COVID-19 and the Regulation of Work Health and Safety

Elizabeth Bluff and Richard Johnstone†*

This article examines the regulation of work health and safety (WHS) in relation to COVID-19 in Australia. It considers the broader public health response to COVID-19, which is separate from and has not overruled WHS laws or regulators' powers but has shaped the regulation of WHS in fundamental ways. As the article explains, WHS laws set high standards for the protection of workers and others at workplaces, and WHS regulators have far-reaching powers for promoting, inspecting and enforcing compliance. Yet, the WHS regulators have played an auxiliary role in government responses to COVID-19; promoting public health 'core practices' that entail lower order administrative methods and personal protective equipment, and conducting limited inspection and enforcement of COVID-19 risk control. The article provides examples of deficiencies in control of COVID-19 risks and concludes that more could have been done within the framework of WHS laws.

Introduction

SARS-CoV-2 is a formidable health hazard. The virus is highly contagious and readily spread when an infected person coughs, sneezes or exhales infected droplets or aerosols, and another person breathes in infected air or touches their eyes, nose or mouth after touching contaminated surfaces.[1] Also, a person may be infectious but have no, or only mild, symptoms, increasing the potential for the virus to spread.[2] Workplaces around the world have repeatedly been the source of COVID-19 outbreaks, especially where the nature of the work makes close, face-to-face contact difficult to avoid; and those whose work caring for others puts them in contact with infected people have suffered disproportionately higher rates of illness in the pandemic.[3] Additional factors increasing vulnerability for virus exposure — which often occur in combination — are being a migrant worker, lack of information and training in infection control procedures (or ability to understand and apply these), understaffing, low pay and conditions, and lack of leave entitlements

* Visiting Fellow, School of Regulation and Global Governance (RegNet), Australian National University.

† Professor, School of Law, Queensland University of Technology. We thank Peter Thorning for his helpful comments on an earlier draft of this article.

1 L Morawska and D K Milton, 'It Is Time to Address Airborne Transmission of Coronavirus Disease 2019 (COVID-19)' (2020) 71 *Clin Inf D* 2311; WorkSafe Victoria, *Exposure to COVID-19 in Workplaces*, 31 January 2020, at <https://www.worksafe.vic.gov.au/safety-alerts/exposure-coronavirus-workplaces> (accessed 23 July 2021) (*Exposure to COVID-19 in Workplaces*).

2 X He et al, 'Temporal Dynamics in Viral Shedding and Transmissibility of COVID-19' (2020) 26 *Nat Med* 672; R Li et al, 'Substantial Undocumented Infection Facilitates the Rapid Dissemination of Novel Coronavirus (SARS-CoV-2)' (2020) 368 *Sci* 489.

3 Fellows of the Collegium Ramazzini, '24th Collegium Ramazzini Statement: Prevention of Work-Related Infection in the COVID-19 Pandemic' (2020) 62 *J Occup Env* 467.

(as for casual, seasonal and transient workers), working at multiple locations, and living and travelling in close proximity to others.[4] These were key factors in the Australian outbreaks in, or arising from, hotel quarantine, meat works and aged care, among others.[5]

The COVID-19 illness ranges from mild to severe respiratory conditions, to long-term damage to the lungs and other organs, and some people die from their illness.[6] As well as the physical illness, there are effects on psychological health relating to:

- fear and anxiety about transmission of the virus and the impact on employment;
- for those performing emergency and caring work, the moral distress of being unable to fulfil these roles properly during the pandemic;
- ethnicity-related harassment and threats; and
- the multifaceted impacts of working from home including social isolation, electronic communications and supervision facilitated by technology (which might be poorly functioning), and conflicting work and family responsibilities.[7]

A further concern is fatigue for those working more or longer hours, or at unusual times.[8]

This article examines the regulation of work health and safety (WHS) in relation to COVID-19 in 2020. It begins by outlining the broader

4 H Kromhout, 'Learning from a Global Pandemic' (2020) 77 *Occup Environ Med* 587; K Lippel, 'Occupational Health and Safety and COVID-19: Whose Rights Come First in a Pandemic?', in C M Flood et al (Eds), *Vulnerable: The Law, Policy and Ethics of COVID-19*, University of Ottawa Press, Ottawa, 2020, pp 473–86.

