



safe work australia

Chief Executive
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**Impacts and Benefits of COAG Reforms
Productivity Commission
GPO Box 1428
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To whom it may concern

Thank you for the opportunity to provide comment on the Productivity Commission's *Discussion Draft: Impacts of COAG Reforms: Business Regulation and VET*.

This submission is focussed on Chapter 8 – Occupational Health & Safety of the discussion draft. Safe Work Australia provides comment, clarification and correction on a number of aspects of chapter 8. The key areas are:

- objectives of the reform
- the harmonisation process and what has changed, and
- the functions of Safe Work Australia compared to its predecessors the Australian Safety and Compensation Council (ASCC) and the National Occupational Health and Safety Commission (NOHSC).

Yours faithfully

Rex Hoy
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WHS Reform objectives

Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA)

The main objectives of the work health and safety reform process are for parties to the IGA to work cooperatively to harmonise occupational health and safety (OHS) regulation through the adoption and implementation of model legislation. The IGA committed the parties among other things to:

- a) ...the adoption and implementation of model OHS legislation [which] requires each jurisdiction to enact or otherwise give effect to their own laws that mirror the model laws as far as possible having regard to the drafting protocols in each jurisdiction (IGA part 5, 5.1.7, emphasis added by Safe Work Australia).

The adoption and implementation of model OHS legislation is not intended to prevent jurisdictions from enacting or otherwise giving effect to additional provisions, provided these do not materially affect the operation of the model legislation, for example, by providing for a consultative mechanism within a jurisdiction (IGA part 5, 5.1.8, emphasis added by Safe Work Australia).

Parties to the IGA

The discussion draft on page 135 notes that Western Australia (WA) did not agree to adopt conditions in the model Work Health and Safety (WHS) laws which were significantly different from its own policy settings, it would be more accurate to say:

The WA WHS Bill includes the vast majority of the provisions in the model WHS Act. These provisions in the WA WHS Bill include those that create duties, impose responsibilities, provide the regulator with powers and effectively deliver safety at the workplaces.

However, from the beginning of the process to develop the model WHS Bill, WA has highlighted four areas that it did not agree with and consequently would not be adopting as law in this State. WA intends to give effect to additional provisions on:

- a) *Penalty levels*
- b) *Union right of entry*
- c) *Health and Safety Representatives capacity to direct the cessation of work, and*
- d) *Reverse onus of proof in discrimination matters.*

The removal of these provisions do not materially affect the operation of the primary duties set out under the model WHS legislation (accessed from http://www.commerce.wa.gov.au/worksafe/Content/About_Us/Legislation/National_model_act_FAQs.html on 15/02/2012).

Legal framework: A risk management approach

There is some confusion in the discussion draft about the legal framework used for harmonisation. The harmonisation of WHS legislation under the IGA retained the three tier legal framework and general duties approach (based on the Robens model) that has existed since the inception of OHS law across Australia. The legal framework used for WHS legislation has not changed in the reform process.

Information outlined below on the model WHS Act, Regulations and Codes of Practice may be used to replace information outlined in pages 138 to 140 of the discussion draft.

Model WHS Act

The model Work Health and Safety (WHS) Act is the result of a comprehensive national review into work health and safety laws across Australia, which involved substantial public consultation. The first draft of the model WHS Act was based on the decisions of the Workplace Relations Ministers' Council (WRMC) in relation to the national review findings.

WRMC endorsed the model WHS Act in December 2009, allowing Safe Work Australia to make further technical and drafting amendments to ensure its workability.

Model WHS Regulations

The Model WHS Regulations support the model WHS Act. They provide specific control measures to be implemented for specific hazards as well as other compliance requirements, rights and duties. They were developed in a three stage process, as required under Section 5.3 of the Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA) and outlined below:

- stage one will set out an overall framework for a consolidated body of regulations and will incorporate detail on those matters broadly common to all current jurisdictional regulations, as well as recently reviewed national standards material
- stage two will include consideration of matters that are broadly included in some, but not all, jurisdictions' regulations, as well as material from national standards currently under review, and
- stage three will cover those matters identified as requiring considerable policy development and will complete the remainder of the regulations identified in the framework.

