SEYFARTH SHAW

Review of aspects of the Work Health & Safety Regulatory Framework in the Building and Construction Industry

The Review Team

The Review was conducted by Seyfarth Shaw Australia with assistance from the Review Team at the Department of Jobs and Small Business. The Reviewer would like to thank them for that assistance. The Reviewer would also like to thank Safe Work Australia and other stakeholders for their assistance during the Review.

The Seyfarth Shaw team was led by Jane Hall. In her current role Jane assists leading employers to identify and manage workplace health and safety (WHS) risks. Her experience spans all practical jurisdictions and industries. She also has extensive experience and expertise in government and regulation. Formerly the Director, Enforcement Group at WorkSafe Victoria. In that role she was responsible for strategic and operational leadership for all services delivered by the Enforcement Group, including investigating and prosecuting offences under the Occupational Health and Safety Act 2004 (Vic) and associated legislation. She is a current Member of the Safety Rehabilitation and Compensation Commission. Jane was supported by her colleagues Sam Witton, Senior Associate and Geoffrey Beinart-Smollan, Associate.

Disclaimer: The information, analysis and observations in this Report do not constitute legal advice.

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List of Acronyms and Abbreviations

ABCC	Australian Building and Construction Commission
ACCI	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AMWU	Australian Manufacturing Workers' Union
ANZSIC	Australian and New Zealand Standard Industrial Classification
CCF	Civil Contractors Federation
Decision RIS 2011	Decision Regulation Impact Statement for National Harmonisation of Work Health and Safety Regulations and Codes of Practice 2011
FSC	Federal Safety Commissioner
HIA	Housing Industry Association
MBA	Master Builders Australia
NRCOHSR	National Research Centre for Occupational Health and Safety Regulation
National Standard	National Standard for Licensing Persons Performing High Risk Work
NECA	National Electrical and Communications Association
OHS Act 2004 (Vic)	*Occupational Health and Safety Act 2004* (Vic)
OHS Regulations 2017 (Vic)	Occupational Health and Safety Regulations 2017 (Vic)
OSH Act 1984 (WA)	*Occupational Safety and Health Act 1984* (WA)
OSH Regulations 1996 (WA)	Occupational Safety and Health Regulations 1996 (WA)
PCBU	Person conducting a business or undertaking
RCDs	Residual current devices, commonly known as safety switches
SMEs	Small to medium enterprises
SWMS	Safe Work Method Statements
TOOCS	Type of Occurrence Classification System
WHS	Work health and safety
WHS Act	model *Work Health and Safety Act 2011*
WHS Accreditation Scheme	WHS Accreditation Scheme for Commonwealth funded building work
WHS Regulations	model Work Health and Safety Regulations 2011

1. Executive summary

The Australian building and construction industry is characterised by predominantly small businesses and a range of employment types. In particular, high levels of (multi-level) sub-contracting, self-employment and labour hire are present.

The building and construction industry accounts for the third highest number of fatalities and the sixth highest fatality rate Australia wide. As the Australian Government remains concerned about the level of accidents and fatalities on building sites in Australia, the department commissioned the Review.

The Reviewer, in consultation with the department, identified the elements of the WHS regulatory framework relevant to the Review. The Terms of Reference focus on regulations, Codes of Practice and guidance material specific to the top three mechanisms of injury. The main mechanisms of fatalities in the building and construction industry considered by the Review are subject to comprehensive regulation.

Data was also provided to the Reviewer by Safe Work Australia. In addition to the Work-related Traumatic Injury Fatalities data provided by Safe Work Australia the Reviewer analysed unpublished fatality data compiled by the Federal Safety Commissioner (**FSC**). This data was compiled from fatality incident reports provided to the FSC by accredited contractors under the WHS Accreditation Scheme for Commonwealth funded building work (**WHS Accreditation Scheme**) for the ten-year period 2007 to 2016.

Based on this material, an Issues Paper was developed. The Issues Paper contained six key questions to ask stakeholders to answer from their (or their organisation's) perspective, that is, as someone who owes a duty, is owed a duty, or assists duty holders to discharge their duties.

The targeted questions were designed to assist the Review to focus on the key issues relevant to the Terms of Reference.

Question 1 Have you got any comments on whether the guidance in the WHS regulatory framework (refer to Annexure A) is readily available, easy to understand, and in a useful format to assist you to eliminate or minimise risks?

Question 2 Have you got any comments on whether the WHS regulatory framework (refer to Annexure A) provides sufficient guidance to help you eliminate or minimise risks?

Question 3 Have you got any comments on how the WHS regulatory framework (refer to Annexure A) could be improved?

Question 4 Have you got any comments on what is most helpful in the WHS regulatory framework (refer to Annexure A) to eliminate or minimise risks?

Question 5 Are there any elements of the WHS regulatory frameworks not currently contained in the model WHS regulations, Codes of Practice or guidance materials that should be considered as part of a nationally consistent framework?

Question 6 Have you got any comments on how the WHS Accreditation Scheme, administered by the FSC, assists you to eliminate or minimise risks?

It was envisaged that the targeted Terms of Reference would provide the Reviewer with a unique opportunity to consider the WHS regulatory framework and its effectiveness in a high-risk industry.

The goal was to:

- Test whether aspects of the WHS regulatory framework itself are acting as a barrier to building industry participants managing the risks associated with the top three mechanisms of injury in the building and construction industry.
- Seek to understand if the significant amount of information (including in Codes of Practice and guidance materials) available to duty holders assists them to eliminate or minimise these risks to health and safety.

The Reviewer was not able to make definitive findings or recommendations about these important issues for a range of reasons. These reasons include:

- Only a small number of stakeholders provided detailed feedback or submissions about particular aspects of the WHS regulatory framework relevant to the Review. A lot of the feedback was about matters outside of the Terms of Reference.
- Some stakeholders reported that their needs are being met by the current WHS regulatory framework.
- Some stakeholders provided detailed reasons why some aspects of the WHS regulatory framework were not meeting their needs. Despite this feedback, the limited participation from employee representatives meant that the Reviewer could not be satisfied that there was a complete or balanced perspective on the complex issues being considered.

To make any recommendations for change without more targeted participation from a broader range of stakeholders would have been inconsistent with the principles of the Review, in particular considering the needs of all sectors within the industry.

On that basis the Reviewer has confined this Report to observations about areas of the WHS regulatory framework that require further consideration. These observations are intended to:

- Support the objects of the WHS Act, in particular the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare.
- Encourage further consideration of these important issues by government and WHS regulators.

1.1 Summary

The Review makes 18 observations, which are contained in body of this Report. There are a number of themes in those observations. They include:

Data

It would assist all stakeholders, including WHS regulators, if the data currently collected in relation to injuries and fatalities were to be supplemented with broader contextual information. This would assist with:

- determining whether specific characteristics of the building and construction industry are particularly impacting the top three mechanisms of injury and fatality in the sector
- understanding whether small to medium enterprises were over or under-represented in the data.

Helping stakeholders eliminate or minimise risks

The Reviewer received a range of varying feedback about aspects of the WHS regulatory framework. The WHS regulatory framework is meeting the needs of many stakeholders who report that information relevant to the top three mechanisms of injury is appropriate and easy to read.

Not all stakeholders share these views. Feedback from some stakeholders suggests that for some industry participants information relevant to the top three mechanisms of injury:

- may not be easy for some duty holders to understand
- may not be accessible or readily available to some duty holders
- may not provide sufficient guidance to help some duty holders eliminate or minimise risks relevant to the top three mechanisms of injury.

A nationally consistent framework

Having different Codes of Practice and guidance material in different jurisdictions is an ongoing issue for building and construction industry participants who work across multiple jurisdictions.

Safe Work Method Statements

The WHS regulatory framework for Safe Work Method Statements is a significant area of concern for multiple stakeholders including Industry Associations and Unions. The National Research Centre for Occupational Health and Safety Regulation (**NRCOHSR**) made a range of recommendations and they are being considered as part of the 2018 review of the model WHS laws conducted through Safe Work Australia. The Reviewer supports further work in this area.

Use of vehicles on public roads in the building and construction industry

The WHS regulatory framework could be improved to assist duty holders understand how to eliminate or minimise risks associated with the use of vehicles on public roads. Whilst the general risk management provisions of the WHS Regulations and general vehicle safety standards apply, there is little other information or guidance on the use of vehicles in the workplace context.

1.2 Recommendation

The Reviewer recommends that the department provide the observations in the Report to Safe Work Australia to help inform its 2018 review of the model WHS laws.

2. Reason for the Review

2.1 The Review

On 18 December 2017 the Department of Jobs and Small Business (the **department**) commissioned this independent review into the Work Health and Safety (**WHS**) regulatory framework in the building and construction[1] industry (the **Review**).[2]

2.2 Genesis of the Review

During the Australian Senate's consideration of the Building and Construction Industry (Improving Productivity) Amendment Bill 2017, the then Minister for Employment agreed to a request from the cross bench to ask Safe Work Australia to review the WHS laws in the building and construction industry. Not all WHS ministers supported the approach to have Safe Work Australia conduct the review. As the Australian Government remains concerned about the level of accidents and fatalities on building sites in Australia, the department subsequently commissioned the Review.

2.3 Terms of Reference

The Terms of Reference are set out below:

Background

Building and construction is a national priority industry under the Australian Work Health and Safety Strategy 2012–2022, however the rate of serious injury and fatality remains high. The proposal for a review of work health and safety (WHS) in the building and construction industry arose during the Senate debate on the Building and Construction Industry (Improving Productivity) Amendment Bill 2017, reflecting a shared desire to improve safety in this priority industry.

The Review

The Review will focus on the effectiveness of specific aspects of the regulatory framework that address the top three mechanisms of injury over the ten-year period 2007 to 2016 that accounted for the highest proportion of fatalities in the building and construction sector.[3] They are: falls from heights or being hit by falling objects (40 per cent of fatalities), vehicle incidents (16 per cent of fatalities) and contact with electricity (12 per cent of fatalities). The Review will assess the operation of the relevant WHS regulatory framework to preventing such incidents, including the efficiency and effectiveness of all relevant WHS regulations and the regulatory tools in use. The Review will also examine the performance of companies accredited by the Federal Safety Commissioner including any aspects of the building and construction WHS Accreditation Scheme, administered by the Federal Safety Commissioner, that could inform options to improve outcomes in these areas across the industry.

[1] This Report uses the term 'building and construction industry'. The relevant Australian and New Zealand Standard Industrial Classification (**ANZSIC**) is 'construction'. Data quoted from Safe Work Australia is based on the 'construction' classification. ANZSIC has been developed for use in both countries for the production and analysis of industry statistics. The ANZSIC has been jointly developed by the Australian Bureau of Statistics and Statistics New Zealand .

[2] The Review is focused on the specific items in the WHS regulatory framework set out in Annexure A.

[3] The fatalities data that is being used to inform the Review has been coded by Safe Work Australia for the Work-related Traumatic Injury Fatality data set using the nationally agreed Types of Occurrence Classification (TOOCS) version 3, revision 1, 2008 using codes No 01 – Falls from Height; No 21 - Being hit by falling objects; No 57 - Contact with electricity and No 92 - Vehicle incidents.

Scope of the Review

The Review may, where appropriate, draw on (but should not duplicate) the work of other recent or current reviews. The Review will take into account the views of stakeholders and make observations and recommendations on ways in which WHS laws could be improved to enhance safety outcomes. The Review will not assess the effectiveness of practical compliance and enforcement strategies implemented by regulators to address these issues. The outcomes of the Review will inform the 2018 review of the model WHS laws being conducted by Safe Work Australia.

Principles for the Review

The Review will be guided by the following principles:

(a) That the needs of all sectors within the building and construction industry are appropriately considered, particularly noting the high number of small businesses within the industry.

(b) Any recommended amendments to existing laws, regulations, codes or guidance material are to be supported by substantial evidence of their effectiveness in improving safety, enabling the development of any required Regulation Impact Statements.

(c) That recommendations do not undermine the model WHS legislation and a harmonised approach to WHS.

3. The Building and Construction Industry

3.1 Background

The Australian building and construction industry is characterised by predominantly small businesses and a range of employment types. In particular, high levels of (multi-level) sub-contracting, self-employment and labour hire are present.[4]

The composition of the building and construction industry is important in the context of the Review because the principles of the Review require considering the needs of all sectors in the building and construction industry.

The following analysis from RMIT University is useful in providing context to the nature of the building and construction industry:

> [The] industry is…dominated by small-to-medium sized enterprises (SMEs). According to the Australian Bureau of Statistics (ABS), 93.8% of construction businesses have fewer than five employees, and just over two-thirds of all people working within the industry work for SMEs. Conversely less than 1% of construction businesses employ 20 or more people, and companies of this size employ only 13.6% of the construction workforce. ABS data indicates that the average number of people employed by construction businesses in 2002-2003 was 1.8 per business for residential building businesses, and 4.7 per business for the non-residential and non-building (that is, engineering, industrial and services) sectors.[5]

This analysis[6] assisted the Review to consider, based on stakeholder feedback, the effectiveness of the WHS regulatory framework in addressing the top three mechanisms of fatalities for the whole building and construction industry including for the majority of businesses within the sector that are small to medium enterprises (**SMEs**).

For the purposes of the WHS regulatory framework, which is within the scope of the Review, construction work has a specific meaning relevantly defined as:

> any work carried out in connection with the construction, alteration, conversion, fitting-out, commissioning, renovation, repair, maintenance, refurbishment, demolition, decommissioning or dismantling of a structure.[7]

3.2 Fatalities as a result of the top three mechanisms in the period 2007 to 2016

The building and construction industry accounts for the third highest number of fatalities and the sixth highest fatality rate Australia-wide.[8] It remains a national priority under the Australian Work Health and Safety Strategy 2012-2022, due to the high number of fatalities. The retention of the building and construction industry as a priority industry was reaffirmed in the mid-term review of the strategy, which reported in October 2017.[9]

In the ten year period 2007 to 2016, there were a total of 354 fatalities in the building and construction industry, with 240 (68 per cent) of these fatalities caused by the top three

[4] Centre for Construction Work Health and Safety Research, Final Report: The Definition of a Construction Project, August 2017, RMIT, pp. 20-21.
[5] Ibid., pp. 20-21.
[6] The RMIT analysis is supported by additional data from the Australian Bureau of Statistics which, for the 2011-2012 financial year, found that small businesses (with 0-19 employees) accounted for 97.7 per cent of all construction businesses: Australian Bureau of Statistics, Private Sector Construction Industry, Australia, 2011-12, Canberra, Australia, 2013.
[7] Regulation 289 of the WHS Regulations.
[8] Data provided by Safe Work Australia covers the four-year period 2013-2016.
[9] Safe Work Australia's mid-term review of the Australian Work Health and Safety Strategy 2012-2022 is available online – click this link https://www.safeworkaustralia.gov.au/system/files/documents/1711/mid-term-review-of-the-australian-work-health-and-safety-strategy_1.pdf.

mechanisms of injury. However, the incidence of work-related fatalities in the building and construction industry has decreased steadily since 2004.[10]

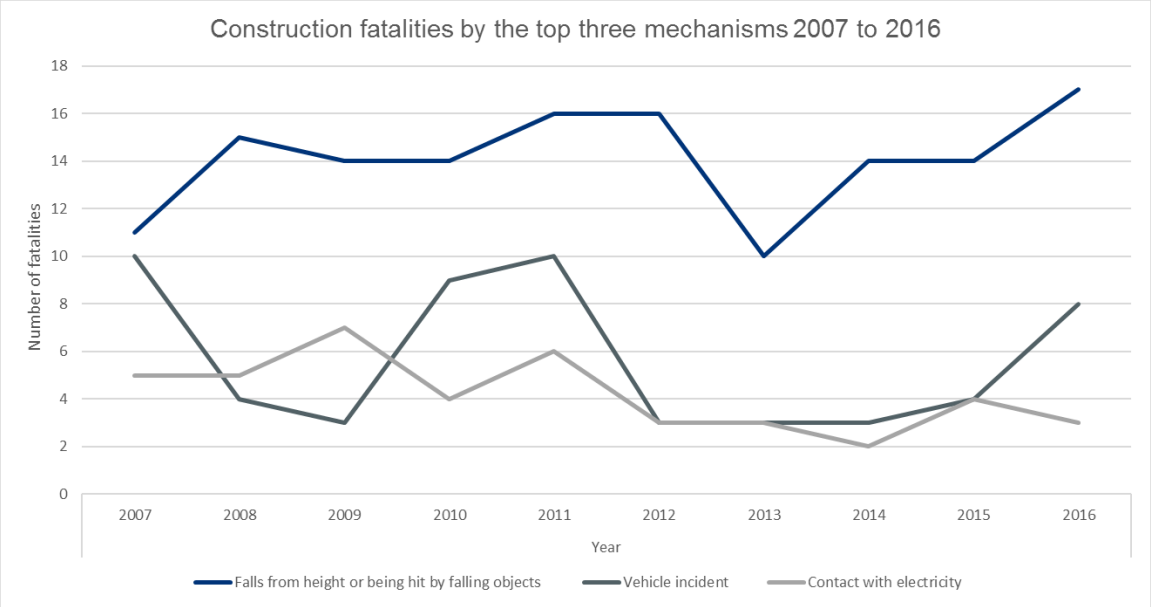
The breakdown of the fatalities by the top three mechanisms of injury is set out in Table 1.