5 J Coate, *COVID-19 Hotel Quarantine Inquiry Final Report and Recommendations*, Vol I, Victorian Government Printer, Melbourne, 2020, at 23, 196–9, 221–2, 231–2; S Cousins, 'Experts Criticise Australia's Aged Care Failings over COVID-19' (2020) 396 *Lancet* 1322; 'COVID-19 Work Cluster Sparks Renewed Calls for WHS Overhaul', *OHS Alert*, 6 May 2020.

6 New South Wales Government, *Symptoms and Testing*, updated 9 January 2021, at <https://www.nsw.gov.au/covid-19/how-to-protect-yourself-and-others/symptoms-and-testing#symptoms-of-covid-19> (accessed 23 July 2021); World Health Organization, *Getting Your Workplace Ready for COVID-19*, WHO, Geneva, 2020.

7 A Aujayeb and D Wakefield, 'A Note on Working From Home' (2020) 77 *Occup Environ Med* 806; Centre for Transformative Work Design, *Thrive at Work at Home*, Curtin University, Perth, 2020; V Williamson, D Murphy and N Greenberg, 'COVID-19 and Experiences of Moral Injury in Front-Line Key Workers' (2020) 70 *Occup Med (Lond)* 317; WorkSafe Victoria, *Managing COVID-19 Risks: Mental Health at Work*, updated 12 July 2021, at <https://www.worksafe.vic.gov.au/managing-coronavirus-covid-19-risks-mental-health-work> (accessed 23 July 2021) (*Managing COVID-19*). See also Allen and Orifici in this issue: D Allen and A Orifici, 'Home Truths: What Did COVID-19 Reveal about Workplace Flexibility?' (2021) 34 *AJLL* 77.

8 WorkSafe Victoria, *Prevention and Management of Exposure to COVID-19 in the Healthcare and Social Assistance Industry*, updated 16 July 2021, at <https://www.worksafe.vic.gov.au/prevention-and-management-exposure-coronavirus-covid-19-healthcare-and-social-assistance-industry> (accessed 23 July 2021) (*Healthcare and Social Assistance Industry*); WorkSafe Victoria, *Preventing and Managing the Increased Risk of Employee Fatigue in Healthcare during COVID-19*, updated 29 June 2021, at <https://www.worksafe.vic.gov.au/preventing-and-managing-increased-risk-employee-fatigue-healthcare-during-coronavirus-covid-19> (accessed 23 July 2021).

Commonwealth, state and territory government framework for managing the public health response to COVID-19 in Australia, before sketching key provisions of WHS laws and examining the WHS regulators' role in relation to COVID-19. For simplicity, the abbreviated term WHS is used when referring generally to these regimes although we note that, at the time of writing, the term occupational health and safety (OHS) is used in Victoria, and occupational safety and health (OSH) in Western Australia. The article shows that while WHS laws set high standards for the protection of workers and others at workplaces, and give WHS regulators broad powers to promote, inspect and enforce compliance with those laws, the response of these regulators in relation to COVID-19 has been shaped substantially by the broader public health framework. This is despite the evidence, which the article also canvasses, of widespread deficiencies in control of COVID-19 in workplaces, including the massive incidence of COVID-19 among health and social care workers in Victoria in July–August 2020.

The Public Health Framework for Managing COVID-19

There is an overarching public health framework for managing COVID-19 in Australia which is additional to, but impacts on, the regulation of WHS. At the national level, key forums are the National Cabinet (the Prime Minister, state Premiers and territory Chief Ministers) which, for health issues, are advised by the Australian Health Protection Principal Committee, comprising all state and territory Chief Health Officers and chaired by the Australian Chief Medical Officer.[9] There is also an Infection Control Expert Group,[10] which has endorsed guidance materials on COVID-19 published by the Commonwealth Department of Health.[11]

In regard to preventive actions, in mid-March 2020 the Commonwealth Government declared a human biosecurity emergency under the Biosecurity Act 2015 (Cth), which enabled limits on overseas travel and international passenger arrivals, and prohibition of international cruise ships, as strategies

