Contributing to the review

The review panel is keen to receive your feedback. All interested individuals and organisations are invited to share their views by providing comment and responses to the questions in the discussion paper.

Submissions can address any or all of the questions and can include any evidence, examples or case studies that you think may be relevant. All submissions accepted by the review are public documents which will be posted on the review’s website. Individuals and organisations can request that their submissions remain confidential.

The review panel will assess all public submissions received.

The closing date for submissions is 1 August 2016.

Submissions can be lodged by:

- completing an online submission form, available at www.ohsreview.vic.gov.au
- downloading and completing this comment template and forwarding to independentreview@ohsreview.vic.gov.au or
- mailing your completed comment template response to:
  Independent OHS Review
  GPO Box 4579
  Melbourne VIC 3001

<table>
<thead>
<tr>
<th>Name</th>
<th>Elizabeth Bluff</th>
</tr>
</thead>
<tbody>
<tr>
<td>Job Title</td>
<td>Research Fellow</td>
</tr>
<tr>
<td>Organisation</td>
<td>National Research Centre for OHS Regulation</td>
</tr>
<tr>
<td></td>
<td>School of Regulation and Global Governance, Australian National University</td>
</tr>
<tr>
<td>Email Address</td>
<td></td>
</tr>
<tr>
<td>Work Postcode</td>
<td>2600</td>
</tr>
</tbody>
</table>
**Discussion paper comment section**

**General feedback: Do you have any general comments for the review to consider?**

**Comment:** A number of questions ask ‘how effective’ is WorkSafe? There is no reliable way of answering these types of questions other than by making research and evaluation central to the design and planning, modification and refinement of particular strategies, programs, interventions, approaches to inspection, use of mechanisms, and so on. And such studies should make use of a combination of sources in order to triangulate data and information. See also question 6.


**Section 3 – OHS Compliance and Enforcement Framework**

This review will examine the policies in the C&E framework and their implementation to establish whether they are relevant, appropriate and support the improvement of OHS in Victoria.

**Question 1:** How appropriate and relevant is the C&E policy in guiding WorkSafe’s approach to ensuring Victorian OHS laws are complied with, enforced and communicated?

**Comment:** There is value in having a C&E policy to steer WorkSafe’s compliance support and enforcement activities, and communicate WorkSafe’s approach to a wide range of ‘OHS actors’ including employer associations and unions (the social partners), OHS professionals and practitioners, workplace parties, and providers of education and training relevant to OHS.

**Question 2:** How can the C&E policy be improved?

**Comment:** The C&E policy is broadly sound but should reflect the full range of mechanisms and tools available to and used by WorkSafe Victoria and the agency’s inspectors, and indicate how and when the agency and/or inspectors make use of the different mechanisms and tools.

Also, the C&E Policy contains a short statement (s 7.1) that compliance with Victoria’s OHS laws is a continuous process which involves the development, improvement and maintenance of a healthy and safe working environment and systems of work. There would be value in a stronger statement promoting compliance through effective and systematic management of OHS, and highlighting the types of actions that are now addressed separately in the Information and Education section of the policy (s 13.1) – this refers to the need for a planned and proactive approach; commitment and involvement of managers at all levels; meaningful and effective involvement of employees and other workers; identification and assessment of all risks and the control of hazards at their source; priority to occupational health and safety; provision of training, information and supervision; and systematic management of health and safety issues). In other words, simple principles of systematic OHS management should be centre stage in the approach to supporting, inspecting and enforcing compliance.
Discussion paper comment section

The review panel would like to know your views on the NC&E policy. The review will examine consistency between the state and national policies, and consider whether greater alignment would improve WorkSafe’s compliance and enforcement policy and activities.

Comment: In principle, there should be a nationally consistent approach to compliance support, inspection and enforcement as committed to in the Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (COAG 2008). This requires national level policy and common principles, frameworks, operational protocols and procedures for administration and enforcement of the legislation. Some progress was made with the National Compliance and Enforcement Policy (NCEP) developed by Safe Work Australia, and the multiple documents presenting the common approaches to administration and enforcement developed by the Heads of Workplace Safety Authorities (HWSA).

Based on interviews and analysis of documentation in the jurisdictions with harmonised WHS laws, most of the WHS regulators have adopted the NCEP and made it available by linking to the NCEP on Safe Work Australia’s website, but some have simply incorporated some elements of the NCEP in their own policy or framework for compliance and enforcement. Also, the NCEP is a high level, principle based document which reflects the broad functions and powers of the regulators, and is less detailed than WorkSafe Victoria’s C&E Policy. Specifically, the NCEP has less information about how and when different types of mechanisms and tools will be used. With regard to the HWSA initiatives, some of the WHS regulators have adopted these, but others have adopted some of the common approaches or used them as a resource when the regulator is reviewing its protocols and procedures. There is some concern that some of the HWSA common approach documents are overly detailed or complex, and that this has been an impediment to their implementation.