Table 1 - Total number of construction fatalities with reference to top three mechanisms of injury 2007 to 2016

Mechanism of fatality	Number of fatalities	Mechanism of fatality as a percentage of total fatalities
Fall from a height or being hit by a falling object	141	40 per cent
Vehicle incidents	57	16 per cent
Contact with electricity	42	12 per cent
Other mechanisms	114	32 per cent

Figure 1 below sets out the number of fatalities by the three main mechanisms from 2007 to 2016.

Figure 1 - Number of construction fatalities by the top three mechanisms 2007 to 2016



3.3 Senate inquiry into industrial deaths 2018

The Senate Standing Committee on Education and Employment is currently undertaking an inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia. The inquiry commenced on 26 March 2018 and received 59 written submissions. Public hearings took place between 12 July and 30 August 2018.

The inquiry is due to report on 17 October 2018. We look forward to the Committee's findings and any additional light they may shed on preventing and eliminating the risk of industrial death in Australia.

[10] Safe Work Australia's Work-related Traumatic Injury Fatalities data set is available on its website – click this link https://www.safeworkaustralia.gov.au/statistics-and-research/statistics/fatalities/fatality-statistics-industry. This data covers a different time period to the time period represented in Figure 1 in the Issues Paper.

4. WHS regulatory framework

The main mechanisms of fatalities in the building and construction industry considered by the Review are subject to comprehensive regulation.

All Australian jurisdictions (with the exception of Victoria[11] and Western Australia[12]) have enacted laws based on the model Work Health and Safety Act (**WHS Act**) and the model Work Health and Safety Regulations (**WHS Regulations**).[13] In Western Australia, the relevant legislation is the *Occupational Safety and Health Act 1984* (**OSH Act 1984 (WA)**). In Victoria, the relevant legislation is the *Occupational Health and Safety Act 2004* (**OHS Act 2004 (Vic)**).

4.1 Overview of the WHS regulatory framework

The WHS regulatory framework consists of:

- A principal **WHS Act** (in each participating jurisdiction) that provides the overarching framework of WHS duties and rights at work. The WHS Act is supported by WHS Regulations and Codes of Practice made under the WHS Act as well as guidance material.
- **WHS Regulations** that set out detailed requirements to support the general duties in the WHS Act and other procedural or administrative requirements. WHS Regulations identify practical steps and processes that must be applied to specific work activities and hazards to achieve a health and safety standard.
- **Codes of Practice**[14] which are developed to assist duty holders to comply with the WHS regulatory framework. They provide further practical guidance to achieve the standards of health and safety required under the WHS Act and WHS Regulations. The Codes of Practice set out specific requirements to help eliminate or minimise risks to health and safety from certain risks. A Code of Practice has a specific legal status set out in Division 2 of the WHS Act: an approved Code of Practice is admissible in a proceeding as evidence of whether or not a duty or obligation under the WHS Act has been complied with. A court may have regard to the code as evidence of what is known about a hazard or risk, risk assessment or risk control to which the code relates; and rely on the code in determining what is reasonably practicable in circumstances to which the code relates.[15]
- **Guidance material** is developed by Safe Work Australia and WHS regulators to provide further information and examples on how duty holders may discharge their obligations under the WHS regulatory framework.

[11] In Victoria, the OHS Act 2004 (Vic) is similar to the model WHS Act. However, there are key differences in areas relevant to the Review. Some of these differences have been discussed below.

[12] On 12 July 2017, the Western Australian Government announced the development of a modernised WHS Act for Western Australia which is based on the model WHS Bill 2016. On 29 June 2018 the Ministerial Advisory panel released a discussion paper on modernising WHS laws in Western Australia. The paper is available online – click this link https://www.commerce.wa.gov.au/sites/default/files/atoms/files/whs_act_consultation.pdf.

[13] A national review into model occupational health and safety laws took place in 2008. The review was conducted by an advisory panel chaired by Robin Stewart-Crompton, with Barry Sherriff and Stephanie Mayman as panel members. The review recommended the form of the model WHS regulatory framework. Important elements of the model are: the retention of general risk based duties which require duty holders to identify and assess hazards and risks and to, so far as is reasonably practicable, eliminate or minimise risk; and subordinate legislation which sets out specific obligations.

[14] Victoria has not adopted laws based on the model WHS Act. In Victoria the OHS Act 2004 (Vic) does not provide for making Codes of Practice. Instead, compliance codes are developed for the purpose of providing practical guidance. Under the OHS Act 2004 (Vic) a failure to comply with a compliance code does not give rise to any civil or criminal liability. A person who complies with a compliance code may, however, be taken to have complied with the OHS Act 2004 (Vic).

[15] The OHS Act 2004 (Vic) is different. Section 150 states that a failure to comply with a compliance code does not give rise to any civil or criminal liability and section 152 states that a person who complies with a compliance code may, however be taken to have complied with the Act. The OSH Act 1984 (WA) contains a provision that is similar to the WHS Act (notwithstanding that Western Australia has not adopted laws based on the model WHS Act).

The Report discusses the comments received in relation to the legal status of Codes of Practice in Chapter 9.

It is important to note that both Codes of Practice and guidance materials are relevant in relation to the knowledge about a hazard or risk that a duty holder had, or ought reasonably to have had, and are therefore relevant in an assessment of whether a duty holder has taken all reasonably practicable steps to discharge their duty.[16]

An overview of the elements of the WHS regulatory framework relevant to the top three mechanisms of injury is provided at Annexure A to this Report.

4.2 Accreditation by the Federal Safety Commissioner

In addition to obligations imposed by WHS laws, some organisations in the building and construction industry[17] have sought accreditation under the WHS Accreditation Scheme for Commonwealth funded building work (the **WHS Accreditation Scheme**) administered by the Federal Safety Commissioner (**FSC**).

Established in 2005, the FSC works with industry and government stakeholders towards achieving the highest possible WHS standards on Commonwealth funded building and construction projects.

The key functions of the FSC include:

- promoting sustainable WHS cultural change in the building and construction industry
- developing and administering the WHS Accreditation Scheme
- identifying and progressing initiatives to improve WHS performance.

4.3 The WHS Accreditation Scheme

Subject to certain financial thresholds, only builders who are accredited under the WHS Accreditation Scheme can enter into head contracts for building work that is funded directly or indirectly by the Australian Government.

Projects are considered to be directly funded where a Government agency has responsibility for the project funding and development, for example a Defence facility, Medicare or Centrelink Office or a fit-out or refurbishment of existing Government office accommodation. Projects are considered indirectly funded where the Government contributes funding to a recipient through a funding agreement, grant or other program, for example where the Australian Department of Infrastructure provides funding to NSW Roads who use that funding to deliver a roads infrastructure project.

The WHS Accreditation Scheme applies to projects that are directly funded by the Commonwealth with a value of $4 million or more. The WHS Accreditation Scheme also applies to projects that are indirectly funded by the Commonwealth where:

- a head contract under the project includes building work of $4 million or more (GST inclusive), or
- the value of the Commonwealth contribution to the project is at least $6 million (including GST) and represents at least 50 per cent of the total construction project; or the Commonwealth contribution to a project is $10 million (including GST) or more, irrespective of the proportion of Commonwealth funding.

[16] Section 18(c) of the WHS Act.

[17] The WHS Accreditation Scheme does not cover the construction of single dwelling houses.

Since the FSC was established, it has been notified of 1,712 directly and indirectly funded contracts for building work covered by the WHS Accreditation Scheme with a combined value of $105.3 billion.[18]

As at 29 May 2018, 446 companies were accredited by the FSC.[19]

The WHS Accreditation Scheme is voluntary and is designed to ensure that only best practice health and safety systems and procedures are in operation on Commonwealth funded building projects.

4.4 Safety under the WHS Accreditation Scheme

The WHS Accreditation Scheme focuses on safety processes and implementation to improve safety outcomes.

The WHS Accreditation Scheme is based on over 100 criteria to which accredited companies must adhere. The WHS Accreditation Scheme criteria sets out system and implementation outcomes that must be met to gain and maintain accreditation, but does not prescribe the method by which companies must achieve those outcomes. This is designed to give all companies scope to achieve the WHS Accreditation Scheme criteria compliance in a manner that fits their businesses.

A review of the WHS Accreditation Scheme in 2014 considered opportunities to streamline and modernise the scheme. One of the review outcomes was the introduction of a risk-based approach to monitoring and enforcing compliance with the WHS Accreditation Scheme requirements, meaning those companies with a strong track record of compliance are subject to less FSC intervention than those with a poor compliance history.

4.5 Safety performance under the WHS Accreditation Scheme

In the ten-year period 2007 to 2016, 53 fatalities were reported by accredited companies across all mechanisms of injury, 29 of which were caused by the top three mechanisms of injury.[20] This represented 15 per cent of all fatalities in the building and construction industry and 12 per cent of total fatalities caused by the top three mechanisms of injury. Accredited companies account for approximately 40-50 per cent of the market turnover.

It should be noted that the data collected under the WHS Accreditation Scheme is different to the data collected and reported by Safe Work Australia. For example, the FSC does not capture data about vehicle incidents where the incident does not occur on a building or construction site covered by the WHS Accreditation Scheme. The Reviewer was informed that this approach is taken because the FSC only has jurisdiction under the *Building and Construction Industry (Improving Productivity) Act 2016* over sites where building work is performed and not over public roads.

4.6 SMEs in the WHS Accreditation Scheme

Approximately 20 per cent of accredited companies are 'small' companies with 19 or fewer employees and approximately 58 per cent are medium sized companies with between 20 and 199 employees.[21]

[18] Data provided by the Federal Safety Commissioner.
[19] Data provided by the Federal Safety Commissioner.
[20] Data provided by the Federal Safety Commissioner.
[21] Data provided by the Federal Safety Commissioner.

5. Approach to the Review

5.1 Issues Paper

The elements of the WHS regulatory framework relevant to the Review are set out in Annexure A to this Report. The Terms of Reference focussed the Reviewer on provisions of the WHS Regulations, Codes of Practice and guidance material specific to the top three mechanisms of injury.

Data was also provided to the Reviewer by Safe Work Australia. In addition to the Work-related Traumatic Injury Fatalities data provided by Safe Work Australia the Reviewer analysed unpublished fatality data compiled by the FSC. This data was compiled from fatality incident reports provided to the FSC by accredited contractors under the WHS Accreditation Scheme for the ten-year period 2007 to 2016.

Based on this material, an Issues Paper was developed. The Issues Paper contained six key questions to ask stakeholders to answer from their (or their organisation's) perspective, that is, as someone who owes a duty, is owed a duty, or assists duty holders to discharge their duties.

The targeted questions were designed to assist the Review to focus on the key issues relevant to the Terms of Reference. A copy of the questions can be found in the Executive Summary of this Report.

The Reviewer also asked stakeholders to consider these questions and 'effectiveness'[22] in the context of a key objective of the WHS regulatory framework, which is **the protection of workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work** (our emphasis).

The Issues Paper inviting submissions was released publicly by the department on 29 March 2018 through the department's website.

5.2 Consultation

The department identified key stakeholders based on previous industry consultation processes for WHS regulation. The consultation process was designed to be balanced, seeking input from key stakeholders from the building and construction sector, including regulators and employer and employee representatives. The department contacted identified key stakeholders providing the Terms of Reference and the Issues Paper for their consideration. As part of the consultation process, all key stakeholders were invited to provide a written submission and to meet with the Reviewer. Peak bodies were asked to coordinate member/affiliate input in an effort to reach a broad range of duty holders and interested parties.

Employee groups invited to take part in the Review included the Australian Council of Trade Unions (**ACTU**) and its affiliates, as well as unions involved in the building and construction industry.[23] The Australian Manufacturing Workers' Union (**AMWU**) participated in the Review and provided valuable employee insights and perspective. Unfortunately all other union organisations declined to participate.

Despite this, between 13 April and 15 June 2018, the Reviewer spoke to a diverse range of stakeholders. The Reviewer would like to thank the following stakeholders for meeting with the Reviewer:

[22] A definition of 'effectiveness' was included in the Issues Paper to focus stakeholders on this aspect of the Terms of Reference: 'the degree to which something is successful in producing a desired result'.

[23] Union peak bodies invited to participate and coordinate a submission on behalf of their members/affiliates: AMWU, ACTU, Construction, Forestry, Maritime, Mining and Energy Union (**CFMMEU**), Electrical Trades Union of Australia (**ETU**), Australian Workers' Union (**AWU**).

- Australian Building and Construction Commission (**ABCC**)
- Australian Chamber of Commerce and Industry (**ACCI**)
- Australian Constructors Association
- AMWU
- Civil Contractors Federation (**CCF**)
- Housing Industry Association (**HIA**)
- Master Builders Australia (**MBA**)
- National Electrical and Communications Association (**NECA**)
- Safe Work Australia and Marie Boland, the independent reviewer appointed by Safe Work Australia to conduct the 2018 review of the model WHS laws
- SafeWork SA
- WorkSafe ACT
- WorkSafe Victoria
- WorkSafe (Western Australia)

The Reviewer would also like to thank the following stakeholders who provided written submissions and/or associated background information to assist the Review:

- ABCC
- ACCI
- Australian Industry Group
- CCF
- Comcare
- HIA
- MBA
- NECA
- Queensland Office of Industrial Relations, Work and Electrical Safety Policy
- SafeWork NSW
- Safe Work Australia
- WorkSafe (Western Australia)
- WorkSafe Victoria

The Reviewer is grateful for their participation and feedback.

5.3 Stakeholder feedback

A range of stakeholders raised concerns about the focus of the Review, arguing that it was unnecessarily narrow, for example it did not consider the practical operations of the WHS laws or the role of WHS regulators.

Those concerns are summarised at Chapter 15 of this Report.

5.4 Attribution of stakeholder feedback in this Report

The Report provides extracts from stakeholder feedback. The Reviewer has attributed that feedback using the following three terms, acknowledging that the AMWU was the only union that participated in the Review:

- Industry Association
- Union
- Regulator

6. Stakeholder feedback

It was envisaged that the targeted Terms of Reference would provide the Reviewer with a unique opportunity to consider the WHS regulatory framework and its effectiveness in a high-risk industry.

The goal was to:

- test whether aspects of the WHS regulatory framework itself are acting as a barrier to building industry participants managing the risks associated with the top three mechanisms of injury in the building and construction industry
- seek to understand if the significant amount of information (including in Codes of Practice and guidance materials) available to duty holders assists them to eliminate or minimise these risks to health and safety.

The Reviewer was not able to make definitive findings or recommendations about these important issues for a range of reasons. Those reasons include:

- Only a small number of stakeholders provided detailed feedback or submissions about particular aspects of the WHS regulatory framework relevant to the Review. A lot of the feedback was about matters outside of the Terms of Reference.
- Some stakeholders reported that their needs are being met by the current WHS regulatory framework.
- Some stakeholders provided detailed reasons why some aspects of the WHS regulatory framework were not meeting their needs, Despite this feedback, the limited participation from employee groups meant that the Reviewer did not have a complete or balanced perspective on the complex issues being considered.

To make any recommendations for change without participation from a broader range of stakeholders would have been inconsistent with the principles of the Review, in particular considering the needs of all sectors within the industry.

On that basis the Reviewer has confined this Report to observations about areas of the WHS regulatory framework that require further consideration. Those observations are all intended to:

- support the objects of the WHS Act, in particular, the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare
- encourage further consideration of these important issues by government and WHS regulators.