9 Prime Minister, Minister for Health and Chief Medical Officer, *Advice on Coronavirus*, Media Release, 13 March 2020.

10 Ibid.

11 See, eg, Department of Health (Cth), *Coronavirus Disease (COVID-19): Information for Employers*, Australian Government, Canberra, 21 April 2020, at <https://www.health.gov.au/resources/publications/coronavirus-covid-19-information-for-employers> (accessed 23 July 2021) (*Information for Employers*); Infection Control Expert Group (ICEG), *Guidance on the Minimum Recommendations for the Use of Personal Protective Equipment (PPE) for Health Care Workers in the Context of COVID-19*, Australian Government, Canberra, 10 June 2021, at <https://www.health.gov.au/sites/default/files/documents/2021/06/guidance-on-the-use-of-personal-protective-equipment-ppe-for-health-care-workers-in-the-context-of-covid-19.pdf> (accessed 23 July 2021) (*Guidance on Use of PPE in Health Care*); ICEG, *Guidance on Infection Prevention and Control in Residential Care Facilities in the Context of COVID-19*, Australian Government, Canberra, 16 June 2021, at <https://www.health.gov.au/resources/publications/coronavirus-covid-19-guidelines-for-infection-prevention-and-control-in-residential-care-facilities> (accessed 23 July 2021); ICEG, *Information about Routine Cleaning and Disinfection in the Community*, Australian Government, Canberra, 16 June 2021, at <https://www.health.gov.au/resources/publications/coronavirus-covid-19-information-about-routine-environmental-cleaning-and-disinfection-in-the-community> (accessed 23 July 2021).

to limit the entry of the SARS-CoV-2 virus into Australia.[12] Other preventive actions have been agreed by National Cabinet and the key advisory bodies,[13] but have been given effect by state and territory governments using public health or emergency management laws, as discussed below. Significant examples that impact on the conduct of work are:

- prohibiting a range of business activities or limiting how work is conducted, including requiring that work is done from home where it can be, and restricting travel;
- determining 'essential' activities that, depending on the stage of the pandemic, could continue to operate;
- establishing a three-step framework,[14] to gradually remove business and travel restrictions where COVID-19 cases are sufficiently controlled, according to the stage of the pandemic. This includes businesses producing COVIDSafe plans[15] to outline their actions to protect workers and others at their premises; and
- setting 'core practices' for reducing exposure to the SARS-CoV-2 virus, and tracing contacts when cases of COVID-19 are confirmed (see Table 1).[16]

Table 1: The Public Health Core Practices

Business and travel limits	Complying with restrictions and avoiding non-essential travel
Social/physical distancing	Staying at least 1.5 metres away from others, providing 4 square metres per person, and limiting face-to-face interactions
Hygiene	Hand washing or sanitising, facilities and substances for these, and covering coughs and sneezes

12 Prime Minister et al, *Border Restrictions*, Media Release, 19 March 2020; Prime Minister, *Update on Coronavirus Measures*, Media Release, 20 March 2020. See also Prime Minister, *Update on Coronavirus Measures*, Media Release, 24 March 2020; Prime Minister, *Update on Coronavirus Measures*, Media Release, 15 May 2020.

13 Prime Minister et al, above n 12.

14 Department of Health (Cth), *3 Step Framework for a COVIDSafe Australia*, Australian Government, Canberra, 2020 (*Three Step Framework*).

15 National COVID-19 Coordination Commission, *My Business's COVIDSafe Plan*, Department of Prime Minister and Cabinet, Canberra, 2020.

16 Department of Health (Cth), *Information for Employers*, above n 11; Department of Health (Cth), *Three Step Framework*, above n 14; Australian Health Protection Principal Committee (AHPPC), *Statement on Recommendations for Managing of Health Risk as COVID-19 Measures Lift*, Australian Government, Canberra, 2020, at <https://www.health.gov.au/news/australian-health-protection-principal-committee-ahppc-statement-on-recommendations-for-managing-of-health-risk-as-covid-19-measures-lift> (accessed 23 July 2021); AHPPC, *Statement on the Review of Physical Distancing and Person Density Restrictions*, Australian Government, Canberra, 2020, at <https://www.health.gov.au/news/australian-health-protection-principal-committee-ahppc-statement-on-the-review-of-physical-distancing-and-person-density-restrictions> (accessed 23 July 2021).