Codes of Practice

A Code of Practice is a practical guide to achieve the standards of health and safety required under the model WHS Act and model WHS Regulations. Codes of Practice provide duty holders with guidance on effective ways to manage work health and safety risks. A code of practice applies to anyone who has a duty of care in the circumstances described in the code. In most cases, following an approved code of practice would achieve compliance with the health and safety duties in the WHS Act, in relation to the subject matter of the code.

The legal effect of Codes of Practice

- Codes of Practice are admissible in court proceedings under the model WHS Act and Regulations. Courts may regard a Code of Practice as evidence of what is known about a hazard, risk or control and may rely on the Code of Practice in determining what is reasonably practicable in the circumstances to which the Code of Practice relates.
- Codes of Practice are designed to be used in conjunction with the model WHS Act and model WHS Regulations but do not have the same legal implications. A person cannot be prosecuted for failing to comply with a Code of Practice.
- The WHS Act and Regulations may be complied with by following another method, such as a technical or an industry standard, if it provides an equivalent or higher standard of work health and safety than the Code of Practice.
- An inspector may refer to an approved Code of Practice when issuing an improvement or prohibition notice and may offer the person to whom the notice is issued a choice of ways in which to remedy the contravention.

The Harmonisation Process

Harmonisation process

Sections of the discussion draft including pages 138 to 140 confuse events that occurred in the harmonisation process. Outlined below is a timeline of events throughout the harmonisation process which could be used to correct the references in chapter 8.

1 February 2008	At the WRMC meeting on 1 February 2008 Ministers agreed the use of model legislation was the most effective way to achieve harmonisation of work health and safety laws.
April 2008	A National Review into Model Occupational Health and Safety Laws (national OHS review) was conducted prior to the development of the IGA to make recommendations on the optimal structure and content of a model OHS Act that was capable of being adopted in all jurisdictions. The national OHS review was carried out by a panel of three independent experts. In making its recommendations, the panel took into account the changing nature of employment arrangements and consulted extensively with more than 260 individuals. This consultation process incorporated representatives from over 100 organisations across Australia, including regulators, union and employer organisations, industry representatives, legal professionals, academics and health and safety professionals. The panel also received 243 written submissions from various organisations and individuals.
3 July 2008	The Council of Australia Governments formally committed to the harmonisation of work health and safety laws by signing an IGA. The IGA sets out the principles and processes for cooperation between the Commonwealth, states and territories to implement model WHS legislation. It was complemented by consistent approaches to achieve compliance and enforcement by the end of 2011. Under the IGA, all jurisdictions committed to adopting the model work health and safety legislation, with minor variations as necessary to ensure it is consistent with relevant drafting protocols and to achieve consistency with other laws and processes operating within the jurisdiction.
May 2009	WRMC considered 232 recommendations from the national OHS review panel, and made decisions on these recommendations, setting the policy parameters for developing a model Act.
September 2009	<p>The first draft of the model WHS Act was released for public comment for six weeks in September 2009. The 480 submissions received during this period informed many of the amendments to the first draft.</p> <p>The model WHS Regulations were developed from a three-staged process as outlined in the IGA.</p> <p>The three stages were:</p> <ul style="list-style-type: none">• the development of regulations covering those areas currently regulated in all jurisdictions• consideration of matters included in some but not all jurisdictions, and• identifying matters requiring considerable policy development.