7. Data

Data from Safe Work Australia's Work-related Traumatic Injury Fatalities database provides information on the number, trends and nature of all work-related traumatic injury fatalities in Australia. This data, along with other information, can be used to assist in the targeting of WHS intervention and compliance strategies.

While trends in the fatalities data can provide an indicator of the effectiveness of WHS strategies, there are many factors that can contribute to changes in the number of fatalities.

This Chapter of the Report considers the current process for compiling data for the Work-related Traumatic Injury Fatalities database and whether any additional data should be captured in future to help all industry stakeholders increase awareness and improve performance of preventing the top three mechanisms of injury.

7.1 Process for compiling Traumatic Injury Fatalities data

There is a comprehensive process for compiling the data. Safe Work Australia compiles work-related fatality data using a number of different information sources. This includes:

- media reporting
- notifications from the various jurisdictional WHS authorities
- information from other relevant authorities
- National Coronial Information Service (including access to coroner and police reports)
- workers' compensation claims data from jurisdictions (for example, compensable fatalities). [24]

Safe Work Australia receives all of this information and extracts and verifies relevant information to compile the Work-related Traumatic Injury Fatalities database, which is compiled on an annual basis. Analysis of the data is reported in the annual Work-related Traumatic Injury Fatalities Report and a number of other statistical publications on specific industries or issues.[25]

For reporting of the data by industry, Safe Work Australia uses the Australian and New Zealand Standard Industrial Classification (ANZSIC). This classification is used because it is the most authoritative and widely used system, including by jurisdictional authorities which supply data to Safe Work Australia. In addition, Safe Work Australia relies on labour force data from the Australian Bureau of Statistics (which is based on ANZSIC) to get estimates of the number of employees/workers in the relevant industry classification to enable the calculation of rates.

Safe Work Australia uses the Type of Occurrence Classification System (TOOCS) to code both workers' compensation claims and worker fatalities with regard to the nature, causes (mechanism), bodily location etc. of an injury, illness or fatality. This system was developed by the former Australian Safety and Compensation Council for the purpose of ensuring national consistency in the way the workers' compensation claim data provided to Safe Work Australia is coded by each of the jurisdictional authorities. While primarily created for the purpose of the national workers' compensation data compilation, it is also used for the compilation of fatalities data by Safe Work Australia.

[24] Information provided by Safe Work Australia.
[25] Information provided by Safe Work Australia.

7.2 Data about industry sub-sectors

Stakeholder views

Stakeholders raised a number of concerns in relation to grouping statistics for the industry as a whole to help with targeted intervention and to accurately reflect the safety performance of each industry sector. The feedback included:

- The data needs to be 'sliced up' in order to identify the specific hazards and mechanisms of injury per sector and the most appropriate corresponding activity. This would help in the creation of targeted prevention activities relevant to a specific group. (Industry Association)
- The tendency to treat the construction sector as homogenous has specific implications for the data relied on in the Issues Paper and this raises concerns about the accuracy of the image of the building and construction industry that is being portrayed in relation to the residential building sector. (Industry Association)

Consideration of issues

The ANZSIC system data from the Australian Bureau of Statistics is broken down into industry sub-sectors which enables Safe Work Australia to report that level of detail in the Work-related Traumatic Injury Fatalities Report (see Table 10 on page 18 of the 2015 Report).[26] Note that this table is relevant to all mechanisms of injury and not just the top three. The same exercise could be undertaken in relation to the top three mechanisms of injury alone, however due to the relatively small numbers represented in these categories, the data divided by sub-sectors may not be robust because it is considered to be too small to be statistically significant.

On that basis, the Review did not consider a further breakdown of the current data set into industry sub-sectors.

7.3 Data about industry characteristics

Stakeholder views

During consultation the Reviewer heard a lot from stakeholders about the different parts of the industry and its commercial characteristics and business practices. Some of the characteristics and practices which were referred to by multiple stakeholders as having an impact on safety outcomes include:

- the high use of labour hire from other industries, people from varying backgrounds,[27] differing levels of experience on a site, transient workforces and lack of job security so there is no long-term connection with a workplace (Union)
- competitive tendering processes and safety being treated as a 'costing item', for example contracts being awarded based on price and not necessarily on an assessment of the 'safest' bidder (Union)
- the practices of some principal or primary contractors who are perceived as trying to 'transfer' their duties through commercial arrangements. (Unions and Industry Association)

Consideration of issues

As discussed earlier in this Chapter, the data available to the Review neither supports nor contradicts the views expressed by stakeholders regarding the impact of specific industry characteristics on injuries and fatalities. The data is not sufficiently granular to enable an

[26] Safe Work Australia, Canberra, 2016. The report is available online – click the following link https://www.safeworkaustralia.gov.au/system/files/documents/1702/work-related-traumatic-injury-fatalities.pdf

[27] Including temporary visa-holders and workers from other industries who had not previously worked in the building and construction industry.

assessment of the links (if any) between the characteristics of the building and construction industry (or the industry sub-sectors) and the mechanism of injury or fatality.

It would assist all stakeholders, including WHS regulators if the data currently collected in relation to injuries and fatalities were to be supplemented with broader contextual information to assist with determining whether specific characteristics of the building and construction industry are particularly impacting the top three mechanisms of injury and fatality in the sector.

As an example, it would be useful to understand if an incident involved a worker or workers who had come from other industries and whether any of the workers were provided through labour hire arrangements. It would also be helpful to understand what the tendering and selection process for a project involved from a health and safety perspective.

Such contextualisation may facilitate an understanding of whether there are specific characteristics of a sub-sector or sub-sectors of the industry which have an impact on the successful management of risks associated with the top three mechanisms of injury.

The Review notes and supports the mid-term review of the Australian Work Health and Safety Strategy 2012-2022 dated October 2017 and published by Safe Work Australia in April 2018 which considered data and recommended:

> more sophisticated analyses of existing fatality and workers' compensation claims data should be pursued over the next five years with the intention of deepening understanding of workplace fatalities, injuries and illnesses.[28]

Consideration ought be given to whether additional data on industry characteristics could be collected by WHS regulators as part of incident notifications requirements under the WHS Act. This issue should be considered as part of Safe Work Australia's 2018 review of the model laws.

As an example of additional detail which might assist with this type of analysis, the Reviewer notes that the FSC collects information about the type of construction for a project where an incident occurs. It also requires accredited companies to provide information about the gender and occupation of the injured worker, as well as details of their employer (for example, are they a sub-contractor), a breakdown of the agency of the incident and to identify the high-risk construction category (if any) that relates to the incident.[29]

Observation 1

It would assist all stakeholders, including WHS regulators, if the data currently collected in relation to injuries and fatalities were to be supplemented with broader contextual information to assist with determining whether specific characteristics of the building and construction industry are particularly impacting the top three mechanisms of injury and fatality in the sector. Such contextualisation may facilitate an understanding of whether there are specific characteristics of a sub-sector or sub-sectors of the industry which have an impact on the successful management of risks associated with the top three mechanisms of injury.

7.4 SMEs

The Review was not able to determine whether SMEs were over or under-represented in the data from the Work-related Traumatic Injury Fatalities database because the data set does not code for the size of a business in the collection process.

[28] Safe Work Australia, The Mid-term Review of the Australian Work Health and Safety Strategy 2012-2022, October 2017, p.4.
[29] FSC Incident Report template.

The industry is characterised by predominately small businesses but the Reviewer received information from the FSC that of the 53 fatalities reported by accredited companies across all mechanisms of injury between 2007 to 2016, 82 per cent were from large companies.[30]

Medium companies represented 18 per cent of the fatalities and there were no reported fatalities for small companies.[31] These results relate to all fatalities as opposed to being limited to the top three mechanisms of fatality, the subject of the Review. However, the results are interesting because (as noted earlier) SMEs make up approximately 78 per cent of accredited companies. The Reviewer was not made aware of any reasons for the difference in safety performance and the over-representation of large companies in the fatality data. Assumptions might be made about the number of people performing work for large companies and the number of hours worked by the larger companies when compared with the smaller companies.

However, these are assumptions only. There is an opportunity for further work to identify if there is a link between company size and safety performance and if so, the reasons for this.

Observation 2

Information collected for the Work-related Traumatic Injury Fatalities database does not enable an assessment of whether SMEs were over or under-represented in the data because the data set does not code for the size of a business in the collection process.

7.5 Data on falls and vehicle incidents

A Regulator provided feedback about the need for changes to the notification of vehicle incidents and falls from height to assist with prevention and regulation in these two areas. Whilst this feedback relates to the provision of information about particular incidents, rather than data itself, incident notification is a source of data for the Work-related Traumatic Injury Fatalities database.

Stakeholder views

- Notifiable incident requirements in the WHS Act for dangerous incidents relating to falls of people from heights or being hit by falling objects limit a regulator's ability to have oversight of these issues and effectively regulate from a prevention point. (Regulator)
- Specific provisions in the WHS Act and regulations requiring notification of incidents and hazards relating to falls (specifically people or objects falling when no one is injured) and vehicle incidents would send a clear message that these incidents are now a high priority risk category. (Regulator)

Consideration of issues

The Reviewer did not receive any similar comments on notification of electrical incidents from WHS regulators.

The notification provisions are contained in the WHS Act and the review of the WHS Act is outside the scope of the Review, but the Reviewer encourages further consideration of these issues by Safe Work Australia as part of the 2018 review of the model WHS laws. In particular, the review ought to consider if specific information relating to the mechanisms of the injury (including electricity and any characteristics of the person conducting the business or undertaking (**PCBU**) involved and/or the site where the injury occurred) would assist in the regulation of the top three causes of fatalities in the building and construction industry. Safe Work Australia's 2018 Review

[30] The FSC determine the size of companies with reference to the number of employees: 0-19 is a small company, 20-199 is a medium company and 200+ is a large company. These size categories are consistent with the definitions used by the Australian Bureau of Statistics.
[31] The FSC was able to categorise 51 of the 53 reported fatalities during the period.

Consultation Summary indicates that stakeholders have raised the need for the clarification of incident notification requirements.[32]

[32] Safe Work Australia, Review of the Model WHS Laws Public Consultation Summary, Canberra, 2018, available online at the following link https://www.safeworkaustralia.gov.au/doc/review-model-whs-laws-consultation-summary

8. WHS Regulations

8.1 Overview of the general risk management provisions in the WHS Regulations[33]

Part 3.1 of the WHS Regulations contains requirements for general risk management. This includes a hierarchy of controls which provides that if it is not reasonably practicable for a duty holder to eliminate risks to health and safety, they must minimise the risks so far as is reasonably practicable by doing one or more of the following: substitute the hazard giving rise to the risk, isolate the hazard from any person exposed to it, implement engineering controls.[34] The management of risks is the key to understanding all of the duties under the WHS Regulations. The principles in Part 3.1 apply to all of the hazards and risks expressly covered by the WHS Regulations. At the time the WHS Regulations were developed, it was stated that the approach taken in Part 3.1 of the WHS Regulations:

> has the benefit of entrenching widely-accepted and used approaches to managing risks in the workplace and is strongly supported by public comment.[35]

The inclusion of Part 3.1 was also intended to:

- streamline and simplify the provisions that deal generally with managing risks
- promote simpler drafting
- make the WHS Regulations easier to understand and easier to apply
- reduce the length of the WHS Regulations.

8.2 Specific risk control measures

In addition to the requirement for general risk management, the WHS Regulations contain specific requirements for the management of risks relevant to the Review. They include:

- managing the risk of falling objects
- managing the risk of falls
- electrical equipment and electrical installations
- inspection and testing of Residual Current Devices (**RCD**s[36])
- de-energised equipment
- electrical equipment and installations and construction work
- high risk work
- scaffolds
- Safe Work Method Statements.

8.3 Key themes in stakeholders feedback

Stakeholders who provided specific feedback on the WHS Regulations raised concerns about:

[33] The model WHS Regulations were the subject of specific feedback during the Review. Our observations are made about the model WHS Regulations.
[34] Sub-regulation 36(3) of the model WHS Regulations.
[35] Decision Regulation Impact Statement for National Harmonisation of Work Health and Safety Regulations and Codes of Practice, 7 November 2011 (**Decision RIS 2011**), p. 37, available online – click this link https://www.safeworkaustralia.gov.au/system/files/documents/1702/decision_ris_national_harmonisation_whs_regs_codes.pdf
[36] RCDs are commonly known as safety switches. They protect against the risk of electric shock.

- the level of prescription unnecessarily limiting flexibility in compliance
- regulations repeating requirements in Part 3.1 of the WHS Regulations
- difficulties in interpreting the WHS Regulations
- challenges with complying with the WHS Regulations.

This Chapter of the Report compares the different approaches taken in the WHS Regulations and the Victorian Occupational Health and Safety Regulations 2017 (Vic) (**OHS Regulations 2017 (Vic)**) to consider whether the inclusion of specific controls in the WHS Regulations is a barrier to managing risks.[37] The Reviewer also considered whether it is appropriate to leave some of that prescription to Codes of Practice or guidance material. The Reviewer looked at a number of specific issues raised by stakeholders to consider this further.

8.4 Managing risks to health and safety under the WHS Regulations v position in Victoria

As indicated at 8.1 (above) Part 3.1 of the WHS Regulations applies to PCBUs who have a duty under the WHS Regulations to manage risks to health and safety.

Part 3.1 also requires a duty holder to comply with specific requirements under the WHS Regulations for the management of risks when implementing the requirements of Part 3.1.[38]

By way of contrast to the WHS Regulations, in Victoria a different approach is taken to the management of some risks. The Report looks at two specific examples where Victoria decided not to include specific provisions in the OHS Regulations 2017 (Vic) following consultation with a broad range of stakeholders. These examples relate to the management of the risk of falling objects and managing the risk of falls.

8.5 Example 1 – management of risk of falling objects

Division 10 - regulations 54, 55(1), (2) and (3)

Regulation 54 requires a PCBU to manage, in accordance with Part 3.1 of the WHS Regulations, risks to health and safety associated with an object falling on a person if the falling object is reasonably likely to injure the person.

Regulation 55 is applicable if it is not reasonably practicable to eliminate the risk of an object falling on a person.

Sub-regulation 55(2) requires the PCBU to minimise the risk of an object falling on a person by providing adequate protection against the risk.

Sub-regulation 55(3) prescribes that the PCBU has provided adequate protection against the risk, for the purposes of sub-regulation 55(2), by providing and maintaining a safe system of work, including preventing an object from falling freely, so far as is reasonably practicable, or providing, so far as reasonably practicable, a system to arrest the fall of a falling object. Sub-regulation 55(3) also provides examples of a system to arrest the fall of an object as including providing:

- a secure barrier
- a safe means of raising and lowering objects
- an exclusion zone persons are prohibited from entering.

Stakeholder views

Stakeholders suggested that Division 10 should be removed for the following reasons:

[37] The Victorian position has been discussed because the review which led to the OHS Regulations 2017 (Vic) considered if the position adopted in the WHS Regulations ought be adopted in Victoria. The development of regulations to support any new WHS Act in Western Australia has not yet commenced and so there is no similar comparative analysis available for Western Australia.
[38] Regulation 33.

- Division 10 reiterates the provisions of Part 3.1 of the WHS Regulations so is unnecessary. (Industry Association)
- Although sub-regulation 55(3) at face value appears like it is a 'deemed to comply' provision, the means of controlling falling objects can be interpreted as possibly restricted to the matters and examples in this regulation. It is also unclear whether reliance on the general hierarchy of control would be acceptable. The existing *Fact Sheet - Falling Objects* could stand alone and be sufficient without the need for Division 10. Division 10 should be removed. (Industry Association)

The Victorian position on falling objects

In contrast with the WHS Regulations, in Victoria, the OHS Regulations 2017 (Vic) do not have specific provisions for the management of risks associated with falling objects.[39]

WorkSafe Victoria considered whether there was a case for specific regulation for falling objects during its review of the OHS Regulations 2007 (Vic). Following that review, the existing duties of the OHS Act 2004 (Vic) and the OHS Regulations 2007 (Vic)[40] were considered sufficient to cover the hazards and risks associated with falling objects. WorkSafe Victoria decided that information on how to manage the specific hazards and risks were considered to be best delivered through Codes of Practice and guidance material.