Personal protective equipment and clothing (PPE)	Provision and use of PPE appropriate for particular work
Cleaning	Frequent cleaning and disinfection of regularly touched objects and surfaces, and equipment and substances for these
Contact tracing	Recording workers and others at workplaces
Testing and self-isolation	Staying home and getting tested if a person has COVID-19 symptoms
'Health vulnerable'[17] workers	Additional protections including support to work from home, re-assignment to roles that do not involve contact with others, and leave or other measures
Mental health support	Mental health education, care and support at work[18]

The Commonwealth Government also issued COVID-19 safe workplace principles[19] and declared the national WHS policy agency, Safe Work Australia, as a 'centralised information hub'.[20] The agency's website provides information for 37 industry sectors or types of work, although much of the content is generic with extensive use of the public health 'core practices' (as above), pre-existing model codes and guidance,[21] and reference to risk assessment guidance and a workplace checklist.[22] In a similar vein is a draft model code about COVID-19 issued by the Commonwealth

17 Aboriginal and Torres Strait Islander people of 50 years and older, other people 65 years and older who have one or more chronic medical conditions, people 70 years and older, and all people with compromised immune systems.

18 National Mental Health Commission, *National Mental Health and Wellbeing Pandemic Response Plan*, Australian Government, Canberra, 2020.

19 National Cabinet, *National COVID-19 Safe Workplace Principles*, Office of Prime Minister, Canberra, 2020.

20 Prime Minister, *Update on Coronavirus Measures*, Media Release, 5 May 2020. See Safe Work Australia, *COVID-19 Information for Workplaces*, updated 23 February 2021, at <https://www.safeworkaustralia.gov.au/covid-19-information-workplaces> (accessed 23 July 2021).

21 Safe Work Australia, *Work Health and Safety Consultation, Cooperation and Coordination: Code of Practice*, Safe Work Australia, Canberra, 2018; Safe Work Australia, *How to Manage Work Health and Safety Risks: Code of Practice*, Safe Work Australia, Canberra, 2018 (*How to Manage WHS Risks*); Safe Work Australia, *How to Determine What Is Reasonably Practicable to Meet a Health and Safety Duty*, Safe Work Australia, Canberra, 2013 (*What Is Reasonably Practicable*).

22 Safe Work Australia, *Key Considerations for Undertaking a Risk Assessment — COVID-19*, Safe Work Australia, Canberra, 2020; Safe Work Australia, *Checklist: What Can I Do to Keep My Workers Safe at the Workplace and Limit the Spread of COVID-19?*, Safe Work Australia, Canberra, 2020.

Attorney-General's Department[23] as 'an example for state and territory governments, which can be adopted if required'.[24]

With regard to the broader public health response to COVID-19, state and territory governments have used public health or emergency management laws to establish directions, orders or restrictions, and impose fines for noncompliance with such requirements. For example, in Queensland and the Australian Capital Territory, the responsible Ministers declared a 'public health emergency' under the Public Health Act 2005 (Qld) and Public Health Act 1997 (ACT) respectively, and used emergency powers under these laws to restrict certain businesses and activities, require hotel quarantine for certain travellers, restrict the movement of people diagnosed with COVID-19, and limit who could enter those jurisdictions, among other restrictions.[25] In New South Wales, similar restrictions were imposed by the Health Minister, who has very broad powers under the Public Health Act 2010 (NSW) to take action to deal with public health risks without declaring a state of emergency.[26]

A fourth jurisdiction, Victoria, initially declared a 'state of emergency' under the Public Health and Wellbeing Act 2008 (Vic) in March 2020, also restricting certain businesses and activities, requiring hotel quarantine for certain travellers, and limiting the movement of people diagnosed with COVID-19, among other directions.[27] As COVID-19 cases increased in mid-2020, further directions limited the movement of people and required the wearing of face coverings. When these actions did not contain the spread of COVID-19, the Victorian Government declared a 'state of disaster' under the Emergency Management Act 1986 (Vic), from 2 August 2020.[28] This gave the Police Minister responsibility for directing and coordinating the activities of all government agencies and allocating resources as necessary to respond to the disaster. The Minister's directions prevailed over anything to the contrary in any state law, and enabled suspension of the operation of any Act or legislative instrument (or part thereof) that would inhibit the government's

