Governments should use policy interventions in relation to public health

⁹⁴ Department of Education, Employment and Workplace Relations, National Review into Model Occupational Health and Safety Laws, First Report (2009) Page 26 accessed 10 March 2018

only to achieve the WHS laws stated aims. **Certainly, a national communications programme is needed to clarify each of the laws involved in public safety and to distinguish public health and public safety from work related health and safety. Duty holders need clear messaging to help understand their duties.**

19. Behaviour change

Many reports have shown that there has been improvement in awareness of the benefits of good WHS practices to date. This has been particularly so for large businesses.⁹⁵

The primary duty of care (s 19) already applies to all situations. So, in reality, what's needed is an explanation of *how* workers and PCBUs are to meet these requirements.

For long-term, sustained behavioural change, perhaps lessons can be learnt from the public health campaign on smoking⁹⁶ or some of the research on awareness and actions taken by people in the workplace regarding asbestos.⁹⁷

⁹⁵ Gunningham & Associates, WorkSafe WA *Impacts of work health and safety harmonisation on very large businesses* SWA unpublished report (2013). Now published as Gunningham, Neil 2016. 'Impacts of work health and safety harmonisation on very large businesses'. RegNet Research Paper, No. 118, School of Regulation and Global Governance (RegNet) accessed 1 April 2018

⁹⁶ Department of Health <http://www.health.gov.au/tobacco>

⁹⁷ Asbestos Safety and Eradication Agency (ASEA) National benchmark survey of awareness of and attitudes to asbestos 2016 <https://www.asbestossafety.gov.au/research-publications/asbestos-safety-research/national-benchmark-survey-awareness-and-attitudes-asbestos-2016> accessed 20 March 2018

Interventions that focus on societal attitudes can be challenging but are also more rewarding. Golechha (2016)⁹⁸ has undertaken a review for tobacco smoking and found that

Population capacity to address change and readiness are the key factors that influence effective health promotion efforts for smoking prevention and cessation... Empowering communities to bring about change in their own social domains is not only more sustainable but however, is also extremely effective.

It is not about the number of prosecutions nor the number of inspectors, it is about **communicating how to achieve good outcomes in the most effective and timely manner.**

Sustainable behaviour change requires more than just legislation.

Culture change is not promulgated by rules. A focus on prevention and strong engagement with stakeholders and their communities is key.

20. Summary

On the whole, **the model WHS Laws have been successful.** The WHS framework has consolidated legislation, provided some consistency in approach and the laws have provided the impetus for increased awareness and for more proactive approaches.

There have, however, been unintended consequences where **some states and territories have different interpretations and responses.** There has been regulatory creep where some jurisdictions have changed the legislation slightly or interpreted them differently and produced slightly different guidance. In some cases, rightly, further guidance has been needed e.g. right of entry, the licensing regimes, implementation of Globally Harmonised System (GHS) for chemicals, quad bike actions, responses to falls legislation and use of RCDs. **It is a continuous process of refinement.**

SWA is a useful forum; all potential changes can (and should) be considered through the tripartite process. However, more can be done to ensure that this process reflects the realities for those that must take action - the implementers or social partners. **The voices of social partners should be given more weight in the SWA deliberations** – they are currently outnumbered.

⁹⁸Golechha M., Health Promotion Methods for Smoking Prevention and Cessation: A Comprehensive Review of Effectiveness and the Way Forward *Int J Prev Med.* 2016; 7: 7.
<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4755211/> accessed 19 March 2018

A particular challenge is to ensure small to micro businesses, specific industries, migrant workers and others are recognised as a target group and have specific information in appropriate language and format for effective nationally consistent communication. **Most people just want to know what applies to them and what they have to do. Therefore, keep any advice simple. Keep it relevant and targeted and timely. And use technology to disseminate the messages.**

The consultative risk-based framework has been successful. More can be done to communicate and educate and advise all stakeholders on a nationally consistent basis. This would help provide a uniform, equitable and effective regime that minimises WHS risks.

The Compliance and Enforcement provisions are mostly effective. The staged approach with focus on advice is key to ongoing success. Enforceable Undertakings can achieve much if used correctly. More work can be done to have a nationally consistent approach to when and how to use EUs effectively. Where things go very wrong and serious breaches occur, the onus of proof should remain with the prosecutor. More guidance on conditions that substantiate matters under the current WHS laws would be helpful; as opposed to, for example, complicating matters with industrial manslaughter legislation.

Where serious breaches have still occurred, the failure lies in the process; rather than in any inadequacy of the legislation. Referral to DPP could be clearer and more consistent. This is not a justification for more regulation. The system for prosecution should not require new laws – use the laws that exist. Absolutely bring to bear the full force of those laws on those whose behaviour is criminal. WHS regulators have the power to refer matters to DPP. Industrial manslaughter legislation should **NOT** be introduced.

Sentencing guidelines may help towards a consistent approach, as would a national tribunal.