The question then is not whether greater alignment with the NCEP (and HWSA common approaches) would improve WorkSafe Victoria’s C&E policy and activities, but whether Victoria and the other Commonwealth, state and territory regulators can be encouraged to revisit the NCEP and problem areas in the HWSA documents, with a view to resolving issues and achieving greater alignment across jurisdictions.

Question 3: How consistent is Victoria’s C&E policy with the NC&E policy?

Comment: See response to question 2

Question 4: Does the Victorian policy need to be more consistent with the national policy?

Comment: See response to question 2

Section 4 – OHS compliance and enforcement activities

The review intends to examine and review WorkSafe’s compliance and enforcement approach against the markers of modern regulatory best practice, as well as against WorkSafe’s view of what a modern regulator is.

Question 5: How effectively is WorkSafe operating as a modern regulator?

Comment: No comment as do not have specific experience of how WorkSafe operates in relation to the Victorian Guide to Regulation’s ‘principles of modern regulation’.

Question 6: Are there areas in which WorkSafe could improve its approach as a modern regulator?
## Discussion paper comment section

**Comment:** In regard to the attribute of ‘evidence-based enforcement’ a key consideration is using sound and diverse sources to triangulate data and information (not preferring claims data). This may include conducting and/or commissioning research and analysis, reviewing the literature and published research, using hospital surveillance (admissions data), work hazard surveillance studies, population surveys, research into persistent and emerging issues for particular sectors and workforce groups, and analysis of work-related deaths.

For the attribute of ‘expert knowledge’ there is a need to develop and maintain a high level of knowledge, skills and experience among WorkSafe staff, which in turn requires sufficient funding, appropriate classification, recruitment, and initial and ongoing professional development – to ensure that the agency and its staff can regulate effectively, and garner respect and authority among the multiple influential actors for health and safety at work.

And see response to question 7 below.

### Question 7: Are there other regulatory approaches that the review should consider?

**Comment:** The Victorian Guide to Regulation advocates a risk-based approach to administration, compliance and enforcement strategies, and recommends a series of attributes which relate to tailoring compliance and enforcement, using expert knowledge, problem solving, evidence-based enforcement, long-term vision, a planned and systematic approach, and a strong consultative approach with stakeholders. There would be value in WorkSafe recognising and understanding the relevance of different regulatory theory/perspectives, and considering how these could be applied to the range of different activities in administration, compliance and enforcement, that is, in:

- Detecting and identifying non-compliance, poor performance or outcomes (problems)
- Setting priorities and targets
- Identifying and developing mechanisms and tools for responding to/solving problems
- Developing strategies and interventions for responding to/solving problems
- Implementing strategies and interventions
- Assessing and evaluating effectiveness/impact
- Reviewing regulatory system performance and modifying approaches

Relevant theory/perspectives include:

- Risk-based regulation for resource allocation, strategy and intervention design and implementation - response proportionate to risk (Black and Baldwin)
- Responsive regulation – for approach to engagement and choice of mechanisms and tools – responsive to willingness and capacity for self-regulation (Braithwaite)
- Smart regulation – for role of state and non-state actors, and networked response (Gunningham and Grabosky)
- Strategic regulation – for targeting regulatory response to those most influential, and for those most in need of protection (Weil)
- Systems theory – for identifying and analysing inter-connected contributing factors within, outside and between regulated organisations and third parties that influence the ‘problem’ to be addressed.

**References**

## Discussion paper comment section

The review would like to know your views on WorkSafe’s approach to its constructive compliance strategy.

### Question 8: How effective is WorkSafe in applying the levers to ensure OHS laws are complied with, enforced and communicated?

**Comment:** Does WorkSafe have clear criteria for when and how the agency and/or individual inspectors use each of the different types of mechanisms and tools – and are these criteria understood and applied by staff, and communicated to other ‘actors’ for health and safety at work? (For actors see qn 1). These measures are important to reduce discretion and the perception (and reality) of inconsistent treatment in like circumstances. (On discretion see Black J, ‘Managing Discretion’, paper presented to the *Australian Law Reform Commission Conference: Penalties, Principles and Practice in Government Regulation*, Sydney, Australia, 2001).

