

Working for business.  
Working for Australia



# Senate Education and Employment References Committee: Prevention, Investigation and Prosecution of Industrial Deaths in Australia

19 June 2018



**WORKING FOR BUSINESS.**

**WORKING FOR AUSTRALIA**

Telephone 02 6270 8000

Email [info@australianchamber.com.au](mailto:info@australianchamber.com.au)

Website <https://www.australianchamber.com.au>

**CANBERRA OFFICE**

Commerce House

Level 3, 24 Brisbane Avenue

Barton ACT 2600 PO BOX 6005

Kingston ACT 2604

**MELBOURNE OFFICE**

Level 2, 150 Collins Street

Melbourne VIC 3000

PO BOX 18008

Collins Street East

Melbourne VIC 8003

**SYDNEY OFFICE**

Level 15, 140 Arthur Street

North Sydney NSW 2060

Locked Bag 938

North Sydney NSW 2059

ABN 85 008 391 795

© Australian Chamber of Commerce and Industry 2017

This work is copyright. No part of this publication may be reproduced or used in any way without acknowledgement to the Australian Chamber of Commerce and Industry.

**Disclaimers & Acknowledgements**

The Australian Chamber of Commerce and Industry has taken reasonable care in publishing the information contained in this publication but does not guarantee that the information is complete, accurate or current. In particular, the Australian Chamber is not responsible for the accuracy of information that has been provided by other parties. The information in this publication is not intended to be used as the basis for making any investment decision and must not be relied upon as investment advice. To the maximum extent permitted by law, the Australian Chamber disclaims all liability (including liability in negligence) to any person arising out of use or reliance on the information contained in this publication including for loss or damage which you or anyone else might suffer as a result of that use or reliance.

## Table of Contents

<b>1</b>	<b>Introduction</b>	<b>1</b>
<b>2</b>	<b>Reductions in the Incidence of Work-Related Death, Injury and Illness</b>	<b>2</b>
<b>3</b>	<b>Harmonisation of work health and safety legislation</b>	<b>4</b>
<b>4</b>	<b>Improving Safety Outcomes for all: Safe-work Culture</b>	<b>6</b>
<b>5</b>	<b>Safety, Labour Hire and Temporary Work</b>	<b>9</b>
<b>6</b>	<b>Deterrence is only one side of the compliance triangle</b>	<b>12</b>
<b>7</b>	<b>Compliance: Do we have the right tools and are we using them?</b>	<b>14</b>
<b>8</b>	<b>Conclusion</b>	<b>27</b>
	<b>About the Australian Chamber</b>	<b>28</b>
	<b>Australian Chamber Members</b>	<b>29</b>

# 1 Introduction

1. The Australian Chamber of Commerce and Industry (the **Australian Chamber**) and its members throughout Australia believe that one death in the workplace is one too many, and that we should all actively strive to ensure no one dies at work. This is a long-standing goal shared by employers, trade unions, political leaders and regulators.
2. The business community welcomes the continued downward trend in work related fatalities nationally (see Section 2) and supports initiatives that genuinely increase safety in workplaces, and that deliver further reductions in workplace injuries and deaths.
3. The Australian Chamber welcomes the opportunity to make this submission to the Senate Education and Employment References Committee on the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia.
4. Industry whole-heartedly supports work health and safety legislation and its intent, including appropriately scaled penalty provisions for breaches as part of a wider system focussed on prevention through information and promotion. Prevention of workplace incidents, injuries and fatalities is the responsibility of everyone, and those who blatantly disregard the law, irrespective of their status as employers, employees or the general public, should be held accountable.
5. Effective legal regulation and systems are already in place to address work related fatalities arising from reckless disregard by a person who owes a duty of care. Any deficiencies in the existing suite of enforcement tools or opportunities to improve the effectiveness of long standing and well refined regulation and enforcement measures should be addressed before consideration of additional tools or mechanisms.
6. The Australian Chamber continues to support the process of workplace health and safety harmonisation (see Section 3). Harmonisation was and is widely welcomed. It is helping to make Australian workplaces safer and is strengthening the work of industries and employers to deliver safer workplaces. Industry strongly supports ongoing efforts to eliminate inconsistencies and duplication in WHS legislation across jurisdictions and authorities.

## Senate Committee - Terms of Reference

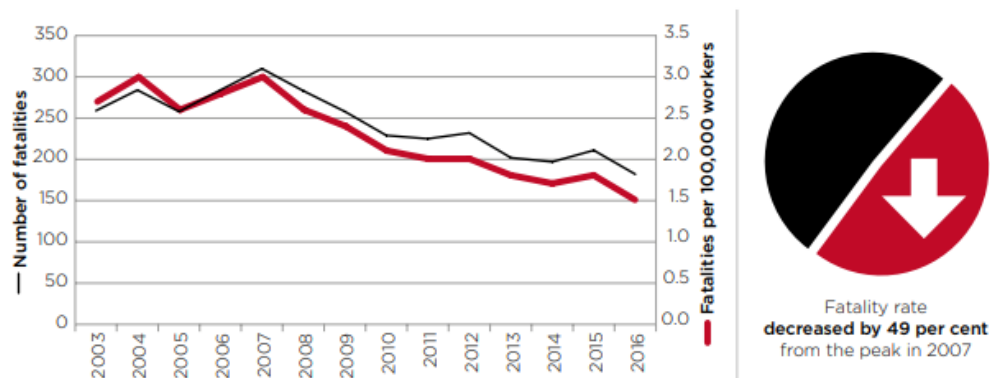
7. The Committee is examining the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia, with particular reference to:
  - a. the effectiveness and extent of the harmonisation of workplace safety legislation between the states, territories and Commonwealth);
  - b. jurisdictional issues surrounding workplace investigations which cross state and territory boundaries;
  - c. issues relating to reporting, monitoring and chains of responsibility between states, territories and the Commonwealth;
  - d. safety implications relating to the increased use of temporary and labour hire workers;

- e. the role of employers and unions in creating a safe-work culture;
- f. the effectiveness of penalties in situations where an employer has been convicted of an offence relating to a serious accident or death; and
- g. any other related matters.

## 2 Reductions in the Incidence of Work-Related Death, Injury and Illness

8. The Australian Chamber is concerned that the recent shift in attitudes towards inappropriately and inflexibly “hard” compliance and punitive measures as evidenced by the Queensland *Work Health and Safety and Other Legislation Amendment Bill 2017* and the current Northern Territory Review terms<sup>1</sup>, will result in a shift in focus away from education, advice and awareness (approaches which have clearly contributed to safer Australian workplaces).
9. This is not to suggest that regulations should not be ‘hard’ in terms of obligations or sanctions for non-compliance, and this submission in no way calls for softened regulation or compliance. Rather, at issue is the guiding character and approach of regulation, and how it is executed. We are contrasting the new (or return to) ‘hard’ compliance approach seen in Queensland with the genuinely balanced approach seen in other jurisdictions which is making progress toward reducing workplace injuries and deaths.
10. A balanced regulatory approach is the key to achieving safer workplaces, evidenced by the continued decrease in fatalities as well as serious injury claims nationally.
11. The national fatality incidence rate has been falling steadily over recent years, decreasing by 49% from 2.96 per 100,000 workers in 2007 to 1.5 per 100,000 in 2016 — the lowest rate since the series began in 2003, as shown in Figure 1.

Figure 1: Trends in work-related injury fatalities, 2003 to 2016 (source: Safe Work Australia<sup>2</sup>)



<sup>1</sup>Department of the Attorney-General and Justice, ‘Best practice review of workplace health and safety in the NT Terms of reference, NT’, <https://justice.nt.gov.au/attorney-general-and-justice/law/open-law-reform-consultation>, (accessed 18 June 2018).

<sup>2</sup>Safe Work Australia, ‘Key Work Health and Safety Statistics Australia 2017 work-related injury fatalities’, [https://www.safeworkaustralia.gov.au/system/files/documents/1709/em17-0212\\_swa\\_key\\_statistics\\_overview\\_0.pdf](https://www.safeworkaustralia.gov.au/system/files/documents/1709/em17-0212_swa_key_statistics_overview_0.pdf), (accessed 12 April 2018)

12. As at 25 May 2018, there have been 55 reported Australian worker deaths at work this year. We reiterate that no industrial deaths are acceptable and this figure remains unacceptably high.
13. However, this figure does represent a continued reduction in deaths by comparison to data recorded at this point last year (see Table 1).