23 Attorney-General's Department, *Draft COVID-19 Model Code of Practice*, Attorney-General's Department, Canberra, 2020, at <https://www.ag.gov.au/industrial-relations/publications/draft-covid-19-model-code-practice> (accessed 23 July 2021).

24 Statement accompanying *Draft COVID-19 Model Code of Practice*, ibid. Model WHS codes are normally issued by Safe Work Australia following public comment, procedures not followed for the COVID code.

25 Justice Connect, *How the Queensland Government's Emergency Restrictions on COVID-19 (Coronavirus) Work*, 30 March 2021, at <https://justiceconnect.org.au/resources/how-the-queensland-governments-emergency-restrictions-on-covid-19-work/> (accessed 23 July 2021); Justice Connect, *How the Australian Capital Territory Government's Emergency Restrictions on COVID-19 (Coronavirus) Work*, 16 December 2020, at <https://justiceconnect.org.au/resources/how-the-act-governments-emergency-restrictions-on-coronavirus-covid-19-work/> (accessed 23 July 2021).

26 Justice Connect, *How the New South Wales Government's Emergency Restrictions on COVID-19 (Coronavirus) Work*, 7 January 2021, at <https://justiceconnect.org.au/resources/how-the-new-south-wales-governments-emergency-restrictions-on-covid-19-work/> (accessed 23 July 2021).

27 Justice Connect, *How the Victorian Government's Emergency Restrictions on COVID-19 (Coronavirus) Work*, 22 June 2021, at <https://justiceconnect.org.au/resources/how-the-victorian-governments-emergency-restrictions-on-coronavirus-covid-19-work/> (accessed 23 July 2021).

28 A Twomey, 'Explainer: What Is a "State of Disaster" and What Powers Does It Confer?', *The Conversation*, 2 August 2020.

response to the disaster. The state of disaster operated in tandem with the state of emergency, which was the principal basis for the extension of work restrictions at this time.

There is, then, an overarching public health framework for managing COVID-19 in Australia, mandating requirements at Commonwealth, state and territory levels, and providing information for businesses and workers through government-wide COVID-19 and public health websites. These mandates and advisory initiatives are additional to the WHS regimes of laws and regulators. They have not overruled the WHS regulatory regimes in a formal sense although, in principle, Commonwealth laws could prevail over anything to the contrary in any state or territory law,[29] and Victoria's state of disaster powers could prevail over anything to the contrary in any other law in that state.[30] Rather, the WHS regimes have played an auxiliary role in Commonwealth, state and territory government responses to COVID-19.[31] This should not be the case in view of the high standards set by WHS laws, as we discuss next.

Key Provisions of WHS Laws

In Australia, there are nine jurisdictions for the general WHS laws: the Commonwealth, six states and two internal territories, which each has their own regulator.[32] In addition, there are separate Commonwealth laws and regulators for health and safety in the maritime industry and the offshore petroleum and gas storage industries, and mining-specific laws and/or regulators in four states (New South Wales, Queensland, Tasmania, and Western Australia). Collectively, these constitute the regulatory framework for prevention of harm at work. In this article we focus on the general WHS laws, which apply to any place where work is performed, including work at home. At the time of writing, these laws are essentially harmonised through the adoption of a Model Work Health and Safety Act and Model Work Health and Safety Regulations[33] in all jurisdictions except Victoria and Western Australia.[34]

The key provision in the harmonised WHS Acts is the s 19 primary duty of a person conducting a business or undertaking (PCBU), which is broadly framed to impose the obligation on all kinds of undertakings. The s 19(1) duty to ensure health and safety is owed to 'workers', defined in s 7 to include all kinds of workers who carry out work in any capacity for a PCBU. As well as direct employees, it protects all workers 'engaged', 'caused to be engaged', 'influenced' or 'directed' by the PCBU. Under s 19(2) the PCBU's duty

29 Australian Constitution s 109.

30 Twomey, above n 28.

31 Australian Institute of Health and Safety, *Victorian Healthcare Sector Changes Welcome, but It's Not Enough*, Media Release, 26 August 2020.