Consideration of issues

At the time the WHS Regulations were drafted, the policy intent was to prevent falling objects that are likely to cause injury to a person in the vicinity of any workplace (including a building and construction industry workplace).[41]

The inclusion of specific controls in the WHS Regulations was supported at the time the WHS Regulations were drafted on the basis that it ensured a consistent approach to regulation in this area.[42] Division 10 was intended to be consistent with Part 3.1 of the WHS Regulations. This policy intent remains sound in light of the fact that falling objects continue to be one of the top three mechanisms of fatality in the building and construction industry. The issue for further consideration is whether the inclusion of specific controls in the WHS Regulations is assisting PCBUs to manage the risks of falling objects or whether it is difficult to understand and apply.

The Reviewer understands that technical issues have been raised in relation to specific parts of the WHS Regulations in the consultation phase of the 2018 review of the model WHS laws. [43] The Reviewer encourages further consideration of these issues as part of that process.

Observation 3

The feedback from several Industry Associations suggests that the inclusion of Part 3.1 of the WHS Regulations as well as specific regulations containing risk controls may not be easy to understand. It may not provide sufficient guidance to help some duty holders eliminate or minimise the risk of falling objects.

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[39] Regulation 3.36 of the Occupational Health and Safety Regulations 1996 (WA) (**OSH Regulations 1996 WA**) contains specific requirements for main contractors at construction sites to ensure that people wear helmets where there is a risk of a person being struck by a falling object. There are also specific requirements for lift work and falling objects in regulation 4.57.

[40] Including section 21 of the OHS Act 2004 (Vic).

[41] Decision RIS 2011, p.67.

[42] Decision RIS 2011, p.67.

[43] Safe Work Australia, Public Consultation Summary, Canberra, 2018, available online at the following link https://www.safeworkaustralia.gov.au/system/files/documents/1808/2018-review-public-consultation-summary_1.pdf.

8.6 Example 2 - managing the risk of falls

Part 4.4 - regulations 78(1) and 79

Regulation 78 requires a PCBU at a workplace to manage, in accordance with Part 3.1, the risk of a fall by a person from one level to another, where that fall is reasonably likely to cause injury to the person or any other person.

Regulation 79 applies if it is not reasonably practicable to eliminate the risk of a fall referred to in regulation 78. The regulation requires a PCBU to minimise the risk of a fall by providing adequate protection against the fall risk.

Sub-regulation 79(3) explains that adequate protection is taken to be provided if the PCBU provides and maintains a safe system of work, including:

- providing a fall prevention device if it is reasonably practicable to do so
- providing a work positioning system, if it is not reasonably practicable to provide a fall prevention device or
- providing a fall arrest system, so far as is reasonably practicable, if it is not reasonably practicable to provide either a fall prevention device or a work positioning system.

Sub-regulation 79(4) clarifies that regulation 79 does not apply to the performance of stunt work, acrobatics, theatrical performance, a sporting or athletic activity or horse riding.

Sub-regulation 79(5) provides examples of fall prevention device which includes a secure fence, edge protection, working platforms and covers.

Genesis of the provisions

At the time the WHS Regulations were drafted, the intention was to require duty holders to provide adequate protection against the risk of falls by implementing a safe system of work.[44] The hierarchy of controls set out in regulation 79 was simplified and amended from the discussion draft of the WHS Regulations so that it:

- applied to all types of falls (not just those over two metres)
- complemented the general risk management principles (in Part 3.1)
- included information about higher order controls and how these should be ranked.

During the Review, feedback was provided by an Industry Association about the lack of clarity in the WHS Regulations for managing the risk of falls. One issue for consideration by the Reviewer is whether the intention of regulation 79 has been met by setting out a clear hierarchy for managing the risk of falls.

Stakeholder views

- This combination of hierarchies of control is very confusing. This makes it difficult for duty holders to be certain of what is required for compliance. (Industry Association)
- Regulation 79 should be removed to avoid confusion, i.e. rely on the provisions of Part 3.1 and guidance only. (Industry Association)
- The scope of the falls provisions and the subsequent hierarchies of control contained in the WHS Regulations could lead to the use of physical fall prevention measures at any height, which is impractical and causes a significant amount of uncertainty over what type of control measures should be used for low risk height issues. (Industry Association)

[44] Decision RIS 2011, p. 98.

- Single storey residential construction should be excluded from the falls provisions of the WHS Regulations. Alternatively, the threshold for providing physical fall prevention measures should be no less than three metres. (Industry Association)

The Victorian positon on managing the risk of falls

The Reviewer was told by WorkSafe Victoria that consideration was given as to whether to adopt falls provisions similar to those in the WHS Regulations during its recent review of the OHS Regulations 2007. This would have resulted in the specific risk control measures for falls above two metres also applying to the risk associated with a fall by a person from one level to another, where that is reasonably likely to cause injury to the person or any other person. Following extensive consultation, Victoria retained the current two metre threshold rather than adopting the 'one level to another' approach, but made some minor changes to clarify that safety obligations still apply (under the OHS Act 2004 (Vic)) in relation to falls below two metres.[45] WorkSafe considered that safety improvements were better achieved through improved access to the information contained in Codes and guidance material.

Consideration of issues

At the time the WHS Regulations were drafted, it was recognised that moving specific controls around falls to Codes of Practice would allow more expansive advice to be tailored to specific sets of circumstances. However it was argued by some stakeholders that this would potentially lead to the introduction of discretion, uncertainty and arguably a reduction in protection of workers.[46] This is a valid criticism if the removal of detail is not supported by a WHS Regulator's compliance and enforcement activities. In particular, it is important that these compliance activities include WHS Regulators educating duty holders who may have a misconception about the role of a Code of Practice and guidance material (that is, that a Code of Practice and guidance material is relevant in the assessment of what is reasonably practicable to eliminate or minimise a hazard or risk). Chapter 9 of this Report discusses this issue further.

This risk of a reduction in safety standards by duty holders (who do not understand their obligations) must be balanced against achieving WHS Regulations that are simple and concise. The limited stakeholder feedback supports simplification.

Observation 4

The feedback from several Industry Associations suggests that the inclusion of Part 3.1 of the WHS Regulations as well as specific regulations containing risk controls may not be easy to understand. It may not provide sufficient guidance to help some duty holders eliminate or minimise the risk of falls.

8.7 Electrical equipment and electrical installations

In examples 3-6 which follow, the Report discusses issues raised about electricity and whether the WHS Regulations are effective in relation to managing electrical hazards and risks.

The intention of WHS Regulations addressing electrical equipment and installations was to provide clarity around what must be done to ensure electrical safety in the workplace.[47]

The discussion set out in the Decision RIS 2011 of the stakeholder feedback received on the draft model WHS Regulations included an assessment of the then existing level of compliance with *AS/NZS 3760:* In-service safety inspection and testing of electrical equipment.[48] The Decision RIS

[45] See regulation 41 of the OHS Regulations 2017 (Vic) and the notes following sub-regulation 41(1).
[46] Decision RIS 2011, p. 99.
[47] Decision RIS 2011, p. 116.
[48] Numbered AS/NZS represent particular Australian Standards/New Zealand Standards made by Standards Australia.

2011 concluded that this standard was widely complied with by businesses as a way of discharging their duties to reduce the risk of electrical shock. The Reviewer received a range of feedback from stakeholders about whether the WHS Regulations provide sufficient clarity to ensure electrical safety.

8.8 Example 3 – inspection and testing of Residual Current Devices (RCDs)

Regulations 150 and 165

Regulation 150 sets out the requirements for when a PCBU must ensure that electrical equipment used in certain high risk environments is regularly inspected and tested by a competent person.

Sub-regulation 150(2) provides that when equipment is new or unused at a workplace, the PCBU is not required to comply with sub-regulation (1) but must ensure that the equipment is inspected for obvious damage before being used.

Sub-regulation 150(3) provides that the PCBU must retain any record of testing carried out until the next test, or the equipment is permanently removed from the workplace or disposed of.

Sub-regulation 150(4) includes requirements for records of testing.

Regulation 165 requires a person with management or control of a workplace to take all reasonable steps to ensure that RCDs used at the workplace are tested regularly by a competent person to ensure the devices are operating effectively. It also requires records of all such testing (other than a daily test) to be kept until the device is next tested or is permanently removed from use.

Position in Western Australia and Victoria

Similar requirements for regular inspection are contained in the Occupational Safety and Health Regulations 1996 (WA) (**OSH Regulations 1996 (WA)**).[49] This requirement does not specify the frequency of 'regular' testing.

There are no specific requirements in relation to RCDs in the OHS Regulations 2017 (Vic).

Stakeholder views

The Reviewer received a single piece of feedback from a regulator on the inspection and testing of RCDs:

- It is unclear what constitutes 'regular' inspection. There may be benefit in adopting a reference to AS/NZS 3760: 2010 In-service safety inspection and testing of electrical equipment in the WHS Regulations or alternatively Table 4 (which sets out the intervals between inspection and tests and types of environments) being replicated into the model Code of Practice: Managing Electrical Risks in the Workplace. (Regulator)

Consideration of issues

RCDs are a control against electric shock.

It is not clear what the intention behind not prescribing what 'regular' inspections ought to be, but the Reviewer assumes it was to give duty holders the flexibility to determine the appropriate testing intervals with reference to their own workplace and risk profile.

[49] See regulation 3.60(4)(a).

The model Code of Practice: Managing Electrical Risks in the Workplace contains a reference to AS/NZS 3760:2010 In-service safety inspection and testing of electrical equipment, which contains indicative inspection and testing intervals for RCDs.[50]

Observation 5

As discussed in Chapter 10, there are difficulties with accessing Australian Standards. The inclusion of a reference to Australian Standards in the WHS Regulations in relation to the inspection and testing of residual current devices should be considered in conjunction with Observation 13.

8.9 Example 4 - overhead and underground electric lines

Regulation 166

Regulation 166 requires PCBUs to ensure, so far as is reasonably practicable, that no person, plant or thing at the workplace comes within an unsafe distance of an overhead or underground electric line. Further provision on what constitutes an 'unsafe distance' may be made separately under general electrical safety laws, relevant Codes of Practice or guidance material.

Sub-regulation 166(2) sets out requirements for PCBUs if it is not reasonably practicable to ensure the safe distance is observed, including a risk assessment requirement. The provision requires the relevant work to be carried out in accordance with any control measures determined in accordance with the risk assessment, and also any relevant requirement of an electricity supply authority with responsibility for the electric line.

Genesis of the provision

At the time the WHS Regulations were drafted, it was recommended that overhead and underground electric lines should be treated in the same way for the purposes of general risk management.[51]

Stakeholder views

Concerns were raised about how sub-regulation 166(2)(b)(ii) (Overhead and Underground Electric Lines) may lead to electricity supply authorities prescribing unwarranted conditions based on a perception that this regulation allows them to impose 'requirements'.

Stakeholders indicated that this could also lead to inconsistencies between such authorities. For example one authority may require that power lines be de-energised in low risk instances but another authority may not require this. (Industry Association)

Stakeholders argued that if an electricity supply authority has any power conferred upon it in relation to risk control when PCBUs seek to operate near power lines, then there is no need for this regulation. It is unwarranted and potentially problematic.

It was argued that the regulation should be removed.

Consideration of issues

The Reviewer was not in a positon to test this issue with additional stakeholders including electricity supply authorities and the regulators for electrical safety, so the Review has not made any specific observation about sub-regulation 166(2)(b)(ii).

[50] The legal status of Codes of Practice is discussed in Chapter 9.
[51] Decision RIS 2011, p. 115.

8.10 Example 5 - de-energised equipment

Regulations 154 and 156

Regulation 154 requires PCBUs to ensure that electrical work is not carried out on electrical equipment—including electrical equipment that forms part of an electrical installation—while it is energised (or 'live') unless the requirements in relation to energised electrical work under the division are met.

Regulation 156 requires PCBUs to ensure that electrical equipment, that has been de-energised so that work can be carried out on it, is not inadvertently re-energised while the work is being carried out.

Stakeholder views

A number of the requirements relating to electrical work are expressed in 'absolute' terms. As an example, regulation 154 provides that a PCBU must ensure that electrical work is not carried out on electrical equipment while the equipment is energised. The requirement is therefore not specifically expressed as being qualified by what is 'reasonably practicable' as some other duties are. Two stakeholders expressed concerns with this drafting on the basis that the WHS Regulations were seen to require 'unrealistic' compliance. One example provided by a stakeholder was regulation 156.

An Industry Association indicated that it was difficult to comply with regulation 156 as it will not always be possible for PCBUs to prevent inadvertent re-energisation in an absolute sense.

Consideration of issues

At the time the WHS Regulations were drafted, it was considered that the requirements around energised electrical work were necessary to ensure there is no lessening of standards. It was stated in the Decision RIS 2011 that the proposed requirements reflected current industry practice and measures that are reasonably practicable for business to implement to manage the significant WHS risks associated with electricity.

As the intention was to implement reasonably practicable measures, our view is that in interpreting regulation 156 (and other WHS Regulations expressed in 'absolute' terms) it is necessary to have regard to the principles in sections 13–18 of the WHS Act.

Section 17 of the WHS Act specifies that a duty holder can ensure health and safety by managing risks, which involves:

- eliminating the risks, so far as is reasonably practicable
- if not reasonably practicable—to minimise the risks, so far as is reasonably practicable.

Section 18 of the WHS Act provides meaning and guidance about what is 'reasonably practicable' when complying with duties to ensure health and safety under the WHS Act, WHS Regulations and Codes of Practice. To determine what is (or was at a particular time) reasonably practicable in relation to managing risk, a person must take into account and weigh up all relevant matters, including:

- the likelihood of the relevant hazard or risk occurring
- the degree of harm that might result
- what the person knows or ought reasonably to know about the hazard or risk and the ways of eliminating or minimising the risk
- the availability and suitability of ways to eliminate or minimise the risk.

Duty holders may be assisted by further guidance on the operations of sections 17 and 18 of the WHS Act.

Observation 6

The feedback from several Industry Associations suggests that there is a perception that regulation 154 requires 'unrealistic' compliance. Duty holders may be assisted by clear guidance on the operations of sections 17 and 18 of the WHS Act specifically, that the obligations in the WHS Regulations are qualified by 'reasonable practicability'.

8.11 Example 6 - electrical equipment and installations and construction work

Stakeholders provided feedback about the level of prescription in regulation 163 which regulates electrical equipment and installations and construction work.

Regulation 163 provides that a PCBU that carries out construction work must comply with *AS/NZS 3012:2010* Electrical installations - construction and demolition sites**.** There are similar requirements in Western Australia, but not Victoria.

At the time the WHS Regulations were drafted, there was strong opposition to this regulation and the incorporation of this standard.[52] However, it was concluded that the standard was drafted in such a way that made it suitable for inclusion in the WHS Regulations. Further, it was argued that compliance with this standard was not expected to have a significant impact on the then-existing obligations because that standard is called up by AS/NZS 3000:2007 Electrical Installations (known as the Australian/New Zealand Wiring Rules) *w*hich was already widely mandated. It was also argued that the requirements in AS/NZS 3012:2010 Electrical installations – construction and demolition sites were preferred over more generic processes proposed for other industries under the WHS Regulations.

Stakeholder views

- The requirement to comply with AS/NZS 3012 Electrical Installations–Construction and demolition sites represents an inappropriate level of prescription for the construction industry. (Industry Association)
- Specific recommendations for construction should be in guidance material and not mandated in an Australian Standard which is outside the control of Safe Work Australia and that referencing of standards in regulations is not supported. (Industry Association)

Consideration of issues

As indicated earlier in this Report, there is obviously a need to balance flexibility in compliance and an appropriate level of prescription in the WHS Regulations for certain high risk activities. Chapter 10 of this Report discusses the accessibility of Australian Standards further.

Observation 7

As discussed in Chapter 10, there are difficulties with accessing Australian Standards. The inclusion of a reference to Australian Standards in the WHS Regulations in relation to electrical equipment and installations for construction work should be considered in conjunction with Observation 13.

[52] Decision RIS 2011, p. 115.

8.12 High risk work

The regulation for high risk work requires persons carrying out classes of high risk work to be licensed, identifies relevant qualifications for an applicant for a high risk work licence, and establishes the licensing process.

High risk work is collectively a group of activities that have been identified as being of sufficient risk that those permitted to undertake the work can only do so after they have demonstrated they are competent to do the work and have obtained a licence to allow them to carry out the work.

The WHS Regulations for high risk work and, in particular, the types of activity covered, were based on the then National Standard for Licensing Persons Performing High Risk Work (as revised in 2006) (the **National Standard**).[53]

Regulations - Schedule 3

A copy of Schedule 3 to the WHS Regulations which sets out the types of high risk work licences is included as Annexure B to this Report.