**Table 1: Year-to-date 2018: Preliminary worker deaths by industry of workplace (as at 25 May, 2018)**

	Preliminary worker deaths year-to-date 2017	Preliminary worker deaths year-to-date 2018
Total worker deaths <sup>3 4</sup>	72	55

14. It is important that the current law and regulatory frameworks can continue to deliver the real improvements in aggregate safety performance we have seen across the past decade.
15. The Australian Chamber is a Member of Safe Work Australia (SWA). SWA operates nationally in collaboration with commonwealth, state and territory governments, industry and trade unions, and the community to achieve healthy, safe and productive working lives for all Australians.
16. SWA, jurisdictional regulatory agencies and harmonised legislation, amongst other jointly agreed approaches, are making a real contribution toward improving safety performance.
17. Each year, SWA produces an annual report on progress against the Australian Strategy<sup>5</sup>, a national plan of strategic priorities agreed on a tripartite basis by employers, unions and governments (commonwealth, state and territory).
18. The most recent report shows strong results against the agreed national targets. This indicates that the integrated strategy of activities being undertaken at the state, national and workplace level are having an impact. One of the key performance goals/criteria in the strategy is reducing the incidence of work-related death, injury and illness.

**Table 2: Results against performance criteria 2, SWA Annual Report 2016-2017**

Performance Criteria 2: reductions in the incidence of work-related death, injury and illness	
Target	By 2022: <ul style="list-style-type: none"> <li>reduce workplace fatalities due to injury by 20% or more</li> <li>reduce the incidence rate of serious workers' compensation claims by 30% or more</li> </ul>

<sup>3</sup> Note: Includes notifiable fatalities that occurred overseas

<sup>4</sup> Source: Safe Work Australia Note: The number of worker deaths listed in this table is based on initial media reports and is a preliminary estimate of the number of people killed while working. Once the appropriate authority has investigated the death, more accurate information becomes available from which Safe Work Australia updates details of the incident.

<sup>5</sup> Safe Work Australia, Annual Report 2015–16 (Australian Strategy Progress Report, feature story), <https://www.safeworkaustralia.gov.au/about-us/australian-work-health-and-safety-strategy-2012-2022> (accessed 18 June 2018).

Result	On track
<b>Analysis</b> <ul style="list-style-type: none"> <li>• 27% decrease in the number of traumatic injury fatalities, from 270 fatalities in the base period to 197 in 2013–2015<sup>6</sup>.</li> <li>• The 2022 target of at least a 20% reduction in work-related deaths is on track</li> <li>• 22% decrease in the incidence rate of serious injuries between the base period and 2014–15.</li> <li>• On track to meet the target of at least a 30% reduction by 2022</li> </ul>	

### 3 Harmonisation of work health and safety legislation

19. The Australian Chamber continues to support the harmonisation of WHS Laws, and has overall positive feedback on what it has delivered and is delivering in terms of safer workplaces. Harmonisation was and is widely welcomed and is making a real difference in reducing serious injury and fatalities.
20. The current 2018 Review of the Model Work Health and Safety (WHS) laws by Safe Work Australia (SWA)<sup>7</sup> will enable us to reflect on the extent to which model legislation is working. We would however note that there are a number of duplicative reviews and inquiries being conducted in parallel without an opportunity to reflect upon the outcomes and recommendations of the SWA review.
21. There is widespread support for harmonisation amongst employers. It has resulted in genuine improvements; however more still needs to be done to secure the benefits of genuinely harmonised approaches. Our main concerns centre on regulator inconsistency in relation to inspections, interpretation of duties and sentencing. This reflects the need for common or consistent legislation to be enforced in a common, consistent or shared manner.
22. Furthermore, while the three-tiered approach of the WHS Act, Regulations, and Codes provides flexibility in responding to changing circumstances and technology, it can at times lead to confusion given the sheer volume of regulation/documents. Regulators who also publish guidelines on issues of individual jurisdictional concern compound this problem.
23. Regulatory overload and inconsistent application create serious compliance concerns for employers, and detract from the capacity of employers to make workplaces safer through a more practical, integrated approach.

<sup>6</sup> **Note:** The annual number of work-related deaths due to injury is highly variable. To even out the volatility in the data, four years of data has been used to establish a base period (2007 to 2010), and a three-year rolling average used to track progress. The data covers all of Australia, for all industries, for the calendar year.

<sup>7</sup> Safe Work Australia, Review of the model WHS laws, <https://www.safeworkaustralia.gov.au/law-and-regulation/model-whs-laws/review-model-whs-laws> (accessed 18 June 2018).

## GHS implementation as an example of jurisdictional inconsistencies

GHS is a hazard classification and communication system for chemicals developed and maintained by the United Nations through the United Nations Sub-Committee of Experts on Globally Harmonised System of Classification and Labelling of Chemicals (UNSCGHS).<sup>8</sup>

In Australia, GHS is given effect through the Model WHS Regulations. As the Model WHS law package was not adopted consistently across Australia, the hazard classification and communication of workplace chemicals remains inconsistent.

*Example of classification and language differences:*

*Scope: In Model WHS law, GHS physico-chemical and human health hazards apply to chemicals for hazard classification. In Victoria, only GHS human health hazards apply.*

*Nomenclature – In Model WHS law, substances and products meeting one or more GHS hazard classification criteria are named “hazardous chemicals”. In Victoria, substances and products meeting GHS human health hazard criteria are named “hazardous substances”.*

While jurisdictions that have not adopted the Model WHS laws (or in the case of ACT omitted the chemical section (Part 7) of the Model WHS Regulations from adoption) have provisions to “accept” labels and Safety Data Sheets (SDS) meeting Model WHS law requirements, the practical implications of this are unclear.

For example, Victoria has stated that it has provisions in its OHS Regulations recognising equivalent WHS legislation (4.1.4(2), 4.1.5(2), 4.1.10(1) (a)), which allows determinations, SDSs and labels developed under WHS legislation to be acceptable in Victoria. However, when questioned with a specific example (lithium batteries), it was clear that additional requirements apply in Victoria, see below.

*Lithium ion batteries are not hazardous chemicals and SDS are not required in those jurisdictions where the Model Work Health and Safety (WHS) Regulations have been implemented (including the section on hazardous chemicals).*

*Victoria has stated that an SDS will be required for storage and handling of substances that are dangerous goods but are not classified as hazardous chemicals such as lithium batteries (see sub-regulation 20(1)(b), Dangerous Goods (Storage and Handling) Regulations 2012 (Vic))*

The Model WHS laws have not delivered a nationally consistent system for chemical classification and use.

Current Model WHS laws can best be described as an attempt at regulatory convergence, but in practice they require continued vigilance every time any update is made at the commonwealth or state/territory levels (which is difficult as the process is not necessarily transparent). This is unnecessarily overcomplicating the management of chemicals for employers with an increased risk of miscommunication of warnings and potential safety consequences.

<sup>8</sup> [http://www.unece.org/trans/danger/publi/ghs/ghs\\_welcome\\_e.html](http://www.unece.org/trans/danger/publi/ghs/ghs_welcome_e.html)



## 4 Improving Safety Outcomes for all: Safe-work Culture

24. The Australian Chamber welcomes the Committee's focus on this critical component of modern safety practice. Laws and regulations are very important, but they can only take us so far. Cultural change and safe cultures in workplaces are very powerful and of ever increasing relevance in delivering safe workplaces.
25. An analogy to road safety may be useful. Road safety authorities continue to promote the policing of speed, drink driving etc. and serious sanctions if one is caught, but increasingly they also emphasise changes in driver attitudes, and changes in the cultures of all road users.
26. Sanctions and compliance information remain very important in contemporary Australian workplaces, but the further significant innovations and gains in reducing serious injuries and fatalities are going to come from positive cultural changes, and the changes in attitudes and behaviours they yield.
27. An effective health and safety culture requires all those involved in the workplace to accept, internalise, and demonstrate shared responsibilities. Making Australian workplaces even safer must start with workplace cultures and attitudes, not with additional regulation.
28. The question is how to help Australians take the next steps to ensure workplaces become even safer, and to make further inroads in reducing fatalities and serious injuries.
29. A commitment to preventing and managing risks develops from a foundation of realistic, practical and encouraging guidance material suitable for and communicated to all workplaces. Regulation, in the vast majority of cases, will not be the right mechanism to further improve or further develop positive workplace cultures on safe working and nor are policy settings that encourage an adversarial, claims based environment.
30. Instead, Australia needs adaptable and nimble work health, safety, and workplace relations frameworks that encourage and support business leaders approaching their WHS and employment relations management in the most appropriate way for their workplace.
31. This Committee should give due consideration to how more Australian organisations can be encouraged to examine their workplace cultures and pursue cultures of safer work.
32. Safe-work culture can mean different things for different people, businesses and industries, and each workplace's culture must ultimately be its own. Instead of seeking to define safe-work culture (which differs from workplace to workplace, employer to employer, industry to industry), the Australian Chamber considers it more useful to articulate what our organisation and our members do not stand for.
33. Employers oppose recklessness, unsafe behaviours or a disregard for regulation. A culture that strays into this territory is one that delivers unacceptable levels of risk of serious injury or death.
34. However, employers need to have available the tools to manage poor and unsafe behaviours in their workplaces, and zero tolerance for unsafe or non-compliant behaviours will be part of a healthy and continuously improving safety culture for most, if not all, workplaces.