The problem of regulatory creep where state legislation is modified without reference to SWA can be avoided by strengthening the IGA and ensuring each government is held accountable.

Currently there is further entanglement of WHS with industrial relations issues and the distinction is important. The adversarial approach in industrial relations contrasts with the intent of WHS laws. What is needed is a **preventative approach, more emphasis on consultation, coordination and cooperation and focus on community engagement.**

Anecdotal reports to date, and some cases, show there is further entanglement of WHS with industrial relations issues and the distinction is

important. The adversarial approach in industrial relations contrasts with the cooperative intent of WHS laws. **The consultation, representation and issue resolution procedures are appropriate. More work can be done to have a nationally consistent approach and to communicate good practice.** Right of Entry Interpretive Guidelines are an example; although they already exist, more communication and education would be beneficial.

Psychological health is dictated by a combination of factors, many outside the control of work; it can be enormously complex, sensitive, private and it relies heavily on perceptions. These subjective community and life matters are not properly the province of legislation. The aim is to minimise the harm arising from work undertaken (so far as reasonably practicable). **The obligations should be based on the effect of work on psychological health – the eight work-related factors outlined in SWA guidance.⁹⁹ The main objective is actually to encourage a respectful, open and caring culture.** The PCBU (and other duty holders) cannot be held accountable for social, financial, environmental, biological and emotional factors outside of work that influence psychological health. Nor should they be diagnosing psychological health or making decisions on its management. They should not be measuring and assessing an individual's psychological health. They can, where appropriate and reasonable, provide support or specific assistance but absence of such support should not be a breach of a WHS duty. More needs to be done to clearly define limitations on control and influence on psychological health and work-related factors.

Overall the WHS Laws are working. What's needed is refinement with stronger engagement with social partners and fine-tuning to produce a consistent approach. Some suggested tweaking includes

1. **The model WHS Act with minimum regulation** where implementation is supported by **targeted industry-specific information materials**
2. Legislation that remains focused on **work-related factors with a risk-based approach that also disentangles as much as possible from industrial relations**
3. **Strengthening the IGA and better cooperation across jurisdictions**
4. **Effective national communication tools to provide flexible targeted information materials.** This means an **adequately resourced national WHS programme of communication, education and advice.** And use stronger engagement with stakeholders and joint messaging

⁹⁹ Safe Work Australia Preventing psychological injury under work health and safety laws Fact Sheet, 2014 p2 <https://www.safeworkaustralia.gov.au/doc/preventing-psychological-injury-under-work-health-and-safety-laws-fact-sheet>

5. **Support a positive culture** for good work. Use education and advisors, utilise the technology and tools available, leverage peer support and market forces more effectively to reduce opportunity for poor choices in daily decision-making – with **an emphasis on practical advice**
6. Use of proactive **interventions** whilst retaining accountability and high standards of health and safety. This means compliance that **uses a staged response** while strengthening the **identification and enforcement of poor performers**. The staged response of education and advice, enforceable undertakings, Provisional Improvement Notices (PINs) and ultimately prosecution if necessary. Staged responses can also consider alternative dispute resolution procedures, or restorative justice. This should not diminish the seriousness of any breach, nor capacity for criminal charges under other legislation
7. SWA should build **a case profile or case book with evaluations** and consider a **national tribunal** to provide some consistency
8. **Rationalise the guidance materials and recognise (and avoid wherever possible) overlap with other legislation.**
9. Wherever possible **use administrative methods** rather than more legislation.

Ultimately, sustainable success of WHS starts with the work culture and attitude and not with a raft of legislation. While fundamental change to the intent of WHS Laws and its principles is not recommended some further refinements are needed to ensure consistent application and operation.

Topic	Key Summary Comment
1. Policy Intent: Its more than compliance – it’s about culture	<p>It’s working, but needs refinement</p> <ul style="list-style-type: none"> • use Myth busters • use a case book
2. Consistent national approaches to manage WHS risks	<ul style="list-style-type: none"> • Strengthen IGA, • national consistent messaging, • rationalise information • use Myth busters • use a case book • establish a national tribunal
3. It Works – Early Evaluations	<ul style="list-style-type: none"> • reviews to date say it works • evaluate what wasn’t adopted and why
4. Current legislative framework – a Risk-Based approach	<ul style="list-style-type: none"> • continue risk-based approach, • beware applying to psychological health
5. Previous Findings and policy interventions	<ul style="list-style-type: none"> • adopt 2016 model laws • evaluate what wasn’t adopted and why
6. Meeting the Object of the WHS Act	<ul style="list-style-type: none"> • value social partners voice • national consistent application, • book of cases and analysis by SWA
7. Role of model WHS Regulations	<p>Simplify regulations – keep high level supported by industry-specific information</p>
8. Codes of Practice and benefit of targeted information	<ul style="list-style-type: none"> • Simple, relevant, targeted and consistent information • remove duplication • rationalise
9. Targeted consistent information and education	<p>Use tools other than regulation; use targeted, relevant, consistent information and communication</p>
10. Cornerstones: Shared Mutual responsibilities, Proactive obligations & Consult, Cooperate and Coordinate (3Cs)	<p>Support mutual proactive obligations and 3Cs with national consistent communication</p>
11. Reasonably Practicable and Control	<ul style="list-style-type: none"> • retain and do more to clarify control and influence • clarify for more than one state operation and multiple or concurrent duty holders • national consistent communication
12. Future and Changing Nature of Work	<ul style="list-style-type: none"> • existing WHS laws flexible and have coverage • need to further define control and influence • national communications