December 2010 to April 2011	Model WHS Regulations were released for public comment. Safe Work Australia received a total of 1343 submissions.
July 2011	Safe Work Australia Members endorsed the model WHS Regulations and first stage Codes of Practice.
August 2011	The model WHS Regulations were agreed to in principle by the majority of WRMC on 10 August 2011 subject to approval of the Decision RIS by the Office of Best Practice Regulation. The Decision RIS was approved on 9 September 2011. A number of Model Codes of Practice were also approved by WRMC.
1 January 2012	New work health and safety laws commenced in New South Wales, Queensland, the Australian Capital Territory, the Commonwealth and the Northern Territory – see further table below.

Below is a table showing each jurisdiction's progress in implementing the new laws. Where a jurisdiction has already enacted the WHS Act and the WHS Regulations the links provided will take you to these documents.

Jurisdictional progress on the model work health and safety laws

Jurisdictions agreed under part 5, 5.1.6 of the IGA to "subject to its parliamentary and other law making processes, take all necessary steps to enact or otherwise give effect to model OHS legislation within its jurisdiction within the timeframes agreed by WRMC".

Page 137 of the discussion draft highlights progress of jurisdictional implementation of the model WHS legislation. The table below provides a more up to date outline of the progress of implementation in each jurisdiction. Further information which may be useful to include in the section of the report on page 137 is provided below on the commitment of jurisdictions to implement by WRMC agreed dates.

Jurisdiction	Introduced to parliament	Passed	Date of Implementation
Commonwealth			
Work Health and Safety Act 2011	6 July 2011	24 November 2011	1 January 2012
Work Health and Safety Regulations 2011	Made 7 December 2011	Registered 14 December 2011	1 January 2012
Australian Capital Territory			
Work Health and Safety Act 2011	23 June 2011	20 September 2011	1 January 2012
New South Wales			
Work Health and Safety Act 2011	5 May 2011	27 May 2011	1 January 2012.
Work Health and Safety Regulation 2011		16 December 2011	1 January 2012
Northern Territory			
Work Health and Safety (National Uniform Legislation) Act 2011	27 October 2011	1 December 2011	1 January 2012

Jurisdiction	Introduced to parliament	Passed	Date of Implementation
Work Health and Safety (National Uniform Legislation) Regulations			1 January 2012
Queensland			
Work Health and Safety Act 2011	10 May 2011	26 May 2011	1 January 2012
Work Health and Safety Regulations 2011	Approved on 24 November 2011	29 November 2011	1 January 2012
South Australia			
Work Health and Safety Bill 2011	19 May 2011		Parliament voted to adjourn debate on the Work Health and Safety (WHS) Bill until 14 February 2012. The Bill is likely to be debated around 28 February 2012.
Tasmania			
Work Health and Safety Bill 2011	18 October 2011		Tasmania's Legislative Council amended the Bill by changing the commencement date to 1 January 2013. The Bill will be resubmitted to the House of Assembly for agreement.
Victoria			
Not yet introduced			The Victorian Government announced it would delay harmonisation.
Western Australia			
Not yet introduced			The Western Australian Government has announced that it is unable to meet the 1 January 2012 implementation timeframe.

What has changed?

The discussion draft on pages 140 - 142 outlines the changes that have occurred under the harmonisation process. The information outlined below could replace the information on pages 140-142 to more accurately reflect these changes:

While any changes to WHS legislation are specific to each jurisdiction, some of the key changes under the new work health and safety laws include:

- The duties of care are not defined by the nature of the employment relationship. This means that the term 'employer' currently applied in most OHS laws is replaced with the term 'person conducting a business or undertaking' and 'employee' is replaced with a broadly defined term of 'worker'.
- The term 'worker' includes employees, volunteers, contractors, sub-contractors, apprentices, work experience students and outworkers.
- The term 'workplace' in most jurisdictions will be broadened to include any place where a worker goes or is likely to go while at work.