## Limitations on addressing safety imposed by other workplace regulation

35. Person(s) conducting a business or undertaking (PCBUs)<sup>9</sup> are often placed in an unenviable position as they attempt to reconcile their duties under WHS laws to provide a safe workplace and the provisions of the *Fair Work Act 2009* (Cth) (FW Act) that deal with unfair dismissal.
36. Employers are very concerned that the interaction of unfair dismissal laws with other obligations too often leaves them 'damned if they do and damned if they don't' in terms of acting on unsafe work or unsafe behaviours.
37. Under the current unfair dismissal regime, employers are compensating and having to reinstate employees who have bullied, threatened, harassed and assaulted their colleagues, and those in direct breach of employer policies and directions on safe work. This puts the safety of others in the workplace at serious risk and sends a terrible message to the victims of this behaviour and to the rest of the workforce. Employers are expected to maintain and enforce acceptable standards of conduct, however our laws are tying employers' hands and making it difficult to protect people in their workplace from risks such as failures to follow safety procedures, bullying and harassment.
38. Australian Chamber submissions to the Productivity Commission's 2015 inquiry into the workplace relations system highlighted this concern, including by referring to a case where an applicant found to have committed serious and repeated breaches of WHS protocols and procedures was nonetheless reinstated and awarded compensation because the impact of the decision was deemed too harsh on him financially.<sup>10</sup>
39. In its inquiry report, the Productivity Commission said:

*"The most problematic aspect of the current legislation is that an employee who has clearly breached the normal expectations of appropriate work behaviour may nevertheless be deemed to have been unfairly dismissed because of procedural lapses by the employer. For example, in one case a business dismissed two employees after they assaulted their supervisor. The FWC concluded that their physical assault was a valid reason for dismissal, but that the employer's failure to follow certain administrative procedures meant that the dismissals were unjust, unreasonable and therefore unfair (p.1).*
40. This led the Productivity Commission to recommend an amendment to the FW Act so that procedural errors alone are not sufficient to award compensation or restore employment in what would otherwise be regarded as a valid dismissal. The Australian Chamber recommended making a complete defence available if an employee was dismissed for the dominant purpose of complying with laws relating to discrimination, sexual harassment, bullying, WHS or any other relevant federal, state or territory law.
41. We have become ever firmer in this view based on ongoing feedback from our members, and seek a specific recommendation from this Committee to the effect that unfair dismissal laws need to be adjusted to better support the capacity of employers to manage workplaces for greater safety.

<sup>9</sup> The WHS Act places the primary duty of care and various other duties and obligations on a 'person conducting a business or undertaking' (PCBU). The meaning of a PCBU is set out in section 5 of the WHS Act.

<sup>10</sup> Harshness is one of the criteria for fair dismissal listed in s.385(b) of the Fair Work Act 2009.

42. Where it is established that an employer has taken disciplinary action in relation to an employee to protect her or his safety, to protect the safety, health and welfare of other employees (or clients, patients or the general public), or to meet their legal liabilities under safety, discrimination or other comparable legislation, the employee whose conduct placed persons at risk should not have access to compensation or reinstatement. Specifically:
- a. Where it is established that a dismissal has been effected to comply with WHS laws (or with laws against sexual harassment, discrimination or bullying), there should be no scope for the dismissal to be found to be harsh based on the circumstances of the individual ex-employee concerned (for example that their age or personal circumstances may impede their capacity to find another job).
  - b. Where it is established that a dismissal has been effected to comply with WHS laws (or with laws against sexual harassment, discrimination or bullying) valid cause should be deemed to have been established and procedural deficiencies should not be able to render that dismissal unfair.
43. When employers are confronted with circumstances of employees being reinstated despite there being a valid reason for termination of employment such as bullying or harassment, or placing the safety of people in the workplace at serious risk, this places them in an exceptionally difficult situation.
44. It can be summed up as simply as 'damned if you do' (terminate someone's employment for being unsafe and then face an unfair dismissal claim) or 'damned if you don't' (their unsafe behaviour leads to an injury to them, their workmates, or the public and keeping the person on risks undermining the safety culture the employer is trying to create and enforce).
45. These perverse outcomes are not in line with community expectations and can create a perception among people in the workplace that there will be no consequences for the individual arising out of misconduct (for example not complying with directions to work safely). This unacceptable situation can send a message that employees have no role in safety and that employers cannot take unsafe conduct seriously. Workplaces are cohorts of people and this threatens to engender the antithesis of the safe workplace culture necessary to secure further improvements in safety performance.
46. The Australian Chamber maintains that the unfair dismissal provisions of the FW Act operate in a manner that is not consistent with WHS law and the expectations placed on employers to comply with their duties under WHS law (and indeed how employers want to manage safety in their workplaces).
47. An employer, who can be held accountable for employee actions that result in risks to work health and safety, must be able to discipline and if necessary end the employment of those who place the safety of their colleagues and others at risk.
48. This is an important area to address to make Australian workplaces safer and reduce risks of serious injury or fatality.

[2017] FWC 2238 *Vic Taylor v Qube Ports* – It was found the Applicant “made a conscious decision not to follow the company’s requirement to use a guide(s) when towing caravans” [32] and “made a conscious decision not to follow a company requirement which had been stated at the beginning of the shift by the Shift Manager” [34].

No valid reason found despite the Applicant having been given prior warnings “for threatening behaviour towards a superior and for not following company procedure” [120]. The Applicant’s age and length of service were also considered to have made it more difficult for him to find alternative employment. In addition, the financial impact of the dismissal was considered severe given the employee had taken out a reasonable sized mortgage not long before he was dismissed” [119]. Compensation was ordered.

[2017] FWC 147 *Vic Palmer v USG Boral Building Products*. It was found that the Applicant had “consistently demonstrated that he could not or would not comply with reasonable and fundamental site rules, directions and procedures, particularly those relating to safety, despite warnings he received along the way” [78]. This conduct was found to be “ultimately inconsistent with the trust and confidence required in a continuing employment relationship” [78]. At first instance the Applicant’s conduct breached the Respondent’s safety policies and provided valid reason for dismissal.

However an appeal was allowed and the matter remitted in [2017] FWCFB 1929. It was subsequently found in [2018] FWC 654 that the Respondent failed to establish there was a valid reason for the Applicant’s dismissal. In particular it was found that the Respondent’s reliance on the unsafe work manoeuvre and the Applicant’s failure to wear safety glasses did not individually or collectively constitute conduct sufficiently serious to justify the Applicant’s termination

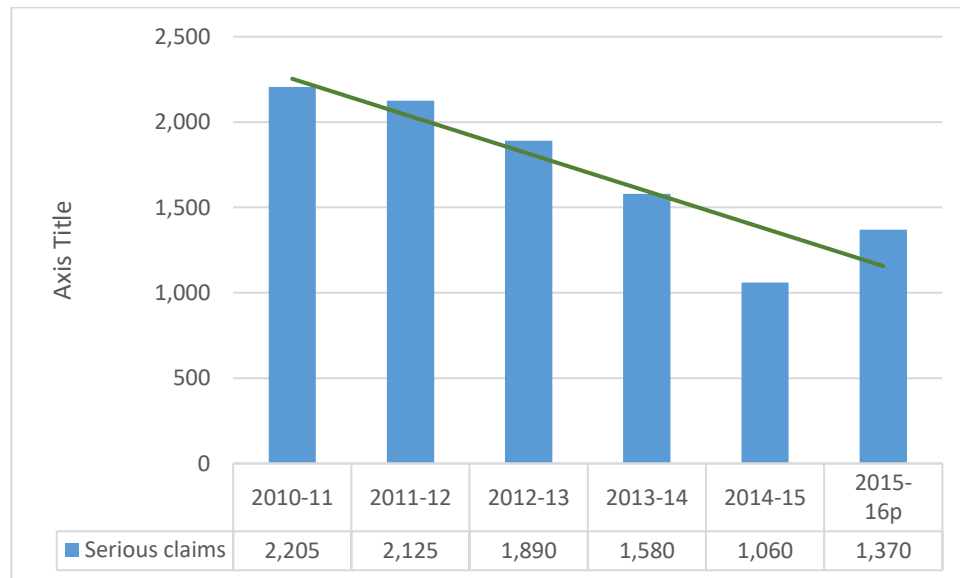
[2018] FWC 846 *Tas Brain v Nyrstar Hobart*. It was found the Applicant “was guilty of a serious safety breach”. This was on the basis that proceeded to energise equipment which was still being worked on by maintenance. It was found that he removed tags from the equipment when he should not have done so, and knew he should not have done so. It was also found he potentially exposed a maintenance worker to the risk of injury. However the termination was considered harsh. The Respondent failed to seek submissions from the Applicant in respect to sanction. Accordingly, it was found the Applicant was denied procedural fairness. Long length of service and likely difficulty in obtaining alternative employment due to age and skills were taken into account - appeal lodged.