32 R Johnstone, E Bluff and A Clayton, *Work Health and Safety Law and Policy*, Lawbook Co, Sydney, 2012, pp 92–8.

33 Model Work Health and Safety Act 2011 (WHS Act); Model Work Health and Safety Regulations 2011 (WHS Regulations). See also Johnstone, Bluff and Clayton, above n 32, chap 3.

34 The Western Australian Parliament passed the Work Health and Safety Act 2020 (WA), to adopt the Model Act, in November 2020. But most of its provisions are only likely to come into effect at the end of 2021 once the regulations underpinning the Act have been finalised.

extends to ensuring that the health and safety of persons other than workers are not put at risk from work carried out as part of the business or undertaking. These 'others' include students, customers, clients, visitors and passers-by. The management of risks provision in s 17 mandates that to ensure health and safety the PCBU must eliminate risks or, if this is not reasonably practicable, the PCBU must minimise the risks so far as is reasonably practicable. 'Reasonably practicable' is defined in s 18 and requires the PCBU to take into account and weigh up all relevant matters including:

- the likelihood of the hazard or risk occurring;
- the degree of harm that might result from the hazard or risk;
- the availability and suitability of ways to eliminate or minimise the risk;
- what the PCBU knows, or ought reasonably to know, about the hazard or risk and ways of eliminating or minimising the risk; and
- after consideration of these matters, the cost associated with the available ways of eliminating or minimising the risk, and whether the cost is grossly disproportionate to the risk.[35]

As set out in the *How to Manage Work Health and Safety Risks: Code of Practice*, which has evidentiary status in the harmonised jurisdictions, a 'hierarchy of control' should be applied.[36] In this hierarchy, eliminating the hazard is the highest level of protection, which can be achieved by not introducing the hazard into the workplace or removing it completely from the workplace. Intermediate level of protection is achieved by substituting the hazard with something safer; isolating the hazard from people, using distance or barriers to physically separate the hazard from people; or engineering controls that contain or reduce exposure to the hazard. The lowest level of protection is provided by administrative controls (methods or procedures) and PPE, which do not control the hazard but may provide some protection if consistently and correctly implemented.

In addition to the obligation to manage risks, s 19(3) requires the PCBU to provide any information, training, instruction or supervision that is necessary to protect workers and others from WHS risks. A further important provision is s 47, which imposes a duty on a PCBU to consult workers who are likely to be directly affected by a WHS issue, including when identifying hazards, assessing risks and making decisions about ways to eliminate or minimise risks. Also noteworthy is the s 27 due diligence duty of officers of a PCBU. This is an immediate, proactive and positive duty on each senior officer which, as set out in s 27(5), requires each officer to take extensive measures to find out about the WHS issues and ensure that the PCBU complies with its obligations.

For their part, workers and others at a workplace have lesser duties under ss 28 and 29 respectively. Both must take reasonable care for their own health and safety, avoid adversely affecting the health and safety of others, and comply with reasonable WHS instructions given by the PCBU. Workers must also cooperate with any reasonable WHS policy or procedure of the PCBU

35 See also Safe Work Australia, *What Is Reasonably Practicable*, above n 21.
36 Safe Work Australia, *How to Manage WHS Risks*, above n 21, pp 18–22.

that has been notified to them. The s 28 duty on workers is complemented by s 84, which gives all workers a right to refuse dangerous work (in addition to their common law right to do this).[37] A worker can take this action if they have a reasonable concern that to carry out the work would expose them to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard.