### Question 9: Are there other approaches and/or levers that the review should consider?

**Comment:** WorkSafe should have a full set of mechanisms and tools. Following is a list of mechanisms and tools in use by all or some OHS regulators around Australia. This is useful for benchmarking:

- mechanisms for general awareness raising (media alerts, social media, marketing, e-updates)
- engagement and partnering
- advice and information (face-to-face, website, presentations, webinars, A-V, advisory service)
- education and training (provision, approval, accreditation, oversight and review of quality of vocational and higher education in relation to specific OHS courses and OHS units in other courses)
- inspection and monitoring of compliance
- audit of OHS management systems/arrangements, and oversight and review of the quality of third party auditing of OHS management
- investigation of incidents, complaints, issues and disputes (requests for assistance)
- directions – verbal and written including inspection reports, administrative action letters
- regulatee prepared risk control plans, and other forms of action plans
- letter of statutory obligation/caution to warn of possible contravention
- notices – improvement, prohibition, infringement, non-disturbance
- memoranda of understanding or equivalent forms of written agreement
- enforceable undertakings
- prosecution and a range of penalties – fines and different types of orders, and disclosure of poor performance
- licenses, registrations, accreditations, approvals or other authorisations (and revocation, suspension or cancellation of these)
- seizure of equipment etc

### 4.1 Use of data and information to drive compliance and enforcement activities

The review would like to know your views on whether WorkSafe’s activities are consistent with identified strategic priorities.

### Question 10: How effective is WorkSafe at using data and information to target its compliance and enforcement activities to the areas of most need and effect?

**Comment:** Keep in mind that priorities and targets can and should include supply chains, networks and franchising systems, as well poor performing enterprises, industry sub-sectors, and hazard/risk or injury/illness types. For example, networked interventions with a cross-section of enterprises (and preferably across borders) leverage regulator efforts by fostering the communication of regulatory messages among principals and other parties within supply chains, networks and franchising systems, and have the advantage of countering uneven treatment which may engender resistance to compliance.
Discussion paper comment section

In addition, focus areas can and should include actors and mechanisms with significant potential to influence the achievement of regulatory objectives. (Examples for illustrative purposes are the vocational education and training system, or parties involved in OHS management system auditing. See also question 13).

Question 11: Are there other sources of data and information WorkSafe could use to inform its activities?

Comment: See response to question 6 emphasising the need for rigorous collection and analysis of data and information from multiple sources.

4.2 Effective communication and engagement with stakeholders

The review is interested in your views on WorkSafe’s effectiveness in engaging with stakeholders to develop, implement and evaluate its compliance and enforcement activities.

Question 12: How effectively does WorkSafe engage and involve stakeholders such as OHSAC?

Comment: No comment on OHSAC. See question 13 for suggestions for improvement.

Question 13: How can WorkSafe improve engagement with and involvement of stakeholders to drive compliance and enforcement activities?

Comment: Keep in mind the wider range of influential actors in the OHS ‘regulatory space’, and the importance of working with and through these actors to build OHS knowledge and skills, motivations and better practice. There is value in mapping key actors and mechanisms with the potential to positively or negatively impact on the achievement of regulatory objectives. The following are some examples for illustrative purposes:

- **Workers’ compensation and rehabilitation regulatory system** – is there optimal reinforcement of the performance related component of premiums as an incentive for prevention (and rehabilitation), and promotion of systematic OHS management?
- **Other government regulatory systems and standards** – for health care and social assistance, aged care, childcare, government building and construction and other procurement, and so on – do those involved in regulating and auditing have access to and promote good OHS resources and tools, and practices?
- **Education and training ‘system’** – are there issues relating to content, teaching and learning methodologies, provider OHS competencies, and learning outcomes for OHS courses and OHS units within other courses, in vocational or higher education?
- **OHS management ‘infrastructure’** – are there issues relating to OHS management system standards or audit criteria, competency and accreditation of auditors, auditor practice (quality of preventive action vs ‘paper compliance’)?
- **Large client enterprises** – are they playing a role in exchanging effective risk control practices (ways to eliminate, substitute, isolate and engineer out hazards)? Are they encouraging informative and user-friendly OHS documentation (eg SWMS, other procedures) or requiring more extensive paperwork?
- **Employer/industry associations** – do they facilitate access to OHS information, training and support, and do their fee for service arrangements facilitate or impede access by small enterprises?
- **Unions** – do they promote and facilitate access to OHS information, training and support in sectors and enterprises with union members?
4.3 Practical and constructive advice and information

A key term of reference for this review is to look at Worksafe’s functions in relation to delivering compliance information and promoting OHS awareness education and training. The review will examine WorkSafe’s approach to providing advice to duty holders, and examine how its current approach to information, education and campaign activities aligns with its C&E policy.