## 5 Safety, Labour Hire and Temporary Work

49. Temporary work is generally work undertaken on a full or part time basis for a specified term or for the completion of a specified task or role. A 12-month ‘contract’ to replace someone on parental leave or employment solely for the roll out of a new IT system are examples of temporary employment.
50. Labour hire and temporary work are necessary to provide the flexibility required to respond to our rapidly changing economy and product and service cycles where work is not always ongoing or guaranteed. Where specialist or additional skills are required for discrete and finite periods, skill and labour gaps are able to be filled through these legitimate arrangements.
51. Irrespective of the number of ‘temporary’ and labour hire workers nationally, SWA data shows the overall number of worker fatalities and the fatality rate across all industries has been trending down since 2007.
52. There is limited evidence to indicate that employment type correlates to risk, once other variables are accounted for.

53. Statistics to date indicate that the labour hire industry is experiencing a downward trend in serious claims for the 'Labour Supply Services' industry (Table 3). Eleven worker fatalities were recorded over the five years from 2012 to 2016.

**Table 3: Number of serious claims<sup>11</sup> for Labour supply services industry (ANZSIC'06 - 7212), 2010-11 to 2015-16p, Australia<sup>12</sup>**



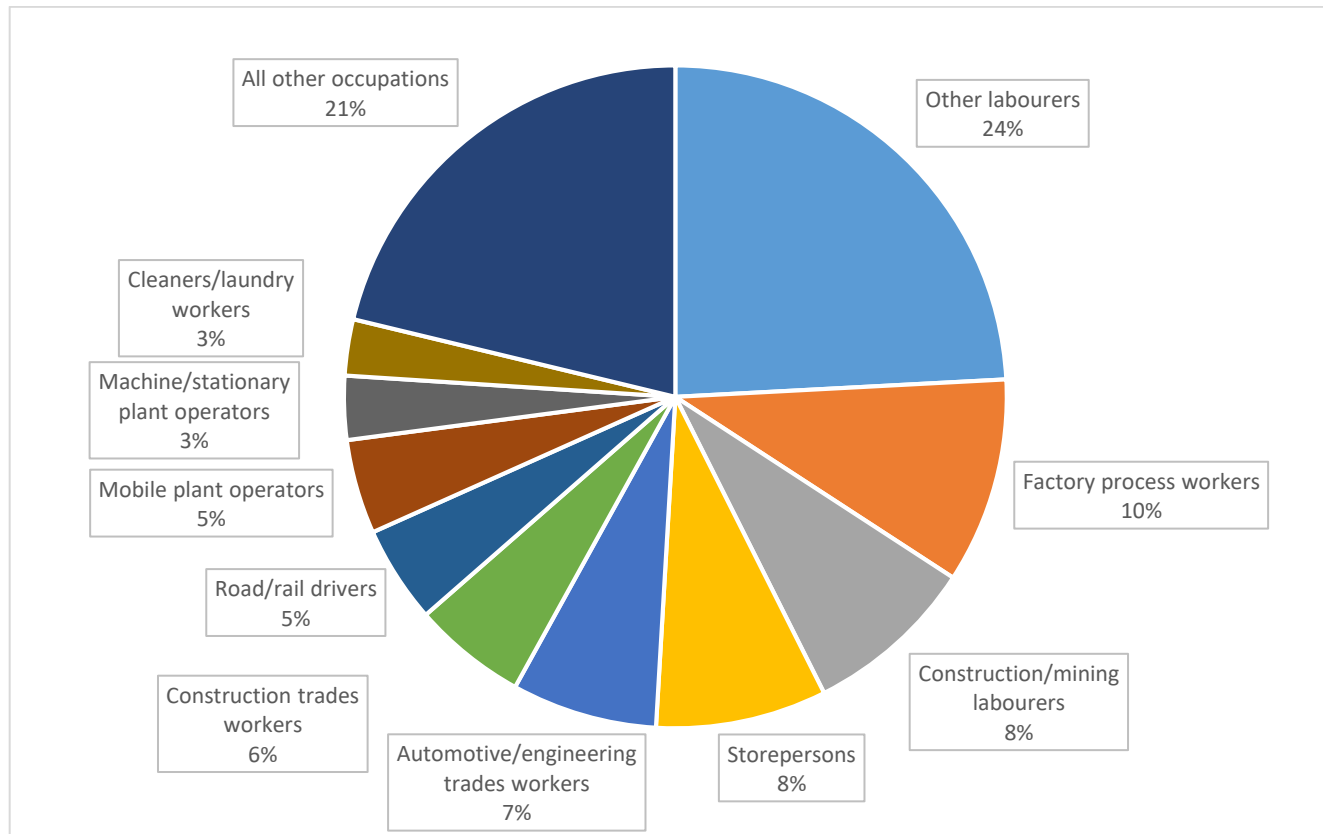
54. Furthermore, statistics produced by Safe Work Australia indicate that the rate of work-related fatalities and injuries are higher for particular occupations across all industries. This pattern also holds true for labour supply services coded workers as seen in Chart 1.

**Chart 1: Proportion of serious claims for Labour supply services industry (ANZSIC'06 - 7212), by Occupation (2011-12 to 2015-16p combined)<sup>13</sup>**

<sup>11</sup> Serious claims are defined as accepted workers compensation claims which have resulted in one or more working weeks lost (excluding fatalities & journey claims). Lodgement Year is all workers' compensation claims lodged between 1 July and 30 June.

<sup>12</sup> **Source:** Safe Work Australia's National Data-Set for Compensation-based Statistics, Notes: p Data for 2015-16 is preliminary and subject to change when new data is available.

<sup>13</sup> Note: Only occupations with the highest number of claims are included separately in the table.

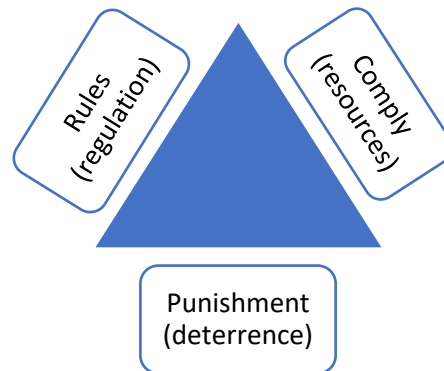


### Adequate laws exist to address any unlawful and unsafe practices

55. An employer in an employment relationship, regardless as to whether it is conducting a labour-hire business or a business of another kind, is obliged to comply with the legal obligations that are imposed on employers by a detailed and complex web of statutes including, but not limited to state based work health and safety laws and workers' compensation laws, federal and state anti-discrimination laws, superannuation laws, employment laws and taxation laws.
56. The Australian Chamber is unaware of any evidence suggesting that employers operating labour hire businesses or employers that hire employees sourced through labour hire agencies are any less compliant with their employment obligations relative to the general employer population / comparable enterprises in the same industry.
57. Labour hire and other 'non-standard' (sic) work forms are legitimate, play an important role in ensuring an agile and adaptable labour market and do not warrant targeted regulation which would create further barriers to their use.

## 6 Deterrence is only one side of the compliance triangle

58. Governments and Regulators, in reviewing and implementing regulation, should be mindful of each of the key components of effective compliance – awareness of the rules (regulation) and the ability to comply (resources). Punishment (deterrence) is only one side of this compliance triangle.



59. Regulators have a number of education and awareness programs, and much of what is done in Australia is world leading. However, measurement of their effectiveness and influence is limited.
60. Anecdotally, a majority of Australian businesses still struggle to identify regulations specific to their context and struggle to understand how to implement the regulations in a way that actually makes their workplaces safer. This challenge is unrelated to penalties and compliance.
61. The current system has scope to be made more balanced, through placing more equal emphasis on both prevention and enforcement. Penalties after the fact cannot be the primary driver of safer workplaces. Regulators need to bolster their inspectorate capabilities to ensure active monitoring of compliance before any incident, as well as improved promotion and information to ensure more employers are focussed on making their workplaces safer through practical, implementable means (and such promotion and information which also engenders workplace cultures that support safe working).
62. There is strong academic evidence to support the conclusion that increasing penalties is – most of the time – ineffective. Attempts at engineering criminal law rules to achieve a heightened deterrence effect are also generally ineffective.<sup>14</sup>
63. Regulatory agencies in developed countries have traditionally had broadly two enforcement styles available; the **deterrence strategy** that:

*'emphasises a confrontational style of enforcement and the sanctioning of rule-breaking behaviour.'*

<sup>14</sup> W. Voermans, *De aspirinwerking van sanction-eren (The Aspirin Effect of Sanctioning)*, (2007), Wolff Legal Publishers.