- There are positive duties for ‘officers’ to exercise ‘due diligence’ to ensure the person conducting a business or undertaking complies with its duty of care. This is a new way of expressing officers’ responsibilities under current law. Currently some OHS Acts attribute liability to officers where a corporation is in breach of a duty and they have a reverse onus of proof to show that they did what was reasonably practicable or that they had no influence in relation to the breach. Under the new work health and safety laws there is no attributed liability.
- A new duty to consult, co-operate and co-ordinate activities with other duty holders has been introduced – this duty aims to address situations where more than one duty holder is responsible for the same work health and safety matter to ensure that duty holders work together to control work health and safety risk.

Under the terms of the IGA, Safe Work Australia was required to consider and include in the model WHS Regulations items which were already regulated in a majority of the jurisdictions. If those items were not regulated in a majority of jurisdictions agreement from Safe Work Australia Members was sought for their inclusion or they were not included in the model WHS Regulations. This approach limited the extent of difference between existing jurisdictional WHS legislation and the model WHS legislation.

Page 142, paragraph 3 of the discussion draft refers to differences between model WHS regulations and jurisdictional regulations. It is more accurate to say:

While each jurisdiction’s regulation will change, a majority of jurisdictional regulations differ only slightly in detail and content from the model WHS Regulations.

The public comment period for the model WHS Regulations proved vital in gaining a broad perspective for the draft model WHS Regulations and first stage Codes of Practice. Some of the changes made to the draft model WHS Regulations in response to public comment included:

- introducing audiometric testing requirements for exposure to hazardous noise to detect hearing loss
- removing the requirement for documenting the use of administrative control measures for the risk of falls above two metres
- revising the hazardous chemicals regulations to rely on the Global Harmonised System of Classification and Labelling of Chemicals published by the United Nations (GHS)
- removing the Regulations dealing with abrasive blasting and placing the requirements in a Code of Practice
- introducing new Regulations dealing specifically with asbestos-related workers, other than removal workers and clarifying requirements relating to naturally occurring asbestos
- realigning the definition of confined space to the relevant Australian Standard, and
- making a clearer distinction between high risk diving work and other general diving work.

Functions of Safe Work Australia

The discussion draft should provide a clear description of the responsibilities and functions of Safe Work Australia as a non-regulatory, tripartite body. It should ensure that it does not confuse responsibilities and functions of Safe Work Australia, policy or otherwise, with jurisdictional regulators or with previous Commonwealth OHS bodies including the Australian Safety and Compensation Council (ASCC) or the National Occupational Health and Safety Commission (NOHSC).

Page 145 of the discussion draft suggests that Safe Work Australia is a 'centralised policy development organisation'. It is more accurate to say:

Safe Work Australia is the national policy body responsible for the developing, monitoring adoption of and evaluating the model WHS legislation. The Commonwealth, states and territories are responsible for regulating and enforcing work health and safety laws in their jurisdictions.

Page 137 of the discussion draft indicates that "prior to the reforms, state, territory and Australian governments were also working together through the National OHS Strategy 2002-2012". It is not correct to state 'prior to' as state, territory and Australian governments continue to work on the National OHS Strategy, and on the development of a new national work health and safety strategy for 2012-2022. This work has been undertaken by Safe Work Australia alongside, but separately from the harmonisation of WHS laws. It would be more accurate to say:

State, territory and Australian governments continue to work together with union and employer bodies through the National OHS Strategy 2002 – 2012, and on the development of a new national strategy for 2012-2022. This work is driven by Safe Work Australia and occurs alongside its work on the harmonisation of WHS laws.

Functions of the Australian Safety and Compensation Council (ASCC) and the National Occupational Health and Safety Commission (NOHSC):

Safe Work Australia was established as an independent Statutory Agency and operates under the *Safe Work Australia Act (2008)*.

NOHSC operated under different legislation and the ASCC was established administratively, though it did possess a statutory power to declare National Standards. These bodies had different functions and responsibilities to Safe Work Australia. Specifically NOHSC and the ASCC developed and declared a range of National Standards and Codes, rather than model WHS legislation.