Stakeholder views

Stakeholders raised concerns about a lack of clarity in the WHS Regulations in relation to the breadth of Schedule 3 which deals with high risk work. The particular concern was:

- The term 'use of' rather than 'operation of', for example use of a crane, may be taken to catch anyone making use of the plant, not just the person operating the plant, for example, a builder making use of a hoist to carry out work. (Industry Association).

Consideration of issues

The term 'use of' is inconsistent with the Schedule - Licence classes and definitions in the National Standard. The National Standard provided that licences related to 'the operation of' relevant plant.

As the intention of the WHS Regulations was to be consistent with the National Standard, the concern warrants further consideration and specific consultation with a broad range of industry participants.

The Review supports further consideration being given to the efficacy of an amendment to Schedule 3 of the WHS to make it clear that high risk work licensing relates to the 'operation of' relevant plant.

8.13 Scaffolds

Regulation 225(5)

Sub-regulation 225(5) requires the person with management or control of a scaffold at a workplace to prevent authorised access to the scaffold while it is incomplete or unattended, for example, by using danger tags.

Stakeholder views

Stakeholders reported challenges in complying with regulation 225(5):

- The requirement to prevent access to an incomplete scaffold is unrealistically onerous as it will not always be possible for a PCBU to prevent access to an incomplete scaffold in an absolute sense, for example if workers disregard the measures implemented by a PCBU to prevent such access. (Industry Association)

[53] An archived copy of the National Standard is available online – click this link https://www.safeworkaustralia.gov.au/doc/national-standard-licensing-persons-performing-high-risk-work

- Both regulation 156 and sub-regulation 225(5) should be subject to 'so far as it is reasonably practicable'. (Industry Association)

Consideration of issues

As discussed in relation to regulation 156, sub-regulation 225(5) is arguably already subject to the qualification 'so far as is reasonably practicable' because the reference to 'must ensure' in the WHS Regulations ought to be read in conjunction with sections 17 and 18 of the WHS Act.

Observation 8

The feedback from several Industry Associations suggests that there is a perception that sub-regulation 225(5) requires 'unrealistic' compliance. Duty holders may be assisted by clear guidance on the operations of sections 17 and 18 of the WHS Act specifically, that the obligations in the WHS Regulations are qualified by 'reasonable practicability'.

8.14 Efficacy of Safe Work Methods Statements

The Reviewer received extensive submissions from some stakeholders about regulations 289, 299, 300 and 302 which relate to Safe Work Method Statements (**SWMS**).

The Report considers SWMS in detail in Chapter 12 of this Report.

9. Codes of Practice

There are 24 model Codes of Practice which have been developed by Safe Work Australia. Each jurisdiction has decided which of the 24 Codes of Practice to adopt. In addition, jurisdictions have developed their own jurisdictional specific Codes of Practice. Annexure A provides an overview of exceptions to the model WHS regulatory framework which includes Codes of Practice.

Approved Codes of Practice are made under section 274 of the WHS Act. An approved Code of Practice provides practical guidance on how to achieve the WHS standards required under the WHS Act and WHS Regulations.

A Code of Practice can assist anyone who has a duty of care in the circumstances described in the code.

Codes of Practice are admissible in court proceedings under the WHS Act and WHS Regulations. Courts may regard a Code of Practice as evidence of what is known about a hazard, risk, risk assessment or risk control, and may rely on the code in determining what is reasonably practicable in the circumstances to which the code relates.[54] It is therefore important that Codes of Practice are accessible and easily understood in order for them to be effective.

The feedback received from stakeholders about Codes of Practice[55] was mixed.

In their current form it could be said that the Codes of Practice are only meeting the needs of certain parts of the industry and when they are read in conjunction with the other aspects of the WHS regulatory framework, many create confusion.

The feedback received on Codes of Practice was in relation to the following areas:

- the suitability of the Codes of Practice to SMEs
- the suitability of the Codes of Practice to the residential building sector
- lack of clarity
- legal status of Codes of Practice
- harmonisation across jurisdictions
- the inclusion of references to Australian Standards
- specific issues with electrical hazards.

Each of these issues is addressed in turn below.

Our discussion begins with a comment on earlier reviews and reform of Codes of Practice to set the context for our comments.

9.1 Other reviews and reform

On 2 May 2014 the Council of Australian Governments agreed all governments would investigate ways in which model WHS laws could be improved with a focus on reducing regulatory burden and making it easier for business and workers to comply. This included a review of the model Codes of Practice,[56] including whether they could be made less complex. Two options were

[54] In Queensland, from 1 July 2018, if a Code of Practice has been approved in that jurisdiction, a PCBU must comply with the code or manage hazards and risks arising from the work carried out as part of the conduct of the business. Alternatively, a PCBU may undertake the work in a way that is different to the code but provides a standard of health and safety that is equivalent to or higher than the standard required under the code. The different approaches in Victoria and Western Australia are outlined at Chapter 4 of this Report.

[55] See Annexure A for the Codes of Practice that were considered as part of the Review.

[56] See Decision Regulation Impact Statement, Improving the model Work Health and Safety laws, December 2014, available online at https://ris.pmc.gov.au/2017/01/18/improving-model-work-health-and-safety-laws.

considered: maintain the status quo by continuing to develop stand alone, comprehensive model Codes of Practice; or modify the format of codes to be shorter and easier for businesses and workers to understand. The preferred option was the second option; for national guidance material and model Codes of Practice to be concise, focussed on a specific hazard or activity and written in a simple easy to understand style. This recommendation was designed to 'reduce the regulatory burden for duty holders, particularly small businesses, by reducing the time taken to find the information they need and saving money that they would otherwise spend on engaging consultants for advice'.[57]

National Research Centre for Occupational Health and Safety Regulation Review

Safe Work Australia entered into a funding agreement for research into a number of WHS issues including Codes of Practice and guidance material[58] as part of planned ongoing evaluation of the model WHS laws. This research was undertaken by the National Research Centre for Occupational Health and Safety Regulation (**NRCOHSR**) between 2014 and 2016.

The NRCOHSR review made a range of observations about Codes of Practice and guidance material following a detailed desktop review and made a range of observations about the purpose of the documents, the intended audience, the language and content, the appearance of the documents and difficulties in accessing the documents. These were all issues which were raised in the course of the Review.

The NRCOHSR Report's recommendations relevant to the Review are set out below. This context assists in framing our discussion of Codes of Practice which follows. The relevant recommendations include:

> Recommendation 4
>
> Substantially reducing the length of Codes of Practice and Guidance Material may result in oversimplification and the loss of essential technical information, and is for the most part, counterproductive. This practice should be discontinued. Replacing 'umbrella' Codes of Practice with Guidance Material with multiple smaller and more targeted ones however, may be beneficial where the target audience comprises largely or exclusively of small enterprises, but not otherwise.
>
> Recommendation 5
>
> Codes of Practice and Guidance Material should be written in a style that communicates effectively with their intended target audience(s). Much depends upon the context. Where small enterprises or workers are a particular target then a non-technical style that is relatively straightforward and geared to a reading age of Year 10 or 11 will be best. In industries where literacy rates are low and/or a high proportion of migrant workers, further efforts will be needed to communicate effectively. Consistent with previous research (Bluff & Gunningham), desirable features of Codes of Practice are: plain language; clear and concise information; practical 'how to' advice and solutions; clear simple drawings, diagrams, photos or other illustrations, checklists and reference to other resources and contacts. There is particular scope to use innovative forms of communication beyond the written word, in the dissemination of Guidance Material and these should be further developed.
>
> Recommendation 7
>
> Guidance material in various forms can and should play an important role in the overall architecture of WHS regulation. However, some jurisdictions need to develop a greater range of such material to complement the Guidance Material developed under the harmonised regime. Moreover, all jurisdictions should continue to explore and expand innovative means of communicating Guidance Material beyond the written word.
>
> Recommendation 8
>
> The distinctive evidentiary status of ACOPs[59] and the benefits of this approach in terms of making clear what constitutes compliance and ensuring compliance provide compelling reasons for maintaining the distinction between ACOPs and Guidance Material. In particular, an ACOP should be selected in preference to guidance where there is a need for unequivocal authoritative advice. Specifically, an ACOP is a more appropriate choice when it is important to provide clarity and certainty about an acceptable way(s) to comply with the WHS statute or regulations, and it needs

[57] Decision Regulation Impact Statement, Improving the model Work Health and Safety laws, December 2014, p. 23.

[58] Gunningham, N., Dennerley, J., and Ivec, M., National Research Centre for Occupational Health and Safety Regulation, Project 4: The Efficacy of Codes of Practice and Guidance Material, Report to Safe Work Australia, September 2015.

[59] ACOPs is the term used in the NRCOHSR Report to mean Approved Codes of Practice.

to be clear and unambiguous that the instrument has legal status and/or can be used as evidence in proceedings. In other circumstances, where the principal aim is to provide practical advice and solutions, Guidance Materials (in various forms) are appropriate.

Recommendation 9

Since ACOPS and Guidance Material commonly play distinctive but complementary roles policy makers should develop clear and appropriate criteria for determining what instruments or combination of instruments, to use in what circumstances. These should be the same nationally and for each jurisdiction, to facilitate understanding of their distinct status and roles.

The Reviewer understands that the evidence presented in the NRCOHSR Report is being considered as part of the review of the model WHS laws due to be completed at the end of 2018.

Safe Work Australia review of model Codes of Practice

Safe Work Australia has been reviewing all model Codes of Practice since February 2017, particularly in terms of technical accuracy and useability, including whether the current information is easy to access, understand and apply. Safe Work Australia published the first tranche of reviewed model Codes of Practice on 25 May 2018.[60] Over the course of the review of the model Codes of Practice, Safe Work Australia consulted a wide range of stakeholders through Safe Work Australia Members and their networks. The Reviewer was informed that industry representatives ACCI and Australian Industry Group consulted their membership in relation to specific model Codes of Practice, including the HIA and MBA. Similarly, the ACTU consulted its membership during the review.

The Reviewer also understands that Safe Work Australia members agreed to a broader review of the model Codes of Practice: Managing the risk of falls at workplaces and Preventing falls in housing construction due to the Strategic Issues Group for Work Health and Safety raising issues that went beyond minor technical amendments and the usability and readability of the documents. The Review has not had the opportunity to take into account the substantial amendments made to these model Codes of Practice.[61]

Against this background, the Report considerers if Codes of Practice are achieving their aim of supporting the WHS Act and WHS Regulations.

9.2 The needs of many stakeholders are being met

Stakeholder views

Our first observation is that many stakeholders were positive about the Codes of Practice. The feedback is as follows:

- The model Codes of Practice and those produced by state regulators are considered to be of high quality and provide guidance on the minimum requirements necessary to achieve compliance. (Industry Association)
- There are many benefits associated with the Codes of Practice including having legislative references contained in Codes of Practice. (Regulator)
- The guidance provided by the Codes of Practice and Guidance Notes are appropriate and easy to read. (Industry Association)
- Codes of Practice are a useful source of information that set out clear direction and guidance within the applicable Codes of Practice. (Industry Association)
- The quality of model and State Codes of Practice is accepted. (Industry Association)

[60] The first tranche of model Codes of Practice that have been reviewed by Safe Work Australia can be found on its website – click this link: https://www.safeworkaustralia.gov.au/resources_publications/model-codes-of-practice

[61] A detailed submission was received from one stakeholder about issues identified with the draft revised Code of Practice: Managing the Risk of Falls at Workplaces but the Review was not privy to this draft code. This submission was passed on to Safe Work Australia.

Observation 9

The needs of many stakeholders are being met by the model Codes of Practice. Those stakeholders report that the Codes of Practice relevant to the top three mechanisms of injury are appropriate, easy to read and contain appropriate information to assist them to eliminate or minimise risks.

Some Industry Associations raised concerns about the effectiveness of the Codes of Practice. These views are set out below.

9.3 SMEs

Stakeholder views

Concerns were raised about the role of Codes of Practice in assisting SMEs to eliminate or minimise risks:

- The practicality, capability and limitations of SMEs needs to be understood and taken into account. (Industry Association)
- Guidance that is of more practical value than the provisions of the model Code of Practice Preventing Falls in Housing Construction. (Industry Association)
- Codes of Practice must provide practical ways to comply. They are still too complex for business. They need to be practical, user friendly, tested and concise. (Industry Association)
- Long and complex codes do little to assist small business to meet their work health and safety duties. (Industry Association)

Consideration of issues

Despite the concerns raised about the length and complexity of Codes of Practice creating challenges for SMEs, the Review was not able to determine from the feedback what aspects of the codes were of concern or how to address the general concerns raised by stakeholders.

As other reviews have stated,[62] there is a need to balance the requirement to convey technical information against shortening and simplifying Codes of Practice to meet the needs of all stakeholders but, importantly, SMEs which may not have the resources (in terms of specialist safety expertise) that a larger organisation may have. Where that information relates to the top three mechanisms of injury, caution needs to be exercised so that there is not an oversimplification or reduction of information about eliminating or controlling risks. The Reviewer encourages WHS regulators to look at innovative ways to communicate complex technical information to SMEs.

Observation 10

Although the Codes of Practice are meeting the needs of many stakeholders, some Industry Associations have reported that the Codes of Practice are not meeting the needs of small to medium enterprises.

9.4 Residential building sector

Stakeholder views

[62] See our discussion of those other Reviews at 9.1 of this Report.

The Reviewer received significant (and conflicting) feedback about the need for a Code of Practice developed specifically for the residential building sector. That feedback includes:

- The need for guidance material specifically designed for the residential building industry. To that end, a Code of Practice specifically for the housing sector will assist in achieving better outcomes than the current approach which sees generic Codes of Practice applying to inappropriate situations. (Industry Association)
- Review the model Codes of Practice and consider the inclusion of guidance. (Industry Association)
- Industry focussed guidance may be more appropriate (Codes of Practices cannot be reviewed and modified quickly). (Industry Association)
- There is a need for focussed, practical guidance to be developed in direct consultation with industry. Directly consulting with the affected industries should be a priority when developing safety materials, no 'blanket' or one size fits all approach. (Industry Association)
- Support development of industry specific guidance, including the development of a Code of Practice specifically for the residential building sector. (Industry Association)

Consideration of issues

There are differing views within Industry Associations representing the residential building sector about whether the answer for eliminating or reducing risks in the residential building sector is a stand-alone Code of Practice or targeted industry specific guidance material. The Reviewer encourages further consultation with the sector on how the WHS regulatory framework could be improved to assist these stakeholders eliminate or minimise risks.

9.5 Two Falls Codes of Practice

The residential building sector has specific guidance on preventing falls in housing construction through the model Code of Practice: Preventing Falls in Housing Construction. Falls are also covered by the model Code of Practice: Managing the Risk of Falls at Workplaces.[63]

Stakeholder views

Industry Associations representing the residential building sector raised issues with what was described as a lack of clarity about the application of the two falls codes for the housing construction sector (i.e. which code applies and when). It was suggested that a statement should be included in the model Code of Practice: Managing the Risk of Falls at Workplaces that '[t]his code is not specifically tailored to housing construction work'. (Industry Association)

Consideration of issues

The Code of Practice: Preventing Falls in Housing Construction does provide that it is to be read in conjunction with the Code of Practice: Managing the Risks of Falls at Workplaces and the Code of Practice: Construction Work.[64] This guidance suggests that the two codes are intended to operate conjointly in the housing construction sector. However, despite this guidance, some stakeholders still consider that it is unclear which code applies and when.

[63] In Victoria, guidance on preventing falls in housing construction is set out in the Compliance Code: Prevention of falls in general construction and in the Code of Practice: Prevention of falls in housing construction (which is not current but which continues to be available to provide guidance to duty holders). In Western Australia, there is a single document, the Code of practice - Prevention of falls at workplaces. The Reviewer did not receive any feedback on these documents.

[64] See Code of Practice: Preventing Falls in Housing Construction, p. 3.

Observation 11

The feedback presented suggests that despite steps to clarify the application of the two Codes of Practice related to falls, some stakeholders remain confused about their application. This observation is made in the context of Safe Work Australia having reviewed all Codes of Practice since February 2017 and the understanding that these Industry Associations were consulted during that process.

9.6 Legal status of a Code of Practice

The legal status of a Code of Practice is set out in section 275 of the WHS Act.