In the states without harmonised WHS laws, Victoria and Western Australia, the principal duty holder is the employer (rather than a PCBU). Each employer owes a duty to their employees and any independent contractor engaged by the employer (and the latter's employees) in relation to matters over which the employer has control.[38] In Victoria, the employer also owes a duty of care to persons other than their employees, in relation to risks arising from the conduct of the employer's undertaking.[39] In Western Australia, persons who have the power of direction and control over the work of others and labour hire agents also have duties.[40]

Although different in detail from the harmonised WHS laws, the Victorian and Western Australian laws require management of risks, provision of information, training, instruction and supervision, and consultation with employees.[41] They impose a reasonably practicable standard of care that requires relevant duty holders to weigh up the risk, the availability and suitability of measures to eliminate (or remove) or reduce (or mitigate) the risk, and the cost of these measures.[42] The regulators in these jurisdictions also advocate the application of a hierarchy of control.[43] The Victorian and Western Australian laws do not include a positive duty on officers, only providing that they are liable for breaches by the business of which they are an officer, that are attributable to the officer's actions or failures.[44]

Direct employees and self-employed persons have duties of care in both states,[45] workplace visitors have obligations in Western Australia,[46] and in Victoria it is an offence for any person to recklessly engage in conduct that places or may place another person at a workplace in danger of serious injury.[47] Workers in Western Australia have a statutory right to cease work if

37 Johnstone, Bluff and Clayton, above n 32, pp 543–4.

38 Occupational Health and Safety Act 2004 (Vic) (OHS Act) s 21; Occupational Safety and Health Act 1984 (WA) (OSH Act) ss 19, 23D.

39 OHS Act s 23.

40 OSH Act ss 23E, 23F.

41 OHS Act ss 21, 23, 35; OSH Act s 19(1); Occupational Safety and Health Regulations 1996 (WA) reg 3.1.

42 OHS Act s 20; OSH Act s 3.

43 The latest version of this longstanding advice is WorkSafe Victoria, *The Hierarchy of Control*, updated 11 July 2021, at <https://www.worksafe.vic.gov.au/hierarchy-control> (accessed 23 July 2021); Department of Mines, Industry Regulation and Safety (WA), *Four Steps for Small Business Safety: Step 3 — Manage Risks*, updated 16 February 2015, at <https://www.commerce.wa.gov.au/worksafe/step-3-manage-risks> (accessed 23 July 2021).

44 OHS Act ss 144–5; OSH Act s 55.

45 OHS Act ss 24–5; OSH Act ss 20–1.

46 OSH Act s 57A.

47 OHS Act s 32.

there is a risk of an imminent and serious injury or harm to their health.[48] This is additional to their common law right to refuse to perform dangerous work,[49] which also applies in Victoria.

In all jurisdictions, the WHS regulators (and their inspectors) have broad powers to promote, inspect and enforce compliance with WHS laws, including conducting legal proceedings.[50] Inspectors have the power to issue improvement notices to prevent a breach of the relevant WHS Act, prohibition notices to stop a dangerous activity, and infringement notices (on-the-spot fines) for prescribed contraventions of WHS laws (except in Victoria and Western Australia). Inspectors can also investigate alleged offences, pursue prosecutions in the courts and accept enforceable undertakings in lieu of prosecution (except in Western Australia).[51] Breaches of ss 19, 27, 28 and 29 of the harmonised WHS Acts are criminal offences, and ss 31–33 set out the three levels of offences. The highest is the s 31 Category 1 offence of recklessness (and gross negligence in New South Wales) with a $3 million[52] maximum fine for a corporate PCBU and possible imprisonment for an individual (officer or worker). Breaches of the duties of care in the Victorian and Western Australian Acts are also criminal offences and noncompliance attracts a significant fine. In Western Australia, breach of a duty involving gross negligence may lead to a higher penalty, as may recklessly placing another person in danger of serious harm in Victoria.[53] There are also relatively new manslaughter provisions in Part 2A of the Work Health and Safety Act 2011 (Qld), Part 2 Div 6 of the Work Health and Safety (National Uniform Legislation) Act 2011 (NT), and Part 5A of the Occupational Health and Safety Act 2004 (Vic).