A collaborative and consultative process for developing greater consistency in work health and safety regulations began in the mid 1980s and led to the development of National Standards and National Codes of Practice in a number of key subject areas by NOHSC.

National Standards were developed in consultation with a broad range of stakeholders and went through extensive public consultation periods prior to approval by NOHSC. National Standards did not have legal status and were not enforceable unless a jurisdiction adopted the provisions of the National Standard into their OHS regulations. As there was no binding agreement nationally on how and when National Standards should be adopted, the level of consistency of adoption varied. Some of the reasons for this included:

- differences between the jurisdictional OHS Acts
- differences between legislative drafting protocols and the drafting of the National Standards into regulations, for example, the need for jurisdictions to redraft clauses and definitions to align with the respective OHS laws
- jurisdictions choosing not to adopt all of the provisions of the National Standards, and
- jurisdictions choosing to adopt the National Standard as a Code of Practice rather than as regulation.

Significant improvements in consistency were achieved in the areas of hazardous chemicals, occupational licensing and noise. However, there was less consistent adoption of provisions from other National Standards.

National Standards developed by NOHSC and then by its replacement body, the ASCC, were used as a basis for developing the model WHS regulations.

Regulation Impact Statement

Throughout the discussion draft references to different RISs is confusing and may misrepresent some information presented. The focus should be on the information provided in the Decision RIS as it contains confirmed data and analysis and was approved by WRMC. References to the information in the Consultation RIS should be removed, and references to the Decision RIS should be checked for accuracy.

Safe Work Australia has found instances where the information provided in the discussion draft does not reflect the Decision RIS for the Regulations and Codes of Practice – which is the reference provided. Some of these examples are:

142	Estimated red tape and other compliance cost savings were around \$22 per worker for multi-state firms.	Page 262 of the Decision RIS provides an amount of \$44.94 per worker per year for multi-state firms.
155	An additional benefit of around \$200 million annually was estimated to be available from changes to the regulations.	Page 264 of the Decision RIS provides an amount of \$250 million .
156	The estimated changes in red tape costs for multi-state firms are modest – in the order of \$100 per worker.	Page 262 of the Decision RIS provides an amount of \$10.92 .
156	The Summary of effects section quotes the one off transition cost in the first year (2012) could be around \$850 million .	Page 269 of the Decision RIS provides an amount of \$885.73 million .

Mining references

In addition to the RIS processes that have been completed for the model WHS Act and the model Regulations and Codes of Practice, Safe Work Australia is currently undertaking a RIS process for the supplementary WHS Regulations and Codes of Practice for mines. Safe Work Australia is working with the National Mine Safety Framework to develop the regulations for mines.

Following clearance by the Office of Best Practice Regulation, a Consultation RIS for the model WHS Regulations and Codes of Practice for mines was published on the Safe Work Australia website in November 2011. During the public comment period 96 submissions were received. This information is assisting in the development of the decision RIS that is expected to be finalised during 2012.

The discussion draft states at page 142 that:

For all jurisdictions except Queensland and Western Australia, there will be some changes to the mining specific OHS regulations.

It would be more accurate to say:

For all jurisdictions there will be some changes to the mining specific work health and safety regulations if the harmonised package is implemented.

Updated Figures

Provided below are updated versions of both Figure 8.1 and 8.2 for information. Figure 8.1 has been published by Safe Work Australia in the *Comparative Performance Monitoring 2009-10* (2011)¹. Figure 8.2 has not been published by Safe Work Australia.