Sub-section 275(2) provides that a Code of Practice is admissible in proceedings as evidence of whether or not a duty holder has complied with a duty or obligation under the WHS Act.

Sub-section 275(3) enables a court to use a Code of Practice as evidence of what is known about hazards, risk, risk assessment and risk control. A code may also be used to determine what is reasonably practicable in the circumstances to which the code relates.

Section 275 does not prevent a person introducing evidence of compliance with the WHS Act apart from the Code of Practice—so long as this provides evidence of compliance at a standard that is equivalent to or higher than the Code of Practice.

The role of a Code of Practice is also described in the foreword of model Codes of Practice.

Stakeholder views

The Reviewer received a range of feedback about the 'legal status' of Codes of Practice indicating a level of confusion about the legal status of codes under the WHS Act. Some of that feedback included:

- Inserting 'caveats' into Codes of Practice removes certainty on what minimum compliance looks like. (Union)
- More clarity on the status of Codes of Practice and Guidance material. (Industry Association)
- If any Codes of Practice are considered necessary these should be industry specific and should contain 'deem to comply provisions' and options for PCBUs to consider in order to help them to comply with WHS laws, rather than be used by regulators as a *de facto* or quasi-regulation to impose further layers of obligation and mandatory requirements. (Industry Association)

Consideration of issues

The feedback indicates that some stakeholders may not understand the role of a Code of Practice and guidance material. In particular, there is confusion about how the information contained in the Code of Practice (and other supporting information about risk and hazard identification and elimination or control measures including other guidance material) ought to be considered in relation to a duty holder's obligations with reference to section 18 of the WHS Act. That is, that these documents may be referred to in an assessment of what a duty holder knew, or ought reasonably to have known, about a risk to health and safety and the available means to eliminate or minimise that risk. References by stakeholders to Codes of Practice as quasi-regulation suggests that more needs to be done to educate duty holders. The focus should be on how to consider the risk control measures set out in the Codes of Practice and guidance material as part of doing what is reasonably practicable to ensure health and safety.

As noted in Chapter 4 of this Report, both Codes of Practice and guidance material are relevant to an assessment of what is reasonably practicable to meet a health and safety duty.

Observation 12

The feedback from some stakeholders suggests that the legal status of Codes of Practice is not easy to understand. Duty holders may be assisted by clear guidance on the role of Codes of Practice in understanding what is reasonably practicable in ensuring health and safety.

9.7 Harmonisation

Concerns were raised about a lack of consistency across jurisdictions with Codes of Practice.

Stakeholder views

- There is duplication in some jurisdictions with Codes of Practice causing a lack of clarity about which one should be applied. (Industry Association)
- There should be a simple document which highlights the subtle changes that the states have made to the model Codes of Practice. (Industry Association)
- There is a lack of harmonisation in the provision and titles used for Codes of Practice across the states (Industry Association)

Consideration of issues

The inconsistencies in the Codes of Practice and guidance materials between jurisdictions are an ongoing issue for businesses in the industry who work across multiple jurisdictions. The different Codes of Practice and guidance material in each jurisdiction are listed in Annexure A. The Reviewer appreciates there is a need for jurisdictional flexibility to be balanced with harmonisation, but the volume of information and different Codes of Practice and guidance material in each jurisdiction will be an ongoing issue for employers. These create unnecessary complexity for business, increase their administrative burden and present challenges for compliance and effectiveness.[65]

Consideration should be given to developing a central source for Codes of Practice and guidance material relevant to the top three mechanisms of industry. This would assist duty holders identify 'at a glance' what applies where and the jurisdictional differences.

9.8 Concerns were raised about the inclusion of and reference to Australian Standards in Codes of Practice

Stakeholder views

- Technical standards, such as Australian Standards, should not form part of a Code of Practice. Where such standards are included in a code, the standards should be described as 'optional information that may be considered by duty holders'. (Industry Association)

The role of, and the issues with Australian Standards being incorporated into the WHS Regulations and Codes of Practice is considered at Chapter 10 of this Report.[66]

9.9 Specific issue with electrical hazards

Stakeholder views

[65] See the detailed discussion about the consequences of inconsistencies in Centre for Construction Work Health and Safety Research, Final Report, The definition of a construction project, August 2017 RMIT University, p. 49 and 50.
[66] The OHS Regulations 2017 (Vic) and the OSH Regulations 1996 (WA) and Codes and Guidance made under those laws also refer to Australian Standards.

- Appropriate isolation procedures, such as circuits not being appropriately de-energised, misunderstanding associated with the actual electrical circuits being worked on and failure to test circuits to ensure that they are not energised. (Regulator)
- Each of these issues has contributed to electrical shocks in one of the model WHS law jurisdictions. (Regulator)
- Recommendation that the electrical code be amended to improve electrical isolation processes during maintenance, demolition and dismantling work. (Regulator)

Consideration of issues

A review of the Code of Practice for Managing Electrical Risks in the Workplace has recently been completed and a revised Code has been agreed to by Safe Work Australia members. This issue had not previously been identified by stakeholders as part of the review of that Code. This issue has been referred to Safe Work Australia for consideration when the model Code of Practice and/or guidance material is reviewed.

10. Australian Standards

Australian Standards exist in relation to a range of WHS matters including in areas relevant to the three leading mechanisms of fatalities in the building and construction industry. In a number of instances, the WHS Regulations, Codes of Practice or guidance material refer to Australian Standards.

Australian Standards are developed by Standards Australia (a non-governmental, not-for-profit standards organisation). Australian Standards are developed by technical committees comprised of relevant subject matter stakeholders. Australian Standards are not freely available and must be purchased from Standards Australia's exclusive distributor, SAI Global.

The Reviewer received mixed feedback from stakeholders about references to Australian Standards in the WHS Regulations and Codes of Practice.

Stakeholder views

Regulators and Union support specific references to Australian Standards to provide detailed guidance to duty holders.

Industry Associations raised concerns about the cost of obtaining Australian Standards, the complexity in cross-referencing them and the difficulties with accessing them. Some of that feedback includes:

- References to external documents inhibit utility as a reference guide as the documents referenced may not be readily available or kept updated, an employer may be required to obtain copies of ancillary material to achieve compliance with the Code and mandating compliance with other external documents imposes an unreasonable (and significant) cost and administrative burden on business. (Industry Association)
- Do not reference them unless they are made freely available. (Industry Association)
- Australian Standards should not feature cross-referencing between Standards. (Industry Association)
- Recommendations should be in guidance material and not mandated by the calling up of Australian Standards in regulations. Only include a technical standard in a Code of Practice where this has been the subject of a comprehensive regulatory impact assessment to demonstrate the need for its inclusion. Standards not subject to this assessment should not carry any weight in meeting WHS obligations and be described as optional information that may be considered by duty holders only. (Industry Association)
- Do not support the current proliferation of referencing of Australian Standards in the model WHS laws. (Industry Association)
- Requires PCBU to obtain documents at great cost and administrative burden which has the potential for adverse impact on compliance. (Industry Association)

10.1 Example

The cost of purchasing Australian Standards is significant and may be an impediment for SMEs in identifying, eliminating or minimising risks. Regulation 163 of the WHS Regulations is an example of cost based on feedback provided by an Industry Association.

WHS Regulation 163 mandates compliance with AS/NZS 3012:2010: Electrical installations - Construction and demolition sites. This standard in turn references 26 other Standards as 'normative' also requiring compliance. Furthermore, each of these Standards would similarly reference other ancillary Standards, and so on. It is usually not easy to ascertain which ancillary Standards are relevant to the issue at hand. A perverse twist is that some of these documents may turn out to be of no relevance to the matter at hand, their lack of relevance being only apparent after the purchase and perusal of the documents.

Incorporation by reference may have the effect of making the Standards legally binding. The result is that 'the reader is forced to look outside the usual sources of written laws in order to gain a complete understanding of it. Affected parties are required to obtain the incorporated material if they are expected to know and fully comply with the law. Not only does this increase compliance costs, it may also have an adverse impact on actual levels of compliance'.[67]

Australian Standards are costly and numerous. Business cannot be expected to purchase the range of Australian Standards, especially given the high volume of cross-referencing between Standards. The table below sets out examples of references in Codes of Practice and the average costs of Australian Standards referenced.

Table 2: Example of references in Codes of Practice and average costs of Australia Standards referenced

Document referencing Australian Standard	No. of Australian Standards referenced	Example referenced and associated purchase cost (as indicative examples)
WHS Regulations	19	AS/NZS 3012:2010. Electrical installations Construction and demolition sites - $207
Model Code of Practice: Preventing falls in housing construction	20	AS/NZS 4576:1995 - Guidelines for scaffolding - $138
Model Code of Practice: Managing the risk of falls at workplaces	31	AS/NZS 1576.1:2010 Scaffolding – general requirements - $207
Model Code of Practice: Managing electrical risks in the workplace	11	AS/NZS 3760:2010 - In-service safety inspection and testing of electrical equipment - $165

Observation 13

The feedback from some Industry Associations indicates that the inclusion of references to Australian Standards in the WHS Regulations, Codes of Practice and guidance materials means that guidance on how to eliminate or minimise risks is not readily available to all duty holders.

[67] Joint Standing Committee on Delegated Legislation, Report 84 Access to Australian Standards Adopted in Delegated Legislation, (2016), Western Australia Legislative Assembly.

11. Guidance material

A large amount of guidance material has been published by Safe Work Australia and the state and territory WHS regulators. The Safe Work Australia list of guidance materials runs to over 15 online screen pages. Under the heading 'Construction' on the industry pages of Safe Work Australia's website, it identifies that there are 66 codes and guides, 14 reports and case studies and 15 videos, seminars and podcasts relevant to the construction industry. Some of this material is relevant to the top three mechanisms of fatality, the subject of the Review.

The feedback received from stakeholders about guidance material in the WHS regulatory framework was mixed.

Positive feedback on guidance materials was received from larger organisations. In contrast, stakeholders representing SMEs considered that more work was required to make guidance materials understandable and accessible. This feedback is discussed below.

11.1 General satisfaction in some parts of the industry

Stakeholder views

The views expressed by stakeholders representing larger organisations with greater resources is that there is general satisfaction with the guidance material within those organisations. Some of the views Industry Associations representing larger employers expressed were:

- The regulatory framework demonstrates a clear understanding of the sector's requirements to evaluate risk exposure and outcomes. (Industry Association)
- Support principles-based system approach with a minimum use of prescription or process standards. (Industry Association)
- Overall it fits together. (Industry Association)
- It is sound and does not need significant or fundamental alteration. (Industry Association)

This positive feedback is likely to be because these larger organisations have access to sufficient resources to identify, analyse and internally communicate which guidance material is relevant.

11.2 Concerns raised about guidance for SMEs

The feedback from other Industry Associations is that more needs to be done to meet the needs of SMEs.

Stakeholder views

Those representing the views of SMEs reported challenges in accessing and understanding the guidance material. Stakeholder feedback was directed to how the needs of SMEs are not being met through guidance.

Some of the concerns raised by Industry Associations about the information includes:

- More generally, regulations need to find better and more specific ways of delivering safety messages to small business. WHS information and guidance must be tailored to meet the needs of small business and specific industry sectors, such as residential building. (Industry Association)
- The diverse nature of the SME requires specialised assistance with industry specific material, education and regulatory approaches. The fundamental differences in structure and operations between small, medium or large organisations are not explicitly recognised or proactively addressed. (Industry Association)

Consideration of issues

The Reviewer heard from a few stakeholders that the needs of SMEs are not being met. The Review has assumed that some stakeholders are seeking targeted, industry specific guidance material and on the other hand, the introduction of this guidance material increases the overall volume of material and may create uncertainty about what tools to apply.

It was interesting that despite the concerns about the volume of information, feedback was received from a Regulator who suggested that multiple, more specific targeted documents may best suit small business. This demonstrates the fundamental dilemma faced from a regulatory perspective.

In the course of the Review, an overview of the WHS regulatory framework, Annexure A,[68] was undertaken by a lawyer, who has specialty training and experience in legal research. Despite this, it was an extensive exercise, made more time consuming by the different sources of information and the volume of information.[69]

The Reviewer encourages further consideration of the specific issues faced by SMEs in accessing and understanding guidance material.

Observation 14

The feedback from some Industry Associations is that more needs to be done to make guidance material readily available and easy to understand for small to medium enterprises.

11.3 Guidance is not always readily available, easy to understand, and in a useful format

Stakeholder views

Other feedback relevant to the industry as a whole was about the sheer volume of guidance material about the three mechanisms of injury and challenges with accessing the information. Some of that feedback included:

- Inordinate array of information but most publications and guidance are no longer available in hard copy form, one common problem is that it is hard to access and difficult to find. (Industry Association)
- Not every element operates 'hand-in-glove', creating problems for implementation. (Industry Association)
- While the three-tiered approach of the WHS Act, WHS Regulations and Codes of Practice provides flexibility in responding to changing circumstances and technology it can at times lead to confusion given the sheer volume of documents. Regulators may also publish guidelines on issues of individual jurisdictional concern compounding this problem. (Industry Association)
- No central repository for information. (Industry Association)

Consideration of issues

As discussed at 11.2 above the review team experienced difficulty locating and identifying the parts of the WHS regulatory framework relevant to the building and construction industry. We repeat our earlier comments.

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[68] It is also Annexure A to this Report.

[69] In reviewing the guidance material, the Reviewer noted that Safe Work Australia has taken steps to group information into industry classifications which assists with accessibility.

WorkSafe Victoria provided feedback on the comprehensive guidance (approximately 245 pieces) relating to the key hazards identified in the Issues Paper. WorkSafe Victoria is currently undertaking a significant review of its guidance material 'to ensure that current and accurate safety messages are delivered in the most effective way'. It is working towards strengthening the state of knowledge through the review of all guidance material and safety information to ensure it is clear and easy to use and reflects contemporary industry practice as part of its long-term strategy WorkSafe 2030.

WorkSafe is upgrading its website to improve accessibility of safety information. The Reviewer supports and encourages these sorts of initiatives in all jurisdictions.

11.4 The residential building sector advocated for industry specific guidance

A lot of feedback was directed to how parts of the WHS regulatory framework are not meeting the needs of the residential building sector. This feedback includes the fact that guidance is written in a way that assumes that controls are the same across the industry (Industry Association).

Specific aspects of the feedback from the residential building sector are discussed in some further detail at Chapter 11 of this Report.

11.5 Lack of consistency across jurisdictions is an issue

Stakeholder views

There are ongoing concerns about the differences in the WHS regulatory framework and the challenges for business. Some of the stakeholder feedback includes:

- A call for improved alignment across all industries and commitment to harmonisation recommended as a priority. Includes Codes of Practice. (Industry Association)
- The need for high priority focus on harmonisation. (Industry Association)
- Need for further WHS harmonisation, for example through Codes and guidance material.

Consideration of issues

Having different Codes of Practice and guidance material in different jurisdictions is an ongoing issue for businesses in the industry who work across multiple jurisdictions. The various guidance is identified in Annexure A. As an example, for traffic management and transporting people, Queensland, South Australia, Victoria and Western Australia all have jurisdictional variations to the Codes and guidance material that applies. Identifying the relevant requirements requires a duty holder to visit four different websites and to have a good understanding of the type of information they are seeking because the information is not grouped by hazard and/or industry.

Harmonisation of the WHS regulatory framework would remove many of these challenges. In the interim, consideration ought be given to developing a single source of information and keeping it up to date to track jurisdictional variations to assist duty holders identify what guidance material is applicable in each jurisdiction.

Observation 15

Having different Codes of Practice and guidance material in different jurisdictions is an ongoing issue for building and construction industry participants who work across multiple jurisdictions.

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12. Safe Work Method Statements

A Safe Work Method Statement (**SWMS**) is a documented process for identifying and controlling health and safety hazards and risks.

A SWMS is required for the high risk construction work activities as defined in the WHS regulations.[70]

A SWMS must identify the high risk construction work activities to be carried out at a workplace, the hazards and risks to health and safety arising from these activities, the measures to be implemented to control the risks and how the control measures are to be implemented, monitored and reviewed. Its primary purpose is to help PCBUs, supervisors and workers implement and monitor the control measures established at the workplace to ensure high risk construction work is carried out safely.[71]

For other construction activities a SWMS is not required. However, a PCBU must manage risks to health and safety by eliminating risks so far as is reasonably practicable, and if it is not reasonably practicable, to minimise those risks so far as is reasonably practicable.[72]

A SWMS must take into account the circumstances at the workplace that may affect the way in which the high risk construction work is carried out that includes the site where the high risk construction work is being carried out, the work environment and the workers carrying out the work.