*It assumes that those regulated are rational actors capable of responding to incentives, and that if offenders are detected with sufficient frequency and punished with sufficient severity, then they and other potential violators, will be deterred from violations in the future.'*<sup>15</sup>

64. Or the **compliance strategy** that seeks to prevent harm rather than punish it and focuses on cooperation between regulator, enforcement authority and person rather than confrontation, and conciliation rather than coercion.
65. With the introduction of the model WHS laws, Australia sought to adopt an approach that combined the two styles, termed '**responsive regulation**'. However, governments, regulatory agencies and courts are increasingly reverting to an outdated, deterrence style approach.
66. The question and debate on whether penalties are an effective means to ensure regulatory compliance has gone on for centuries. Criminologists, legal economists and forensic psychologists, in particular, have addressed these issues.
67. In 1997, Elffers, together with Hessing, examined the role of the threat of punishment related to compliance with tax legislation, concluding:
  - a. Statutory sanctions are ineffective for the conformist compliers, i.e. those who comply with rules only because they fear punishment.
  - b. Statutory sanctions have an indirect effect on the identifiers, i.e. those who comply with rules because they want to belong to a social group for which compliance is the norm.
  - c. Statutory sanctions are superfluous for the internalisers, those who comply with rules because they have made these rules part of their own worldview.
68. Robinson and Darley<sup>16</sup> sought to answer the question "Does criminal law deter?", concluding it didn't after consideration of the behavioural science data. Tombs and Whyte<sup>17</sup> affirmed that across a heterogeneous variety of regulation scholars, there is a generalized rejection of 'deterrence-based' approaches, and Beckett and Harris characterized the use of monetary sanctions as misguided.<sup>18</sup>
69. Barrett, Lynch, Long and Stretesky conducted a longitudinal study examining the impact of the dollar amount of fines on compliance with environmental laws in Michigan, US. The research suggested that:

*"while noncompliance may slightly decrease immediately following a fine, there are few changes to a firm's long term compliance behaviour. Furthermore, analyses of these data suggest that total fines levied prior to the most recent fine actually have a positive relationship with noncompliance."*<sup>19</sup>
70. Lynch, Barrett, Stretesky, and Long<sup>20</sup> simultaneously examined thirty years of US EPA criminal cases and concluded the probability of detection and criminal punishment for a crime is unlikely, casting doubt on the utility of current deterrence-based models.

<sup>15</sup> Neil Gunningham, *Enforcement and Compliance Strategies*, in: Baldwin, Cave and Lodge (eds.), *The Oxford Hand-book of Regulation*, (2010) Oxford University Press, chapter 7 (p. 120-145).

<sup>16</sup> Robinson, P & Darley, J., *Does Criminal Law Deter?: A Behavioural Science Investigation*, (2004) Oxford Journal of Legal Studies, 42, 2, p. 173-205.

<sup>17</sup> Tombs, S & Whyte, D., *The myths and realities of deterrence in workplace safety regulation*, (2013), British Journal of Criminology, doi:10.1093/bjc/azt024

<sup>18</sup> Beckett, K., & Harris, A., *On cash and conviction: Monetary sanctions as misguided policy*, (2011). Criminology & Public Policy, 10(3), 509–537.

<sup>19</sup> Barrett, K.L., Lynch, M.J., Long, M.A. et al. *Am J Crim Just* (2017). <https://doi.org/10.1007/s12103-017-9428-0>

<sup>20</sup> Lynch, M. J., Barrett, K. L., Stretesky, P. B., & Long, M. A. *The weak probability of punishment for*



71. Overall, whilst liability, reputational damage, compensation and sanctions are all important and interact to form a web of incentives for either compliance or non-compliance, there is no mechanical effect of “severe sanctions leading to higher compliance”, in either criminal justice, or in the enforcement of business regulations.<sup>21</sup>
72. Research suggests that criminal prosecution is unlikely to be the most appropriate or effective tool to ensure that non-compliance is addressed, or behaviour changed.
73. More flexible and risk-based tools are more likely achieve improved regulatory outcomes, such as greater use of Enforceable Undertakings (EUs).

## 7 Compliance: Do we have the right tools and are we using them?

74. There has traditionally been a greater focus on regulation and its design, and on regulatory review, than on delivery mechanisms such as inspections and other enforcement tools.
75. There is however ample evidence that enforcement and inspections are crucial to how the regulatory sphere affects businesses, safety outcomes and the economy more broadly. In a report to the OECD on inspection reform, Blanc stated that:<sup>22</sup>

*First, inspections and enforcement actions are generally the primary way through which businesses, in particular SMEs, “experience” regulations and regulators.*

*Second, inadequate approaches or lack of changes in enforcement and inspections can mean that changes in regulations fail to deliver their full benefits.*

*Third, evolutions in inspections and regulatory delivery to make them more compliance-focused, more supportive and risk-based can all lead to real and significant improvements for economic actors, even within the framework of existing regulations (which may, for different reasons, be very difficult to change “on the books” – so the ability to change the way they are enforced in practice matters).*

*Finally, enforcement and inspections are as much about methods and culture as institutions, and as much about organizational mechanisms as legislation.*

### Inspection models vary

76. The main complaints from industry in relation to inspections are:
  - a. The volume of inspecting agencies, inspectors, and inspection visits.

---

*environmental offenses and deterrence of environmental offenders: A discussion based on USEPA criminal cases, 1983–2013*, (2016). *Deviant Behavior*, 37(10), 1095–1109.

<sup>21</sup> Blanc, F., “Reforming Inspections: Why, How and to What Effect?”, (2012), OECD, Paris.

<sup>22</sup> Blanc, F., “Reforming Inspections: Why, How and to What Effect?”, (2012), OECD, Paris.

- b. Frequent overlaps, duplications, lack of coordination (e.g. a quarry may have a WHS inspector, Mines Safety inspector and EPA inspector visit all within the same week).
  - c. Lack of consistency, coordination and coherence between individual inspectors and State regulators – lack of uniform structure, guidelines and approaches.
77. Most businesses are more concerned with how legislation is implemented and enforced than with how it is written. Guidance material is critical to businesses understanding their duties and managing risk. Even more critical however is how inspectors interpret and use that guidance and apply it in practice to the business they are present at for the inspection.
78. Regulatory delivery needs to reflect the intent of the regulation. Any inconsistencies only serve to create further confusion and uncertainty about responsibilities under the law. The more complex the regulations are and the larger the volume of supplementary materials, the more likely you are to have inconsistencies.
79. The way in which inspections are conducted by individual inspectors (i.e. some may be flexible and look to the 'spirit' of the provision whereas others may stick to the written rules) can make identical regulation translate to very different compliance realities.

### It's in the delivery

A national business may have its workplaces in different locations such as South Australia, New South Wales and Queensland, each of which has its own WHS inspectors. The regulation the business has to comply with may be the same (as all are based on the model WHS Act) however the business is faced with different interpretations of the same provisions by the inspectors for its workplaces in each state. The regulation itself is not the problem, it's the implementation. Any clarity and simplicity gained by 'harmonised' legislation disappears creating confusion and likely a costly systems design in order to meet each state inspectors 'interpretation'.

80. Johnstone's report to Safe Work Australia highlighted this reality. He found that different inspectors would factor in a duty holder's attitude or level of cooperation as a criterion in determining the appropriate enforcement response:<sup>23</sup>

*[T]hat whole attitude test comes in whereby: 'I'm here to assist you. I've noticed there's a few issues. I can help you, give you that information to get you up to a standard where it complies'. And if you get resistance from there then you have to look at your alternatives. ... And that's where you start looking at: 'well I'm in a position where I now need to issue an improvement notice because: 'I've provided you information, I will assist you but you need to meet me halfway'. (inspector).*

81. Compared to:

*If there's a matter that requires prohibiting of work because it's unsafe, then that notice is issued. The motivation, level of knowledge or attitude or whatever of the PCBU doesn't come into it because ... I think it gets a bit subjective then.*

<sup>23</sup> Johnstone., 2016, Report to Safe Work Australia "Project 2: Sentencing of Work Health and Safety Offenders", National Research Centre for Occupational Health and Safety Regulation

*Can you imagine: 'oh, you got a notice because you've got a bad attitude', as opposed to: 'you've got a notice to prohibit this work because it's unsafe and it could seriously injure or harm a person'. And same with improvement notices, if there's a need to improve a system or whatever then that's issued. (manager).*

### **Inconsistent use of enforcement tools and delivery mechanisms**

82. Not only is there evidence of individual differences in inspection style by inspectors and significant overlap and lack of consistency by various regulatory agencies, there is also significant variation in the use of available compliance and enforcement tools by State and Territory Regulators.
83. In Table 4 below, significant differences in adoption of available compliance and enforcement tools and consistency of their use between each of the WHS regulatory agencies is evident.