Figure 8.1

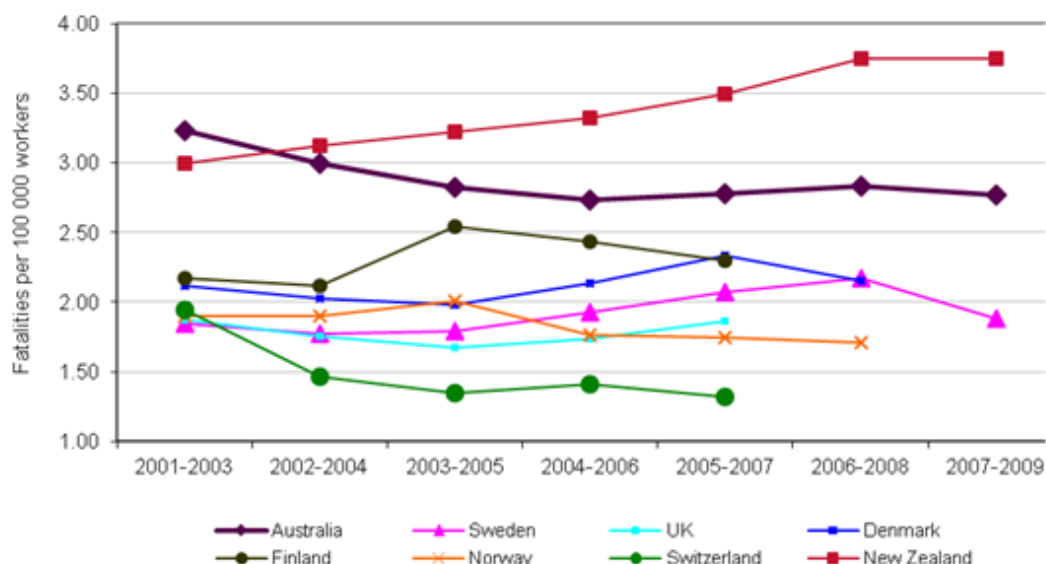
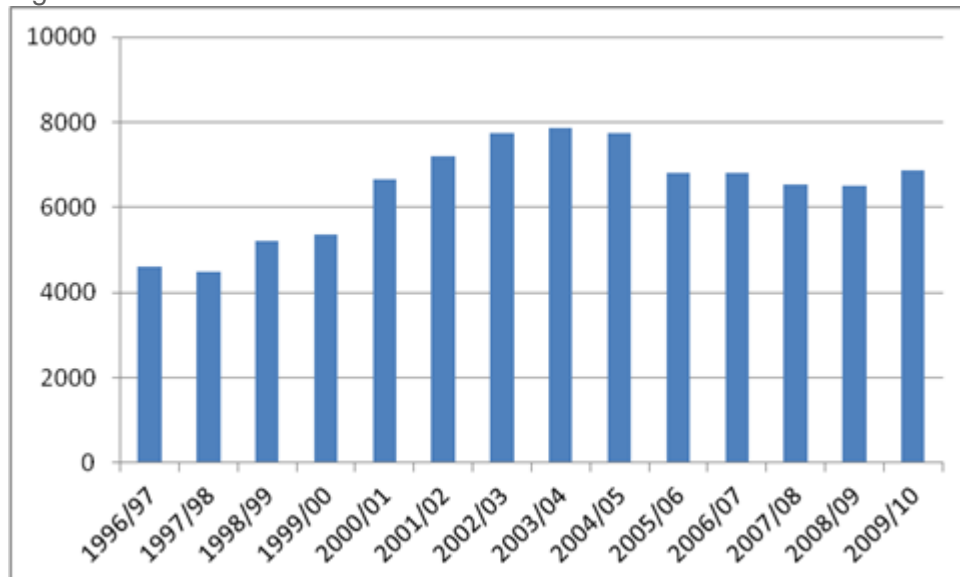


Figure 8.2



The discussion draft quotes on pages 142-143 and 154 amounts from *The Cost of Work-Related Injury and Illness for Australian Employers, Workers and the Community 2005-06*, March 2009. Safe Work Australia has updated this publication and is about to publish this document. Updated amounts can be provided once this report is released.

¹ Comparative Performance Monitoring Report, comparison of work health and safety and workers' compensation schemes in Australia and New Zealand, 13th edition, October 2011