Question 14: How effectively does WorkSafe provide advice and information to duty holders, consistent with the C&E policy?

Comment: See response to question 15

Question 15: How can WorkSafe improve the way it conveys advice and information to duty holders?

Comment: In addition to recognising the need to work with and through a wider range of influential actors to build OHS knowledge and skills (see question 13), there is value in a more nuanced approach to the points of emphasis outlined in the C&E policy and set out on p 26 of the discussion paper. Based on research in small and medium enterprises, core principles and emphases such as these are not well understood, or at least how to put them into practice is not well understood. The following are some specific competencies to foster.

- How to take a planned and systematic approach to managing OHS risks – to comprehensively identify hazards of different types (all reasonably foreseeable), and how to eliminate or minimise risks SFARP
- Controlling risks for inherent safety – the ‘hierarchy of control’ is an abstract concept and people tend to guess where controls fit at different levels – more important is developing understanding that the aim is to make the work organisation, the work environment, the equipment and materials, and so on safer (rather than using safe work procedures and PPE)
- What is good practice for key risk management methods, including effectively involving and consulting workers, conducting inspections, hazard and incident reporting, and responding to incidents and hazards
- The elements of the SFARP standard and its application in practice
- How to provide good quality information, training, instruction and supervision that:
  - Is readily understandable, suitable and adequate – relevant to risks for work, to those who need to be protected, and who needs that ITIS to protect themselves and others
  - Uses method(s) most suitable to develop knowledge and skills, taking account of individuals’ capacities (e.g. dialogue, demonstration, practical problem solving and supervision)
  - Draws on experiences of real-life hazardous situations, injuries and near misses that ‘concern them’, and potential solutions (note: claims data and trends ‘concern others’)

Question 16: How effectively does WorkSafe promote OHS awareness?

Comment: See response to question 17.

Question 17: Are there more effective approaches that should be considered?

Comment: How effective WorkSafe is in promoting awareness, and providing advice and information does not just depend on what WorkSafe does and how. As discussed above, there are multiple actors in the OHS regulatory space and people learn about OHS from many different sources, and may be good or poor in quality. There is therefore value in WorkSafe facilitating access to and use of authoritative sources of information by:

- Channelling information and updates to workplace parties (not relying on them to use the WorkSafe website or subscribe to alerts or other information)
- Providing industry sub-sector specific information that interprets and applies requirements of OHS legislation, and using practical examples
- OHS support services for small enterprises
• A short training course to develop knowledge and skills in locating information on WorkSafe’s website, and locating provisions in the OHS Act, Regulations and compliance (the former ‘WHSO’ course in Queensland was well regarded for demystifying the law and the regulator’s website in this way)
• Training for managers and supervisors about ‘doing WHS’ in their roles
• Support for individuals in a WHS role and/or WHS ‘enthusiasts’ – WHSOs, HSRs, HSC members, other ‘compliance officers’), including a practical pathway course into WHS education and training, and networks or forums for peer support, eg Functioning as WHS Adviser (the former Queensland WHSO course)
• Disseminating key learnings (ie what practices to change) from WHS prosecutions, enforceable undertakings and common law actions (Although these are private actions, legal cases in general are an important motivating influence but only lead to improved OHS outcomes if workplace parties understand the issues and what they mean for OHS action in workplaces)

It is also worth noting that people have different motivations for taking OHS seriously - legal (threat of penalties), economic (good for business), normative (caring for people), social (workforce cohesion, sense of responsibility), intrinsic reward (personal growth and achievement), personal experience of hazardous situations, injuries and near misses. There is value in reinforcing different motivations in advisory and information initiatives and resources.

4.4 Fostering cooperative, consultative relationships

The review will examine WorkSafe’s current approach to supporting workplace parties.

Question 18: How effectively does WorkSafe provide support to workplace parties?
Comment: See response to question 17.

Question 19: How can WorkSafe improve the way it provides support to workplace parties?
Comment: See response to question 17.

4.5 Inspectorate activity

The review will examine how effective WorkSafe’s inspectorate activities are in ensuring that OHS laws are complied with, enforced and communicated. It will also examine how WorkSafe adopts and applies learnings from reviews of inspector decisions.

Question 20: Is WorkSafe’s inspectorate effective in detecting breaches of OHS laws and ensuring compliance with those laws?
Comment: See response to questions 6 and 10.

Question 21: How can WorkSafe’s approach to inspections be improved?
Comment: ‘Inspector presence’ in workplaces matters and the indications are that this is low, given the small proportion of Victorian workplaces visited (p 29 of discussion paper). Increasing and developing the expertise of the inspectorate should be an ongoing priority.