A generic SWMS may be prepared and used for high risk construction work activities carried out on a regular basis. However, a generic SWMS must be reviewed to take into account the hazards and risks for the specific workplace and be revised as necessary.[73]

At the time the WHS Regulations were drafted, concerns were raised about SWMS.[74] These concerns related to creating more 'paperwork' without having an impact on health and safety outcomes. The Decision RIS 2011 for the WHS Regulations concluded that:

- SWMS have a clear safety function in providing workers with a statement of the correct method to follow and a corresponding entitlement to follow it
- concerns regarding SWMS being cumbersome were not agreed
- the performance based nature of the duty to develop a SWMS was flexible enough to allow SWMSs to be developed to be appropriate to individual circumstances.[75]

Concerns about the flexibility of SWMS for use in dynamic construction workplaces were noted. It was recognised in the course of the discussion on the draft WHS Regulations that further work could be done to explain 'best practice' for preparing SWMS to ensure they are practical and effective.

A number of Industry Associations and the AMWU questioned the efficacy of SWMS in the course of the Review.

12.1 Review of the Efficacy of SWMS

The Reviewer was asked by stakeholders to have particular regard to the research carried out by the Australian National University on behalf of Safe Work Australia by NRCOHSR conducted in

[70] Regulation 299 of the WHS Regulations.
[71] The OHS Regulations 2017 (Vic) and the OSH Regulations 1996 (WA) both contain regulations which set out the requirements for SWMSs.
[72] Section 17 of the WHS Act.
[73] Model Code of Practice: Construction Work.
[74] Decision RIS 2011, p. 152.
[75] Ibid., p. 152.

2015-2016.[76] This research identified a range of core problems and concerns with SWMS, including:

- SWMS are used for the purpose of legal and corporate risk management, which undermines their primary purpose as a tool to help ensure that high risk work is carried out safely.
- SWMS contain information that is not required by the WHS Regulations or Codes of Practice which adds to their length and reduces their usability.
- SWMS are used for work that is not high risk construction work, as defined in the WHS Regulations.
- Workers are not consulted in the preparation of SWMS, contrary to the consultation requirements of the WHS Act.

Similar concerns reported in the NRCOHSR research have been raised by stakeholders in the Review and are discussed further below.

12.2 Application of SWMS to certain tasks argued not be high risk construction work

Stakeholder views

Feedback was received that the application of SWMS to certain tasks was "inappropriate" (Industry Association).

- In regulation 289, tasks identified as high risk construction work are defined without regard to whether or not there are risks and all such work is inappropriately labelled as 'high risk'. It is possible some of these identified tasks do not pose a risk to health and safety. E.g. painting a wall behind live power cables would be classed as high risk construction work by virtue of being work carried out near energised electrical installations or services, even if a risk assessment has been carried out and concluded that there is no possibility of contacting the live cables by carrying out the work. If the SWMS provisions are retained this regulation should be modified so that the work is only high risk construction work if there is a risk to health and safety from carrying out that work, rather than merely that the work is carried out in proximity to live cables. Alternatively, the requirement for a SWMS and associated duties should only be triggered if there is a risk to health and safety from carrying out the work. (Industry Association)
- If the SWMS duty is retained, the fall risk threshold in the definition of high risk construction work should be changed to more than three metres. (Industry Association)

Consideration of issues

In relation to the feedback on types of high risk work it is noted that efforts have been made to clarify the types of work which require a SWMS in the Code of Practice - Construction Work.

In Appendix C (page 45) of the revised Code of Practice (published on 25 May 2018) it provides that 'near' in the context of 'work carried out near energised electrical installations or services' means: 'close enough that there is a risk of hitting or puncturing the … electrical installation or service'.

This clarification appears to the Reviewer to address the concern raised. The Review has therefore not made any further observation with respect to any amendment to regulation 289 of the WHS Regulations.

In relation to the fall from height threshold, the Reviewer was not provided with an explanation of why the higher height was preferred. Falls from two metres can have catastrophic

[76] NRCOHSR, Australian National University, The Efficacy of Safe Work Method Statements and WHS Management Plans in Construction: Report to Safe Work Australia, February 2017 (unpublished report).

consequences.[77] The Reviewer does not consider that it would be appropriate to change this threshold in the absence of a compelling basis to do so.

12.3 Issues with the use of a SWMS in practice

Stakeholder views

Feedback was received that the use of SWMS in practice have proven to be problematic and counterproductive and there is evidence that:

- Many PCBUs, including subcontractors, ignore the SWMS duties and only produce SWMS when demanded by a principal contractor or other customer requiring the paperwork to demonstrate compliance. (Industry Association)
- When SWMS are produced by PCBUs the SWMS are usually poor quality and non-compliant. (Industry Association)
- They are often copied from a sample SWMS or plagiarised from others with little or no regard to the actual hazards or risks onsite or whether control measures are appropriate for the work. (Union and Industry Association)
- Once produced the SWMS tend to be placed in a folder and ignored and onsite safety practices are not necessarily carried out in accordance with the SWMS. (Union and Industry Association)

One view expressed by an Industry Association was that the duty to develop SWMS should be removed. They provided the following basis for removing the requirement to have a SWMS.

- The SWMS provisions have been in place in most jurisdictions for some time with no demonstrated benefit. (Industry Association)
- SWMS have proven to be administratively burdensome for builders, who spend a disproportionate amount of time and effort to ensure the paperwork is produced but reap little or no safety benefit from it. (Industry Association)

Consideration of issues

Many of the stakeholder criticisms relate to the application of the SWMS in practice as opposed to the requirement to develop SWMS. They potentially arise from a lack of guidance and template documentation. However, it may also be indicative of a lack of commitment to WHS.

It is interesting to note that at the time the WHS regulations were developed it was acknowledged in the decision RIS 2011 that:

> Greater coordination will be required on larger sites with complex subcontracting arrangements in place. It is envisaged that Guidance Material will be developed to further explain practical ways of meeting [the WHS Regulations].[78]

The NRCOHSR noted that 'despite the multiple concerns with these instruments, based on the findings from interviews and the survey, there is support for retaining the regulatory requirements for both SWMS and plans.'[79]

The Reviewer supports those views. Properly developed and implemented, SWMS have a valuable role to play in assisting to eliminate or control risks to health and safety.[80]

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[77] See for example the analysis of falls of all heights in Turgut, K., Sarihan, M. E., Colak, C., Güven, T., Gür, A., and Gürbüz, S., 2018, Falls from height: A retrospective analysis, World Journal of Emergency Medicine, 9(1), 46–50. Click this link for further information http://doi.org/10.5847/wjem.j.1920-8642.2018.01.007.

[78] Decision RIS 2011, p. 152.

[79] NRCOHSR, Australian National University, The Efficacy of Safe Work Method Statements and WHS Management Plans in Construction: Report to Safe Work Australia, February 2017 (unpublished report), p. V.

[80] See, for example the recent Victorian prosecutions of Timber Imagineering Pty Ltd and Teren Building Services Pty Ltd who were fined $75,000 and $10,000, respectively as a result of (among other things) not providing a safe work

The concerns with SWMS appear to be that they add to the 'paperwork' burden. Reducing the 'paperwork' burden may therefore be more about *how* SWMS are developed and implemented.

Observation 16

The WHS regulatory framework for Safe Work Method Statements is a significant area of concern for multiple stakeholders including Industry Associations and Unions. The National Research Centre for Occupational Health and Safety Research made a range of recommendations and they are being considered as part of the 2018 review of the model WHS laws conducted through Safe Work Australia. The Reviewer supports further work in this area.

12.4 Review of SWMS

Stakeholder views

Regulation 302 provides that a PCBU must ensure that a SWMS is reviewed and, as necessary, revised, if relevant control measures are revised under regulation 38. Feedback was received that the review of SWMSs is unnecessary.

- **Regulation 302** is unnecessary and should be removed. The requirements to review control measures and SWMS can be adequately dealt with in the Code of Practice - Construction Work. (Industry Association)

Consideration of issues

There are concerns with the lack of flexibility of SWMS in a dynamic construction environment. However it is important to ensure SWMS are updated to reflect changed control measures. Without such updates, SWMS would lose their value as a tool to eliminate or control risks. For this reason, the Review does not support the removal of regulation 302.

12.5 FSC requirements for SWMS

Some stakeholders remain confused about the FSC position on the form of a SWMS.

Stakeholder views

One Industry Association indicated that there is considerable confusion and many different interpretations about what hazards and risks are required to be identified and recorded in a SWMS. Further feedback was that the FSC's SWMS template has made the SWMS unnecessarily complex.

Consideration of issues

The feedback that the FSC requirements have made the SWMS requirements 'unnecessarily complex' is not consistent with the position on SWMS set out in *the Fact Sheet* – Safe Work Method Statements (SWMS) published by the FSC which clarifies that there is no FSC SWMS template and the FSC does not dictate the form or content of a SWMS.

It appears that there is therefore a lack of understanding of the requirements in some parts of the industry.

method statement for the task of erecting timber stud walls. A labourer employed by Timber Imagineering Pty Ltd was injured when one of the walls he was erecting collapsed and landed on him.

Observation 17

The Federal Safety Commissioner position that there is no Federal Safety Commission template for Safe Work Method Statements is not understood by all stakeholders in the industry.

13. Regulation of vehicle incidents

Vehicles are regulated as workplaces

For the purposes of WHS legislation, a vehicle is a workplace.[81] As a workplace, the requirements that apply to an office or any other working location also need to be considered, for example ergonomics. The general duty in section 19 of WHS Act applies to vehicles.

In the context of the construction industry, examples of matters that would be covered by the WHS legislative framework but which are not made clear in guidance materials are journeys between construction sites and offices, the movement of goods to construction sites, and any other situation in which a worker is driving a vehicle in the course of their work.

The number of fatalities and the complexity of the regulatory regime

In the 10-year period 2007 to 2016, there were 57 construction fatalities caused by vehicle incidents. The vast majority occurred on public roads (49 fatalities) and in 25 cases involved travelling in a car, 15 involved travelling in a truck and 9 involved travelling in a utility vehicle.

The fatalities represented in the Safe Work Australia data indicate that the majority of fatalities involving vehicle incidents occurred on public roads. Driving on public roads is regulated by the WHS regulatory framework as well as heavy vehicle laws[82] and road traffic laws.

Despite these statistics there is very little by way of guidance provided to PCBUs on managing vehicle use on a public road. There is a model Code of Practice which relates to managing the risk of plant including mobile plant,[83] however it is not clear on the face of the code that this may also be a reference point for duty holders in understanding how to eliminate or manage risks associated with vehicle incidents.

Stakeholder views

One stakeholder raised concerns about the absence of guidance in the area:

- There is no requirement to notify of a vehicle incident when there is no serious injury or illness or no death resulting from the incident. Furthermore, there is nothing in the WHS Regulations to address vehicle safety. (Regulator)
- Consistent with the background provided in the Issues Paper, these types of incidents are the highest proportion of fatalities in the industry, but the WHS Regulations, Codes of Practice and guidance materials are notably silent about them. (Regulator)
- Guidance materials to support vehicle safety is relatively limited. There is guidance material on traffic management but guidance material specifically on 'inspection, maintenance and repair' of vehicles may add value as these may be the main causal factors identified in more serious vehicle incidents. (Regulator)

Consideration of issues

Whilst the general risk management provisions of the WHS Regulations apply, there is little other information or guidance on the use of cars on a public road where that car is the worker's workplace.

Austroads published a report titled Vehicles as Workplace which includes a draft work health and safety guide in March 2018.[84] Finalisation of the guide was discussed by the Heads of Workplace

[81] Section 8 of the WHS Act; section 3 of the OSH Act (WA) and section 5 of the OHS Act (Vic).
[82] For heavy vehicles which are defined as vehicles with a gross vehicle mass of over 4.5 tonnes or a combination of over 4.5 tonnes.
[83] Model Code of Practice - Managing the risk of plant in the workplace.
[84] The Vehicles as a Workplace report is available on Austroads' website. You must log in or register to view the document. For further information, click here www.onlinepublications.austroads.com.au/items/AP-R561-18.

Safety Authorities at its meeting in May 2018. Vehicles as Workplace discusses the context within which WHS and road traffic safety currently intersect, and the process followed during the preparation of a WHS guide.

The draft WHS guide in Vehicles as Workplace aims to 'close a gap' in the provision of guidance on managing vehicle use in road traffic. It provides pointers on how to address road traffic as a hazard, and on the hazards that are likely to be encountered in the use of vehicles in road traffic. This report is obviously not a Code of Practice and it remains in draft.

As mentioned above, guidance is available on the inspection, maintenance and repair of plant in the Code of Practice – Managing risks of plant in the workplace.[85] However, it is not clear on its face that these are WHS requirements which apply specifically to vehicles.

The application of general vehicle safety standards (e.g. vehicle registration, roadworthiness and the approval of modifications to vehicles) under state and territory government regulation also applies to vehicles used in the building and construction industry.

Observation 18

The WHS regulatory framework could be improved to assist duty holders understand how to eliminate or minimise risks associated with the use of vehicles on public roads. Whilst the general risk management provisions of the WHS Regulations and general vehicle safety standards apply, there is little other information or guidance on the use of vehicles in the workplace context.

[85] See clauses 3.4 and 3.5.

14. Should there be broader consideration of elements of the WHS Accreditation Scheme?

14.1 The WHS Accreditation process

Accreditation by the FSC involves a two-stage process – an application and an on-site audit process.

14.2 Requirements of the WHS Accreditation Scheme

The WHS Accreditation Scheme sets a high benchmark and applicants to the scheme must satisfy the following criteria to obtain accreditation:

- demonstrated ability to manage construction hazards and high risk activities
- record in relation to workplace safety
- on-site audit results

In addition, applicants must satisfy performance against the following focus points:

- demonstrated senior management commitment to WHS
- integration of safe design principles into the risk management process
- whole of project WHS consultation and communication
- demonstrated effective subcontractor WHS management arrangements cross building and construction projects
- whole of performance measurement
- WHS training and competency to deal with safety risks.

Stakeholder views

A range of feedback was received about ways in which the WHS Accreditation Scheme can be improved but very little about what it is about the WHS Accreditation Scheme that ought to be considered for broader application.

One stakeholder asked the Reviewer to consider whether the WHS regulatory framework should consider mandating the requirement for a PCBU to have a safety management system and for these to be audited. (Regulator)

This was suggested in the context of the reported performance of companies accredited by the FSC compared with the performance of non-accredited companies.

Consideration of issues

The critical question is whether the broader introduction of a duty to have a safety management system and to have it audited will increase the effectiveness of the WHS regulatory framework. The Reviewer did not receive sufficient feedback on this point to allow a conclusion to be reached.

However, the Reviewer was told by the FSC that a large part of the WHS Accreditation Scheme's effectiveness is linked to the way in which the FSC regulates entities. It was suggested that it would be difficult to consider the elements of the WHS Accreditation in isolation of the regulatory approach.

The Reviewer was advised that the regulatory approach taken by the FSC is not a punitive one. The FSC has a different type of relationship with accredited companies, including following an incident. For example, after an incident the focus may be on managing and adjusting the systems

to demonstrate ongoing compliance with Scheme criteria. The FSC also engages with senior management to ensure improvements to safety systems and practices on-site are driven from senior leaders within accredited companies.

This is different to the approach taken by WHS regulators in their compliance and enforcement activities. The scope for those WHS regulators to regulate compliance with any new requirements to have a safety management system and audits in an effective manner may be limited by the risk of prosecution (for example following an incident) of both the business and/or its officers. Consideration should be given to whether there is merit in applying some of the FSC's compliance and enforcement approaches more broadly.

Approximately 20 per cent of accredited companies are 'small' companies with 19 or fewer employees and approximately 58 per cent are medium sized companies with between 20 and 199 employees. SMEs make up the majority of accredited contractors. This composition broadly reflects the make-up of organisations in the wider building and construction industry (see the discussion in Chapter 3). The Reviewer understands that the FSC has done a lot of work in scaling the WHS Accreditation Scheme to suit SMEs. The Reviewer encourages the FSC to promote the benefits of the scheme to SMEs.