<p>13. Other particular Issues under WHS regulations - construction, asbestos, entry permits and principle contractor</p>	<ul style="list-style-type: none"> • specific refinements, • national communications • use Myth busters • use a case book
<p>14. The questions of Industrial Manslaughter - sentencing and insurance</p>	<ul style="list-style-type: none"> • no new legislation • use referral for criminal issues • national sentencing guidelines • establish a national tribunal
<p>15. Cross jurisdictional cooperation (Extra territorial)</p>	<ul style="list-style-type: none"> • no new legislation • use mutual agreements • guidelines for overseas work
<p>16. Authorisations – licenses, notifications</p>	<ul style="list-style-type: none"> • clarify definitions • evaluate notifications
<p>17. Psychological Health</p>	<ul style="list-style-type: none"> • complex and sensitive • it is about the <u>effect</u> of work on psychological health • beware applying control hierarchy to psychological health • beware measurement • clarify limits on control and influence • use Myth busters • use case book
<p>18. Public Health</p>	<ul style="list-style-type: none"> • be clear about link with work • national communications • use Myth busters, • use case book
<p>19. Behavioural Change</p>	<ul style="list-style-type: none"> • sustainable behaviour change requires more than just legislation
<p>20. Summary</p>	<ul style="list-style-type: none"> • refinement not significant change • problems can be addressed administratively • nationally consistent targeted communication (most people just want to know what applies to them and what they have to do) • consistent application – adopt 2016 model WHS laws • strengthen the IGA • support and encourage consultative risk-based approach • staged approach to National Compliance and Enforcement is supported but needs some refinement • case book with evaluations • national tribunal • use Myth busters • use case book

Appendix 1: Australian Government Guide to Regulation 2014 p5

Ten principles for Australian government policy makers

1. Regulation should not be the default option for policy makers: the policy option offering the greatest net benefit should always be the recommended option.
2. Regulation should be imposed only when it can be shown to offer an overall net benefit.
3. The cost burden of new regulation must be fully offset by reductions in existing regulatory burden.
4. Every substantive regulatory policy change must be the subject of a Regulation Impact Statement.
5. Policy makers should consult in a genuine and timely way with affected businesses, community organisations and individuals.
6. Policy makers must consult with each other to avoid creating cumulative or overlapping regulatory burdens.
7. The information upon which policy makers base their decisions must be published at the earliest opportunity.
8. Regulators must implement regulation with common sense, empathy and respect.
9. All regulation must be periodically reviewed to test its continuing relevance.
10. Policy makers must work closely with their portfolio Deregulation Units throughout the policy making process.

<https://www.cuttingredtape.gov.au/handbook/ten-principles-australian-government-policy-makers>
accessed 13 March 2018

Appendix 2: Independent Review of Occupational Health and Safety Compliance and Enforcement in Victoria Report November 2016

The Independent Review made 22 recommendations. Broadly these were incremental changes to:

1. Clarify compliance and enforcement (C&E) e.g.

Clarify C&E principles and practices

Monitor performance based measures against these principles

Review compliance and enforcement every 3 years (or when change)

Clarify the purpose of Compliance tools and communicate the circumstances for use

Include infringement notices for some offences and update use enforceable undertakings (EUs)

Enforce consultation requirements

Improve capability and supports e.g. checklists for inspectors

2. Communicate and implement a compliance and enforcement framework e.g.

Improve collaboration and information sharing

Publish an annual compliance and enforcement plan

Identify and document its compliance and enforcement framework with a guide developed by mid-2018.

Upgrade website

Increase visits and utilise tools available such as voluntary compliance and risk control plans

3. Enhance engagement with stakeholders e.g.

Engage more with stakeholders especially in developing strategies

Publish OHS research agenda

Increase the amount of published guidance and resources including some inspector checklists.

Improve access to training and ensure it includes C&E

Increase the publication of enforcement outcomes.

4. Collaborate and engage with other regulators and duty holders e.g.

Report on interventions under Australian Strategy (current 2012-2022).

Communicate any learnings and evaluate interventions of particular industries/high risk activities.

Evaluate strategic interventions and communicate outcomes

...and more

[Independent Review of Occupational Health and Safety Compliance and Enforcement in Victoria Nov 2016](#), accessed 10 March and 6 April 2018