Additional important considerations are where to allocate limited inspectorate resources and what inspectors should do in workplace visits (what should they observe, ask about, review re documentation), and what
mechanisms and tools should they use. To reiterate:

- **Strategic regulation** means targeting inspectorate resources to those most influential for poor performance and practice, and to protect those most in need of protection and intervening through supply chains, networks and franchising systems to maximise influence (Qns 7 and 10).
- **Smart regulation** means recognising the influential state and non-state actors in the OHS regulatory space, and fostering constructive partnerships to advance regulatory objectives where WorkSafe may not always be able to reach (Qns 7, 10 and 13).
- **Reinforcing simple principles** and practices for systematically manage OHS is important to secure ongoing action in workplaces, after the inspector visits (Qns 2 and 15).
- **Using a full toolkit of mechanisms and tools**, using them strategically and evaluating different approaches to determine what is most effective (Qns 8 and 9).

**Question 22:** Are there other approaches to enforcement that the review should consider?

**Comment:** No additional approaches.

### 4.6 Enforcement measures

The review will examine how WorkSafe applies its enforcement measures to ensure OHS laws are complied with, enforced and communicated.

**Question 23:** How effective is WorkSafe in applying enforcement measures to deter non-compliance with Victoria’s OHS laws?

**Comment:** The evidence suggests that specific deterrence is stronger than general deterrence, and the challenge is to effectively communicate the outcomes of enforcement, especially undertakings and prosecutions) so that a wide range of OHS actors understand the key messages from these and preventive action required in workplaces. Information about such enforcement actions is often miscommunicated through multiple sources or simply not well known by workplace parties to which particular actions are directly relevant. This is a widespread problem and not unique to Victoria. See also response to question 17 for specific suggestions about developing knowledge and understanding.

**Question 24:** How effective is WorkSafe at promoting its enforcement outcomes for prevention purposes?

**Comment:** See response to question 23.

**Question 25:** How can WorkSafe’s strategic approach to enforcement measures be improved?

**Comment:** It is suggested that WorkSafe give consideration to whether the agency places enough emphasis on prosecuting duty holders responsible for exposing workers and others to high levels of risk (risk-based prosecution in addition to the present focus on fatalities and serious injuries).

In regard to enforceable undertakings, it is suggested that WorkSafe check whether there are learnings for Victoria from the well-developed processes for encouraging, managing, monitoring and enforcing undertakings by the Queensland WHS regulator. There is also merit in considering whether undertakings have a place in proactive interventions and engagement strategies to improve systematic OHS management.

**Question 26:** Are there any impediments to WorkSafe applying its enforcement measures?
Comment: No additional comments.

### 4.7 Working with other agencies

The review panel will look into how WorkSafe works with other agencies to improve OHS standards.

**Question 27:** How can WorkSafe’s approach to working with other agencies be improved?

Comment: See response to question 13.

### Section 5 – Current and future challenges

The review is interested in compliance and enforcement into the future, as our economy, society and environment are affected by a transforming world.

**Question 28:** Are there other future challenges that will affect WorkSafe’s ability to ensure that OHS laws are complied with, enforced and communicated?

Comment: In addition to those identified in the discussion paper, a technological challenge is the safety and welfare issues relating to next generation artificial intelligence (AI) and the need for a framework for assessing and managing the associated risks. For a simple question and answer overview of AI see McCarthy, John (2007). “What is Artificial Intelligence?” <http://wwwformal.stanford.edu/jmc/whatisai.pdf>.

A further challenge is psychosocial hazards, and psychological and physical health effects, social and behavioural outcomes, and functional changes to capacity to work or participate in work activities arising from exposure to these hazards. These hazards are multifaceted and concern aspects of work design; the planning, organisation and management of work; work relationships and interactions; and the work environment. WorkSafe is doing some work in this area and the importance of psychosocial risks should be reflected in ongoing initiatives to:

- Ensure expert knowledge through specialists in work design, work organisation and management, and developing high level knowledge and skills of inspectors with a special interest in psychosocial issues to support the agency and inspectors in responding to psychosocial issues
- Ensure effective procedures, methods and tools for inspecting psychosocial issues, including guidelines (and templates) for investigating issues, gathering information, evaluating organisations’ psychosocial risk management processes, determining compliance and writing notices, and best practice examples of notices
- Establish and maintain ongoing training and development for the general inspectorate in the inspection of psychosocial issues – in psychosocial hazards, and in the specific procedures, methods and tools for inspecting these hazards.