15. Stakeholder feedback about issues outside of the Terms of Reference

Stakeholder views

A number of stakeholders expressed concerns about aspects of the Review including:

- The exclusion of the ABCC and its role as a regulator for health and safety under the *Building and Construction Industry (Improving Productivity) Act 2016*[86] from the Terms of Reference.
- Major contextual aspects of the industry being 'ignored' in the Terms of Reference, for example rights of entry, the role of health and safety representatives in the industry, the 'practices ' of principal contractors and industrial relations.
- The exclusion of the compliance and enforcement practices of health and safety regulators and the practical operations and implementation of the laws from the Terms of Reference.
- How the Review will feed into the review of the model Work Health and Safety laws being conducted by an independent reviewer, Marie Boland. The concerns included the potential risk of a range of unsatisfactory outcomes if the reviews are not undertaken in a co-ordinated and consultative manner.
- Grouping the mechanisms of injury, in particular combining falling from heights or being hit by falling objects because the classes of incident are distinct and should be dealt with separately and it would be inappropriate to assume that the three causes of injury occur consistently across all sectors of the industry.
- The use of the generic term 'building and construction industry' because the industry is diverse and is divided among businesses operating in detached residential, multi-residential, renovation, commercial, public infrastructure and civil works sectors.

These matters were not considered because, as discussed in Chapter 6, the Terms of Reference were focused on the WHS legislative framework and the top three mechanisms of fatality in the building and construction industry. Matters raised with the Reviewer but not addressed in this Report have been relayed to the department.

Consideration of issues

The department has noted matters raised through the consultation process that fall outside the scope of the Review and will provide these matters either to Safe Work Australia, where it falls within its remit, or to the relevant policy area within the department.

[86] The Reviewer consulted with the ABCC and received a written submission about the ABCC's functions and its limited jurisdiction in relation to safety. The Review did not consider these matters in detail because they are outside the scope of the Terms of Reference.

Annexure A - Overview of the WHS regulatory framework relevant to the Review

Falls and being hit by falling objects

1. Out of scope of the Review

The following parts of the WHS regulatory framework will inform the Review, but are out of scope and were not be directly considered as a part of the Review:

Model *WHS Act*

Work Health and Safety Act 2011 (Cth)

Work Health and Safety Act 2011 (ACT)

Work Health and Safety Act 2011 (NSW)

Work Health and Safety Act 2011 (Qld)

Work Health and Safety (National Uniform Legislation) Act 2011 (NT)

Work Health and Safety Act 2012 (SA)

Work Health and Safety Act 2012 (Tas)

Occupational Health and Safety Act 2004 (Vic)

Occupational Safety and Health Act 1984 (WA)

Model WHS Regulations (other than provisions specifically in scope of Review)

Jurisdictional based electrical safety legislation

Road traffic laws

Heavy vehicle national laws

2. Model WHS regulatory framework

The model WHS regulatory framework relevant to a fall or being hit by falling objects is:

Model WHS Regulations: Part 3.1; Part 3.2, Division 10; Part 4.4; Part 5.1 (as it relates to scaffolds and falls when working on powered mobile plant); regulations 291; 297; 298; 299 to 303; 304 to 306; and high risk work licences (relevant to working at height)

Model Code of Practice: How to manage work health and safety risks

Model Code of Practice: Construction work

Model Code of Practice: Managing the risk of falls at workplaces

Model Code of Practice: Preventing falls in housing construction

Fact sheet: Falling objects

Information sheet: Safe work on roofs

3. Jurisdictional differences (exceptions to the model WHS regulatory framework)

The jurisdictional differences to the model WHS regulatory framework relevant to a fall or being hit by falling objects are:

ACT

Work Health and Safety (Formwork) Code of Practice

NSW

Safe Work on roofs - Part 1 Commercial industrial Code of Practice

Qld

Sub-regulation 299(4) of the WHS Regulations is included which provides that in certain circumstances all control measures considered in determining which control measures to implement must be stated in the SWMS.

Tilt up and pre-cast construction Code of Practice 2003

Scaffolding Code of Practice 2009

SA

Certain offences (including those set out in regulations 301-304 of the WHS Regulations) are subject to an expiation fee.

Codes based on the model Code of Practice: Construction work, model Code of Practice: Managing the risks of falls at workplaces and the model Code of Practice: Preventing falls in housing construction have not been adopted in South Australia.

National Code of Practice for pre-cast, tilt up and concrete elements in building construction

NT

National Code of Practice for pre-cast, tilt up and concrete elements in building construction

National Code of Practice for the prevention of falls in general construction

4. Victorian WHS regulatory framework

The Victorian WHS regulatory framework relevant to a fall or being hit by falling objects is:

OHS Regulations 2017 (Vic), Part 3.3; regulation 322; regulation 109 (as it relates to falling objects); regulation 116 (as it relates to falling objects); Part 3.5 (as it relates to objects falling on a person)

Prevention of falls in general construction - Compliance Code

Code of Practice: Prevention of falls in housing construction (this Code of Practice continues to be available as a source of practical guidance. However, as it is made

under repealed legislation compliance with the code may not necessarily mean compliance with a duty under the OHS Act).

5. Western Australian regulatory framework

The Western Australian WHS regulatory framework relevant to a fall or being hit by falling objects is:

OSH Regulations 1996 (WA), Part 3, Division 5; regulation 3.18; regulation 3.30; regulation 3.31; regulation 3.36; Part 3, Division 12 (as it relates to falls); Part 4, Division 4 (as it relates to falling objects); Schedule 6.3 (as it relates to falls)

Code of Practice: Prevention of falls at workplaces

Code of Practice: Safe design of buildings and structures

AS-NZS 4576-1995 Guidelines for scaffolding

Vehicle incidents

6. Out of scope of Review

The following parts of the WHS regulatory framework will inform the Review, but are out of scope and will not be directly considered as a part of the Review:

Model *WHS Act*

Work Health and Safety Act 2011 (Cth)

Work Health and Safety Act 2011 (ACT)

Work Health and Safety Act 2011 (NSW)

Work Health and Safety Act 2011 (Qld)

Work Health and Safety (National Uniform Legislation) Act 2011 (NT)

Work Health and Safety Act 2012 (SA)

Work Health and Safety Act 2012 (Tas)

Occupational Health and Safety Act 2004 (Vic)

Occupational Safety and Health Act 1984 (WA)

Model WHS Regulations (other than provisions specifically in scope of Review)

Jurisdictional based electrical safety legislation

Road traffic laws

Heavy vehicle national laws

7. Model WHS regulatory framework

The model WHS regulatory framework relevant to a fall or being hit by falling objects is:

Model WHS Regulations: Part 3.1

Model Code of Practice: How to manage work health and safety risks

Model Code of Practice: Construction work

Guide: Traffic management general guide

Guide: Traffic management guide - construction work

Information sheet: Traffic management

Checklist: Traffic hazards

Checklist: Traffic control measures

8. Jurisdictional differences (exceptions to the model WHS regulatory framework)

The jurisdictional differences to the model WHS regulatory framework relevant to vehicle incidents are:

Qld

Traffic management for construction or maintenance work Code of Practice 2008

SA

A code based on the model Code of Practice: Construction work has not been adopted in South Australia.

9. Victorian WHS regulatory framework

The Victorian WHS regulatory framework relevant to vehicle incidents is:

Guidance sheet: Work-related driving – Selecting safe vehicles

Guidance sheet: Transporting people and equipment in vehicles

10. Western Australian regulatory framework

The Western Australian WHS regulatory framework relevant to vehicle incidents is:

OSH Regulations 1996 (WA)*:* Regulation 3.22; Part 3, Division 10

Code of Practice: Fatigue Management for Commercial Drivers

Contact with electricity

11. Out of scope of the Review

The following parts of the WHS regulatory framework will inform the Review, but are out of scope and will not be directly considered as a part of the Review.

Model *WHS Act*

Work Health and Safety Act 2011 (Cth)

Work Health and Safety Act 2011 (ACT)

Work Health and Safety Act 2011 (NSW)

Work Health and Safety Act 2011 (Qld)

Work Health and Safety (National Uniform Legislation) Act 2011 (NT)

Work Health and Safety Act 2012 (SA)

Work Health and Safety Act 2012 (Tas)

Occupational Health and Safety Act 2004 (Vic)

Occupational Safety and Health Act 1984 (WA)

Model WHS Regulations (other than provisions specifically in scope of Review)

Jurisdictional based electrical safety legislation

Road traffic laws

Heavy vehicle national laws

12. Model WHS regulatory framework

The model WHS regulatory framework relevant to contact with electricity is:

Model WHS Regulations: Part 3.1; Part 4.7

Model Code of Practice: How to manage work health and safety risks

Model Code of Practice: Construction work

Model Code of Practice: Managing electrical risks in the workplace

General guide: Definitions OHEL

Guide: Working in the vicinity of overhead and underground electrical lines

Guide: Working near low voltage OHEL near structures

Guide: Operating cranes and mobile plant near OHEL

Guide: Transporting high load near OHEL

Information sheet: Working in the vicinity of overhead and underground electrical lines

Information sheet: Scaffolding near OHEL

Fact sheet: Electrical risks

Incidents and scenarios: Case studies

13. Jurisdictional differences (exceptions to the model WHS regulatory framework)

The jurisdictional differences to the model WHS regulatory framework relevant to contact with electricity are:

NSW

Work near overhead power lines Code of Practice

Qld

Electrical safety Code of Practice 2010 - Electrical equipment rural industry

Electrical safety Code of Practice 2010 - Working near overhead and underground electric lines

Electrical safety Code of Practice 2010 - Work

NT

The Northern Territory has not adopted the model Code of Practice: Managing electrical risks in the workplace.

SA

A code based on the model Code of Practice: Construction work has not been adopted in South Australia.

14. Victorian WHS regulatory framework

The Victorian WHS regulatory framework relevant to contact with electricity is:

OHS Regulations 2017 (Vic)*:* Regulation 114

15. Western Australian regulatory framework

The Western Australian WHS regulatory framework relevant to contact with electricity is:

OSH Regulations 1996 (WA)*:* Part 3, Division 6

Annexure B - Schedule 3 of the WHS Regulations

Schedule 3 High risk work licences and classes of high risk work

Regulation 81

Table 3.1

Item	High risk work licence	Description of class of high risk work
Scaffolding work		
1	Basic scaffolding	Scaffolding work involving any of the following: (a) modular or pre-fabricated scaffolds; (b) cantilevered materials hoists with a maximum working load of 500 kilograms; (c) ropes; (d) gin wheels; (e) safety nets and static lines; (f) bracket scaffolds (tank and formwork), but excluding scaffolding work involving equipment, loads or tasks listed in item 2(2)(a) to (g) and item 3(2)(a) to (c)
2	Intermediate scaffolding	(1) Scaffolding work included in the class of Basic scaffolding; and (2) Scaffolding work involving any of the following: (a) cantilevered crane loading platforms; (b) cantilevered scaffolds; (c) spur scaffolds; (d) barrow ramps and sloping platforms; (e) scaffolding associated with perimeter safety screens and shutters; (f) mast climbing work platforms; (g) tube and coupler scaffolds (including tube and coupler covered ways and gantries), but excluding scaffolding work involving equipment, loads or tasks listed in item 3(2)(a) to (c)

Item	High risk work licence	Description of class of high risk work
3	Advanced scaffolding	(1) Scaffolding work included in the class of Intermediate scaffolding; and (2) Scaffolding work involving any of the following: (a) cantilevered hoists; (b) hung scaffolds, including scaffolds hung from tubes, wire ropes or chains; (c) suspended scaffolds
Dogging and rigging work		
4	Dogging	Dogging work
5	Basic rigging	(1) Dogging work (2) Rigging work involving any of the following: (a) structural steel erection; (b) hoists; (c) pre-cast concrete members of a structure; (d) safety nets and static lines; (e) mast climbing work platforms; (f) perimeter safety screens and shutters; (g) cantilevered crane loading platforms, but excluding rigging work involving equipment, loads or tasks listed in item 6(b) to (f) and item 7(b) to (e)
6	Intermediate rigging	Rigging work involving any of the following: (a) rigging work in the class Basic Rigging; (b) hoists with jibs and self-climbing hoists; (c) cranes, conveyors, dredges and excavators; (d) tilt slabs; (e) demolition of structures or plant; (f) dual lifts, but excluding rigging work involving equipment listed in item 7(b) to (e)

Item	High risk work licence	Description of class of high risk work
7	Advanced rigging	Rigging work involving any of the following: (a) rigging work in the class Intermediate Rigging; (b) gin poles and shear legs; (c) flying foxes and cable ways; (d) guyed derricks and structures; (e) suspended scaffolds and fabricated hung scaffolds
Crane and hoist operation		
8	Tower crane	Use of a tower crane
9	Self-erecting tower crane	Use of a self-erecting tower crane
10	Derrick crane	Use of a derrick crane
11	Portal boom crane	Use of a portal boom crane
12	Bridge and gantry crane	Use of a bridge crane or gantry crane that is: (a) controlled from a permanent cabin or control station on the crane; or (b) remotely controlled and having more than 3 powered operations, including the application of load estimation and slinging techniques to move a load
13	Vehicle loading crane	Use of a vehicle loading crane with a capacity of 10 metre tonnes or more, including the application of load estimation and slinging techniques to move a load
14	Non-slewing mobile crane	Use of a non-slewing mobile crane with a capacity exceeding 3 tonnes
15	Slewing mobile crane—with a capacity up to 20 tonnes	Use of a slewing mobile crane with a capacity of 20 tonnes or less Use of a vehicle loading crane with a capacity of 10 metre tonnes or more, excluding the application of load estimation and slinging techniques to move a load Use of a non-slewing mobile crane with a capacity exceeding 3 tonnes Use of a reach stacker

Item	High risk work licence	Description of class of high risk work
16	Slewing mobile crane—with a capacity up to 60 tonnes	Use of a slewing mobile crane with a capacity of 60 tonnes or less Use of a vehicle loading crane with a capacity of 10 metre tonnes or more, excluding the application of load estimation and slinging techniques to move a load Use of a non-slewing mobile crane with a capacity exceeding 3 tonnes Use of a reach stacker
17	Slewing mobile crane—with a capacity up to 100 tonnes	Use of a slewing mobile crane with a capacity of 100 tonnes or less Use of a vehicle loading crane with a capacity of 10 metre tonnes or more, excluding the application of load estimation and slinging techniques to move a load Use of a non-slewing mobile crane with a capacity exceeding 3 tonnes Use of a reach stacker
18	Slewing mobile crane—with a capacity over 100 tonnes	Use of a slewing mobile crane with a capacity exceeding 100 tonnes Use of a vehicle loading crane with a capacity of 10 metre tonnes or more, excluding the application of load estimation and slinging techniques to move a load Use of a non-slewing mobile crane with a capacity exceeding 3 tonnes Use of a reach stacker
19	Materials hoist	Use of a materials hoist
20	Personnel and materials hoist	Use of a personnel and materials hoist Use of a materials hoist
21	Boom-type elevating work platform	Use of a boom-type elevating work platform where the length of the boom is 11 metres or more
22	Concrete placing boom	Use of a concrete placing boom
Reach stackers		
23	Reach stacker	Operation of a reach stacker of greater than 3 tonnes capacity that incorporates an attachment for lifting, moving and travelling with a shipping container, but does not include a portainer crane
Forklift operation		
24	Forklift truck	Use of a forklift truck other than an order-picking forklift truck

Item	High risk work licence	Description of class of high risk work
25	Order-picking forklift truck	Use of an order-picking forklift truck
Pressure equipment operation		
26	Standard boiler operation	Operation of a boiler with a single fuel source that does not have a pre-heater, superheater or economiser attached
27	Advanced boiler operation	Operation of a boiler, including a standard boiler, which may have one or more of the following: (a) multiple fuel sources; (b) pre-heater; (c) superheater; (d) economiser
28	Steam turbine operation	Operation of a steam turbine that has an output of 500 kilowatts or more and: (a) is multi-wheeled; or (b) is capable of a speed greater than 3600 revolutions per minute; or (c) has attached condensers; or (d) has a multi-staged heat exchange extraction process
29	Reciprocating steam engine	Operation of a reciprocating steam engine where the diameter of any piston exceeds 250 millimetres

1 Boom-type elevating work platform

For the purposes of table 3.1 item 21, the length of a boom is the greater of the following:

(a) the vertical distance from the surface supporting the boom-type elevating work platform to the floor of the platform, with the platform extended to its maximum height;

(b) the horizontal distance from the centre point of the boom's rotation to the outer edge of the platform, with the platform extended to its maximum distance.