**Table 4: The use of compliance and enforcement tools by the seven regulators in the jurisdictions that had implemented the model WHS laws by January 2014.**

*Note: These agencies are: WorkSafe ACT, Comcare, WorkCover NSW, NT WorkSafe, Workplace Health and Safety Queensland (WHSQ), SafeWork SA (SWSA) and WorkSafe Tasmania. (Information below has been sourced from SWA commissioned reports and anecdotal experience by industry members)<sup>24</sup>.*

Category of tools	Tools	Description of activities	Used by	Consistency <i>*(qualitative research measure and anecdotal evidence from industry)</i>
AWARENESS, INFORMATION AND TRAINING INITIATIVES	General awareness raising	Media alerts, social media, marketing material, electronic updates and the agency's website	All	Not consistent – materials and use of medium vary.
	Engagement	Agency convenes meetings and forums with stakeholders		
	Advice and information	Provides advice through face-to-face contact in the workplace (and referring to website information) and in presentations (which may be online as webinars).	All	Not consistent.
	Education and training	Designs and delivers their own education and training programs for PCBUs and other duty holders in their jurisdictions.	Not all	Not consistent.
PROACTIVE INTERVENTIONS	Inspection	Conducts inspections of workplaces, and most regard an 'inspection' as a generic term embracing workplace visits for the purpose of conducting proactive interventions or reactive responses to incidents, complaints or for the resolution of issues and disputes.	All	Not consistent. Different models used.
	Audit	Conducts 'audits' with specific regulatory requirements or of WHS management systems.	All	Not consistent.
REACTIVE RESPONSE	Issue and dispute resolution	Each regulator has processes to respond to requests from workplace parties to assist in resolving issues and disputes over a range of matters under the WHS Acts – negotiating work groups, elections for HSRs, provisional improvement notices, 'cease work' decisions, the constitution of health and safety committees, and entry permit holder (EPH) matters relating to the union entry provisions.	All	Not consistent. Agencies take different approaches to issue and dispute resolution. Some regulators are more proactive and, in some cases, innovative in seeking to minimise issues arising, or to facilitate the resolution of issues that do arise. One agency labels these activities as 'workplace relationship resolution', and also deals with allegations of bullying and harassment through this process.

<sup>24</sup> . Bluff, Johnstone & Gunningham., 2015, Report to Safe Work Australia "Project 3: Regulator Compliance Support, Inspection and Enforcement", National Research Centre for Occupational Health and Safety Regulation.  
Johnstone., 2016, Report to Safe Work Australia "Project 2: Sentencing of Work Health and Safety Offenders", National Research Centre for Occupational Health and Safety Regulation.

Category of tools	Tools	Description of activities	Used by	Consistency <i>*(qualitative research measure and anecdotal evidence from industry)</i>
	Dialogue and negotiation	Dialogue is routinely part of inspector visits to workplaces.	Not all	Not consistent. Some inspectors comfortable with the concept of 'negotiation' as part of what they do, but inspectors in two jurisdictions do not get involved in 'negotiation' because the legal requirements must be complied with, within a reasonable time.
	Verbal direction	Most regulators prefer inspectors to put directions in some written form (a notice or written direction as below).	Not all	Not consistent. In some jurisdictions, inspectors give 'verbal' directions where a matter can be, and is, addressed while an inspector is present at the workplace.
	Written directions	Most regulators make use of 'written directions', short of an improvement notice, at the end of an inspection or to address minor issues reported to the regulator without the regulator visiting the workplace. This may be a report/record of inspection indicating matters requiring attention. For lesser matters, regulators can write to a PCBU advising of action needed to comply with the legislation, in lieu of visiting the workplace, as with an 'administrative action letter'.	Not all	Not consistent.
	Letter of statutory obligation	One jurisdiction issues these to formally remind a duty holder of their obligations under the legislation, normally after an inspection or audit where the regulator forms a reasonable belief that a duty holder may be in contravention of, or is not fulfilling their obligations under, the legislation.	Not all	Used only in one jurisdiction.
	Improvement notices	In each jurisdiction inspectors issue improvement notices where they have a reasonable belief that a contravention has occurred, in order to require remedial action within a time limit.	All	Not consistent. The number of improvement notices issued tends to vary from jurisdiction to jurisdiction, and from year to year within each jurisdiction.
	Prohibition notices	Inspectors can issue prohibition notices where there is a serious risk to health and safety emanating from an immediate or imminent exposure to a hazard.	All	Not consistent. The patterns of usage of prohibition notices across jurisdictions resemble the pattern for improvement notices.

Category of tools	Tools	Description of activities	Used by	Consistency <i>*(qualitative research measure and anecdotal evidence from industry)</i>
	Infringement notices	In all jurisdictions, infringement notices (also known as penalty or expiation notices) are provided for under the WHS Acts, or separate statutes or regulations creating infringement notices generally.	Not all	At the time of data collection they were in use in five jurisdictions. One WHS regulator had decided not to implement this mechanism. Another regulator was still determining how to implement them, and anticipated that their use could be an outcome of case conferencing rather than at the sole discretion of an inspector.
	Formal investigation for prosecution	Each regulator has processes for the formal investigation of certain matters with a view to prosecution. Most have specialist investigators: in some jurisdictions these are part of an organisation-wide investigations team or portfolio, and in one jurisdiction investigators are based in regional offices. Investigations are part of the role of generalist inspectors in agencies that do not have specialist investigators, as well as in some areas of the operations of some regulators that do have specialist investigators.	All	Not consistent. Some, but not all, of the WHS regulators have specialist investigators. These people are trained to conduct investigations to criminal prosecution standards, and often have a policing background. In the jurisdictions that do not have specialist investigators, generalist inspectors conduct investigations.
	Letter of caution	This is a warning to an entity or individual that the regulator has detected a breach of the WHS Act and has reasonable prospects of proving this in court.	Not all	Used only in one jurisdiction.
	Required attendance	Mechanism which involves requiring a representative of an organisation to appear to provide information.	Not all	Used only in one jurisdiction.
	WHS undertakings (enforceable undertakings EUs)	As provided in the WHS Acts, each regulator may accept an undertaking from a duty holder in lieu of court proceedings (except for a category one offence). It is the duty holder, not the regulator, which makes the offer of an undertaking.		HWSA (under the leadership of WHSQ) has produced guidelines and information publications for enforceable undertakings. Two regulators have adopted these HWSA guidelines and information publications. One regulator has adopted the information publications, but not the guidelines. Two other regulators have guidelines and information publications with essentially the same information as the HWSA material, but with a few small substantive modifications. One regulator has not yet adopted or developed guidelines or information publications.

Category of tools	Tools	Description of activities	Used by	Consistency <i>*(qualitative research measure and anecdotal evidence from industry)</i>
				At the time of data collection, two regulators did not yet have a structure to assess undertakings. Five regulators had established processes to consider offers of enforceable undertakings. There is no common approach.
	Prosecution (and associated fines or orders)	Each regulator can initiate prosecutions for contraventions of their WHS Acts or regulations.	All	In some jurisdictions, prosecutions are conducted by the office of the Director of Public Prosecutions or the Crown Solicitor's Office.
	Licenses, registrations or other authorisations	Each regulator administers a series of authorisations for major hazard facilities, prescribed types of plant and hazardous work, scheduled carcinogens, dangerous substances, training providers (HSR and EPH), and assessors for high risk work which, according to the issue, may be licenses, registrations, accreditations or approvals. These authorisations may impose conditions and may be revoked, suspended or cancelled as a mechanism to deal with unacceptable conduct or practices.	All	Not consistent.
	Fees and charges	This mechanism is only used by one regulator, which charges PCBUS according to the type of regulatory activities it implements with them, and responses to more serious interventions attract higher fees.	Not all	Used only in one jurisdiction.
	Review of decisions	An eligible person may make a written application to each regulator for review of certain decisions by inspectors or other officers (e.g. relating to authorisations).	All	In each jurisdiction, an Internal Review Panel conducts a merits review based on the material available to the original decision maker and new, relevant information, and may confirm, vary, or set aside and substitute the original decision. External review of decisions by the regulator, including internal review, can be conducted by a court, commission or tribunal.

84. There are significant differences between the regulatory approaches of each of the seven WHS regulatory agencies in the jurisdictions in which the model WHS Act has been enacted. There are key divergences in:
- Agency size and structure.
  - Approaches to training inspectors and investigators.
  - Whether there are specialist investigators or whether local inspectors carry out investigations.
  - Protocols for investigations.
  - Approaches to accepting enforceable undertakings.
  - Prosecutorial decision-making.<sup>25</sup>
85. Every one of these identified factors will influence the effectiveness of harmonisation, penalties, safety outcomes and community perceptions.
86. In addition to the differences in approaches to inspection, investigation and prosecutorial decision-making, there are two significant differences between the jurisdictions in which the model WHS Act has been implemented:
- The type of court in which the prosecution is conducted (and, consequently, the maximum penalty that may be applied) (see Table 5).
  - The involvement of the Office of the Director of Public Prosecutions or Crown Law (see Table 6).

**Table 5: Comparison of type of court in which the prosecution is conducted for each category 1-3 and use of WHS specialists.**

	Magistrates Court/ Local Court (NSW)	Industrial Court	District Court	Supreme Court
<b>Cat 1</b>	SA, NT can elect	ACT	QLD, NSW, SA	TAS, ACT, NT, NSW
<b>Cat 2</b>	TAS, SA, NSW, QLD, NT	ACT	SA & NSW can elect	
<b>Cat 3</b>	TAS, SA, NSW, QLD, NT	ACT NSW can elect	SA can elect	
<b>WHS Specialists</b>	No (NSW) No (QLD) No (SA)	No (ACT)	Some (NSW) No (QLD)	No (TAS)

<sup>25</sup> . Bluff, Johnstone & Gunningham., 2015, Report to Safe Work Australia "Project 3: Regulator Compliance Support, Inspection and Enforcement", National Research Centre for Occupational Health and Safety Regulation.



**Table 6: Jurisdictions that have adopted the model WHS Act and the involvement of the Office of the Director of Public Prosecutions or Crown Law.**

	NSW	QLD	TAS	ACT	SA	NT
Regulator runs prosecution	Yes	Yes				Yes. Outsources to private Bar
Office of Crown Law involved					Yes	
DPP involved	May take over	S231 procedure/ Cat 1 may be involved	Yes	Yes		

87. Each of the jurisdictions mentioned have adopted the Director of Public Prosecutions' Prosecution Policy to guide prosecutorial decision-making in all criminal prosecutions, including for WHS offences. In addition, all Australian WHS regulators are signatories to the National Compliance and Enforcement Policy (NCEP<sup>26</sup>).
88. Irrespective of this, the WHS agencies do not take a common approach to prosecutorial decision-making and use of sentencing options (see Table 7).

<sup>26</sup> Safe Work Australia, 2011, National Compliance and Enforcement Policy, <https://www.safeworkaustralia.gov.au/doc/national-compliance-and-enforcement-policy> accessed 18 June 2018.

**Table 7: Use of sentencing options by jurisdiction (based on RegNet report<sup>27</sup> and search of regulator website and published prosecution and sentencing data)**

Sentencing Options	NSW	QLD	TAS	ACT	SA	NT
Conviction & Fine	Yes	Yes	Yes	Yes	Yes	Yes
Fine without conviction	No		Not possible <i>s7(e) of the Sentencing Act 1997 (Tas)</i>		No	
Enforceable Undertaking s216	Yes	Yes	No		Yes	Yes
Non-pecuniary sanctions	Yes <i>However unlikely for District Court</i>	Yes	No	No	No ( <i>information could not be found</i> )	No ( <i>information could not be found</i> )
➤ Adverse publicity orders s236		No				
➤ Restoration order s237	Yes	No				
➤ WHS project order s238		No				
➤ Court-ordered WHS undertaking s239	Yes	Yes				
➤ Injunction						
➤ Good behaviour bonds		Yes				
➤ Training orders s241	Yes	Yes				

<sup>27</sup> Johnstone., 2016, Report to Safe Work Australia "Project 2: Sentencing of Work Health and Safety Offenders", National Research Centre for Occupational Health and Safety Regulation.

## Effective WHS interventions

89. In its review of effective WHS interventions, Safe Work Australia (2013) concluded that different approaches work better for some companies than for others.
90. For example, large businesses may respond best to enforcement approaches where their public reputation could be at greater risk (such as with adverse publicity orders), whereas informational and lower level persuasive approaches are often better suited to small businesses.
91. Enforceable undertakings (EUs) are another tool available for compliance and are negotiated between the business and the regulator as an alternative to undertaking court proceedings.
92. Industry welcomed EUs in the model WHS legislation as a legitimate tool in compliance activities, recognising they have been used outside of WHS at the federal level for some time (i.e. ACCC, ASIC etc.). The advantages of enforceable undertakings are that, unlike prosecutions, they can produce better results in respect of lasting compliance and do so across a wider range of workplaces and situations.
93. EU's are a transparent process, with both company / organisation names, industries of operation and the terms of the EU published on regulator websites.<sup>28</sup>

### Example: NSW Resources Regulator

The NSW Resources Regulator accepted the joint EU from Ulan West Mine's mine holder, Ulan Coal Mines Ltd, and operator, Ulan West Operations Pty Ltd, after finding it would deliver better safety outcomes than a prosecution.

In accepting the EU, Resources Regulator chief compliance officer Anthony Keon said "the undertaking is considered significant, and will provide tangible benefits to the mining industry and the community".

Ulan Coal Mines and Ulan West Operations will spend \$90,000 on developing and delivering a "skills workshop" for managers and supervisors from mining operations in the Mudgee region, and their contractors according to the EU.

They will also spend \$60,000 on mental health training seminars for these organisations and provide \$100,000 to surrounding public health facilities to fund equipment for musculoskeletal disorder rehabilitation. The undertaking is estimated to cost \$250,000, and the two companies will pay the regulator's costs of \$252,744.

### Example: SafeWork SA

SafeWork SA alleged SRG Building (Southern) Pty Ltd breached s32 of the State WHS Act. The regulator accepted SRG's enforceable undertaking because it "delivers substantial work health and safety benefits to SRG workers, the construction industry in general and the broader community".

The EU document outlines that the employer was issued a prohibition notice after the fatality, and responded by reviewing its system of work for scissor lifts, and designing and manufacturing early-warning devices to be used on EWP's. It also introduced new safety initiatives and safety standards including a "take five" initiative and requiring executive sign-off for EWP use.

<sup>28</sup> See for example: <https://www.worksafe.vic.gov.au/pages/laws-and-regulations/enforcement/prosecution-result-summaries-and-enforceable-undertakings>

The undertaking is expected to cost \$461,920 in the first year, and \$449,600 over the following 24 months, taking the total estimated cost to \$911,520.

The EU document states that SRG committed to:

- \$76,500 on supplying nominated organisations with the early-warning devices to be used throughout the industry, and grant them use of its design and other relevant intellectual property;

"The design and manufacture of such a device is an initiative in the industry that sets a new standard for safety when using a scissor lift," the document says. "It can be further adapted and allow the industry to further improve the current work system".

- \$72,010 to delivering safety training to all levels of staff;
- \$35,200 to implementing a health and wellbeing program targeting manual handling and body awareness;
- \$56,210 to introducing an intranet documents management system;
- \$36,200 on establishing an annual safety awards scheme and participating in SafeWork SAs "safe work month";
- \$169,000 on employing a national quality and system manager; and
- \$16,800 on strategies that deliver community benefits, including expanding its workplace and graduate programs and presenting health and safety education sessions for TAFE SA.

94. In 2017, 25 EUs were accepted around Australia with the total value of actions amounting to \$7,786,448. The average value of actions under EUs in 2017 was \$311,458. However, increasingly there is a trend for larger companies to undertake actions averaging \$800,000 to \$1 million. This financial cost is not insignificant.
95. The most frequent type of actions relate to training, information sharing and auditing with an increasing amount also focusing on the development of new preventative or risk minimising technologies.

### **Enforceable Undertakings not consistently applied across jurisdictions.**

96. Although welcomed by industry and seen as an effective behavioural change tool beneficial to the community more broadly, the use of EUs across jurisdictions and by regulators is again not consistent.
97. Heads of Workplace Safety Authorities (HWSA) has produced guidelines and information publications for EUs. These nationally consistent materials included an overview, guidelines for proposing an enforceable undertaking, and three further publications: information at a glance, information for injured persons, and information for auditors.

98. A report into “Regulator Compliance: Support, Inspection and Enforcement” conducted for Safe Work Australia by the National Research Centre for OHS Regulation<sup>29</sup> found that:

*“Two regulators have adopted these HWSA guidelines and information publications. One regulator has adopted the information publications, but not the guidelines. Two other regulators have guidelines and information publications with essentially the same information as the HWSA material, but with a few small substantive modifications. One regulator has not yet adopted or developed guidelines or information publications.”*

99. Linked to Section 3 of this submission, this is not harmonisation, this is atomisation and each jurisdiction going its own way. It is little wonder the benefits of harmonisation stand to be better realised.
100. Although the materials developed were designed for national consistency, the adoption and use of them have not been applied consistently by jurisdictions. Furthermore, the report concluded that there is no common approach to consider offers of EUs, although in each instance a proposed undertaking will be evaluated by a team or panel. For most of these regulators, the team or panel is made up of agency staff.
101. The Report recommended that the Australian WHS regulators discuss the most effective use of EUs and, in particular:
- a. How other WHS regulators can build on Queensland’s experience in using EUs?
  - b. Should regulators do more to encourage duty holders to propose undertakings?
  - c. Do undertakings have a place in a business engagement strategy to improve systematic work health and safety management?
  - d. What can regulators do to reduce the time it takes to negotiate undertakings?
  - e. What is the best way to monitor the implementation of accepted undertakings, and to enforce undertakings that have not been properly implemented within specific time limits?
102. Industry is calling for SWA to conduct a review of enforceable undertakings and, in particular:
- a. The consistency of application and approach to consideration of offers.
  - b. Whether regulators should do more to encourage duty holders to propose undertakings?
  - c. What regulators can do to reduce the time it takes to negotiate undertakings?
  - d. What is the best way to monitor the implementation of accepted undertakings, and to enforce undertakings that have not been properly implemented within specific time limits?

---

<sup>29</sup> Bluff, Johnstone & Gunningham., 2015, Report to Safe Work Australia “Project 3: Regulator Compliance Support, Inspection and Enforcement”, National Research Centre for Occupational Health and Safety Regulation.

## 8 Conclusion

103. We commenced this submission by reiterating the commitment of employers to actively strive to ensure no one dies at work, and to continue to work with trade unions, political leaders and regulators towards this most important of outcomes.
104. No deaths are acceptable, and employers/PCBUs, workers, trade unions, regulators and others must strive for continuous reductions in workplace deaths and serious injuries.
105. Employers are encouraged by recent downwards trends in fatalities and serious injuries, though not into complacency, an uncritical approach or unwillingness to continue to improve the system. Rather, contemporary, balanced approaches that target information, awareness, cultural and attitudinal change are yielding real improvements, and are seeing more Australians head home safely from work.
106. Continuing to enhance these approaches, which support and complement the important, well-established role played by compliance and enforcement, should provide a solid foundation for further improvements in the safety of Australian workplaces.
107. Better realising the benefits of harmonisation (in practice and implementation, as well as in the form of regulation), and fewer jurisdictions deviating from harmonised approaches should help deliver further improvements in the health and safety of Australian workplaces.



## About the Australian Chamber

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia, speaking on behalf of Australian business at home and abroad.

The Australian Chamber represents more than 300,000 businesses of all sizes, across all industries and all parts of the country employing over 4 million people. It advocates on behalf of the business community on issues including economics, tax, trade, workplace relations, education and training and work health and safety.

The Australian Chamber represents Australian business in international forums including the International Chamber of Commerce, the International Organisation of Employers and the OECD's Business and Industry Advisory Council.

Our vision is to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

## Australian Chamber Members

AUSTRALIAN CHAMBER MEMBERS BUSINESS SA | CANBERRA BUSINESS CHAMBER | CHAMBER OF COMMERCE  
NORTHERN TERRITORY | CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND | CHAMBER OF COMMERCE AND  
INDUSTRY WESTERN AUSTRALIA | NSW BUSINESS CHAMBER | TASMANIAN CHAMBER OF COMMERCE AND INDUSTRY  
| VICTORIAN CHAMBER OF COMMERCE AND INDUSTRY MEMBER NATIONAL INDUSTRY ASSOCIATIONS: ACCORD –  
HYGIENE, COSMETIC AND SPECIALTY PRODUCTS INDUSTRY | AGED AND COMMUNITY SERVICES AUSTRALIA | AIR  
CONDITIONING AND MECHANICAL CONTRACTORS' ASSOCIATION | ANIMAL MEDICINES AUSTRALIA | ASSOCIATION OF  
FINANCIAL ADVISORS | ASSOCIATION OF INDEPENDENT SCHOOLS OF NSW | AUSTRALIA ARAB CHAMBER OF  
COMMERCE AND INDUSTRY | AUSTRALIAN AUTOMOTIVE DEALER ASSOCIATION | AUSTRALIAN BEVERAGES COUNCIL  
| AUSTRALIAN DENTAL ASSOCIATION | AUSTRALIAN DENTAL INDUSTRY ASSOCIATION | AUSTRALIAN FEDERATION OF  
EMPLOYERS AND INDUSTRIES | AUSTRALIAN GIFT AND HOMEWARES ASSOCIATION | AUSTRALIAN HOTELS  
ASSOCIATION | AUSTRALIAN INTERNATIONAL AIRLINES GROUP | AUSTRALIAN MADE CAMPAIGN LIMITED |  
AUSTRALIAN MEAT PROCESSOR CORPORATION | AUSTRALIAN MINES AND METALS ASSOCIATION | AUSTRALIAN  
MOBILE AND TELECOMMUNICATIONS ASSOCIATION | AUSTRALIAN PAINT MANUFACTURERS' FEDERATION |  
AUSTRALIAN RECORDING INDUSTRY ASSOCIATION | AUSTRALIAN RETAILERS ASSOCIATION | AUSTRALIAN SELF  
MEDICATION INDUSTRY | AUSTRALIAN STEEL INSTITUTE | AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO  
ASSOCIATION | AUSTRALIAN TOURISM EXPORT COUNCIL | AUSTRALIAN VETERINARY ASSOCIATION | BOATING  
INDUSTRY ASSOCIATION | BUS INDUSTRY CONFEDERATION | BUSINESS COUNCIL OF CO-OPERATIVES AND MUTUALS  
| CARAVAN INDUSTRY ASSOCIATION OF AUSTRALIA | CEMENT CONCRETE & AGGREGATES ASSOCIATION |  
CHEMISTRY AUSTRALIA | CHIROPRACTORS' ASSOCIATION OF AUSTRALIA | CONSULT AUSTRALIA | COUNCIL OF  
PRIVATE HIGHER EDUCATION | CRUISE LINES INTERNATIONAL ASSOCIATION | CUSTOMER OWNED BANKING  
ASSOCIATION | DIRECT SELLING ASSOCIATION OF AUSTRALIA | EXHIBITION & EVENTS ASSOCIATION AUSTRALASIA  
| FINANCIAL PLANNING ASSOCIATION OF AUSTRALIA | FITNESS AUSTRALIA | FRANCHISEE FEDERATION OF  
AUSTRALIA | HOUSING INDUSTRY ASSOCIATION | LARGE FORMAT RETAIL ASSOCIATION | LIVE PERFORMANCE  
AUSTRALIA | MASTER BUILDERS AUSTRALIA | MASTER PLUMBERS' AND MECHANICAL SERVICES ASSOCIATION OF  
AUSTRALIA | MEDICAL TECHNOLOGY ASSOCIATION OF AUSTRALIA | MEDICINES AUSTRALIA | NATIONAL AUTOMOTIVE  
LEASING AND SALARY PACKAGING ASSOCIATION | NATIONAL DISABILITY SERVICES | NATIONAL ELECTRICAL AND  
COMMUNICATIONS ASSOCIATION | NATIONAL EMPLOYMENT SERVICES ASSOCIATION | NATIONAL FIRE INDUSTRY  
ASSOCIATION | NATIONAL ONLINE RETAIL ASSOCIATION | NATIONAL RETAIL ASSOCIATION | NATIONAL ROADS AND  
MOTORISTS ASSOCIATION | NSW HIRE CAR ASSOCIATION | NSW TAXI COUNCIL | OIL INDUSTRY INDUSTRIAL  
ASSOCIATION | OUTDOOR MEDIA ASSOCIATION | PHARMACY GUILD OF AUSTRALIA | PRINTING INDUSTRIES  
ASSOCIATION OF AUSTRALIA | RECRUITMENT & CONSULTING SERVICES ASSOCIATION | RESTAURANT AND CATERING  
AUSTRALIA | SCREEN PRODUCERS AUSTRALIA | THE TAX INSTITUTE | THINK BRICK AUSTRALIA | VICTORIAN  
AUTOMOBILE CHAMBER OF COMMERCE