This outline of key provisions in the general WHS laws is not exhaustive but serves to illustrate the high standards they set for the protection of workers and others. In particular, the WHS laws require businesses to do what is reasonably practicable to eliminate or minimise risks and envisage that WHS regulators will inspect and enforce the laws in order to secure compliance, which may include the imposition of significant sanctions. As stated previously, the public health response has not overruled WHS laws. However, two minor amendments to WHS laws in Victoria relate to the pandemic. From July 2020, new regulations[54] required employers, independent contractors, and self-employed persons with management or control of a workplace to notify the regulator immediately after becoming aware that a worker has received a confirmed diagnosis of COVID-19, and if that worker has attended the workplace within the relevant infection period.[55] Such amendments were not necessary in the jurisdictions with harmonised laws,

48 OSH Act s 26.
49 Johnstone, Bluff and Clayton, above n 32, pp 543–4.
50 WHS Act Parts 9–11; OHS Act Parts 2, 9; OSH Act Part VI.
51 WHS Act Part 13; OHS Act Part 11; OSH Act Part VII.
52 In New South Wales, $3,982,450.
53 OSH Act ss 18A, 19A; OHS Act s 32.
54 Occupational Health and Safety (COVID-19 Incident Notification) Regulations 2020 (Vic).
55 WorkSafe Victoria, *Report a Confirmed Positive Case of COVID-19 in the Workplace*, 19 October 2020, at <https://www.worksafe.vic.gov.au/report-confirmed-positive-case-covid-19> (accessed 23 July 2021).

which already required PCBUs to report a person being admitted to hospital or suffering a confirmed infection (which includes COVID-19) for which the work was a significant contributing factor.[56] There is no requirement to notify work-related COVID-19 cases to the WHS regulator in Western Australia.[57] The second minor amendment in Victoria related to WorkSafe Victoria inspectors issuing prohibition notices and directions. This temporary amendment clarified that failure to comply with a COVID-19 direction under the Public Health and Wellbeing Act 2008 involved an immediate risk for the purposes of issuing such notices and directions.[58]

Role of the WHS Regulators

Despite their significant powers, the WHS regulators' role in government responses to the COVID-19 pandemic at Commonwealth, state and territory levels has been an auxiliary one, taking their lead from the public health responses. While all of the WHS regulators have contributed to the array of guidance material relating to the management of COVID-19 risks at work, they conceptualise COVID-19 risk management as for the public health response generally.[59] Either directly, or by reference to other government sources,[60] the WHS regulators' information addresses a common set of topics: restrictions on particular types of businesses or how work is conducted, including working from home; the three-step framework for gradually removing restrictions and preparation of COVIDSafe plans; and the core practices for reducing exposure to the SARS-CoV-2 virus and tracing contacts when cases of COVID-19 are confirmed, as summarised in Table 1. For the most part, industry-focused information provides variations on the application of the core practices for the particular sector.[61] The public health core practices

56 WHS Act ss 35–6; WHS Regulations reg 699.

57 Department of Commerce (WA), *About WorkSafe, Inspectors and Notices*, Western Australian Government, Perth, 2015, at 2.

58 The COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020 (Vic) amends the OHS Act ss 112–20.

59 See, eg, Comcare, *Maintain a COVID-Safe Workplace*, at <https://www.comcare.gov.au/safe-healthy-work/current-workplace-hazards/coronavirus> (accessed 23 July 2021); SafeWork NSW, *COVID-19 (Coronavirus)*, updated 5 March 2021, at <https://www.safework.nsw.gov.au/resource-library/COVID-19-Coronavirus> (accessed 23 July 2021); WorkSafe Victoria, *Exposure to COVID-19 in Workplaces*, above n 1; Workplace Health and Safety Queensland, *Coronavirus (COVID-19) Workplace Risk Management*, 23 March 2020, at <https://www.worksafe.qld.gov.au/news-and-events/news/2020/coronavirus-covid-19-workplace-risk-management> (accessed 23 July 2021).

60 See, eg, New South Wales Government, *COVID-19 Safety Plans*, updated 17 May 2021, at <https://www.nsw.gov.au/covid-19/covid-safe#industry> (accessed 23 July 2021).

61 See, eg, Comcare, *Coronavirus (COVID-19): Practical Guide for Call Centres*, Comcare, Canberra, 2020; WorkSafe Victoria, *Managing the Risk of COVID-19 Exposure: Construction Industry*, updated 11 June 2021, at <https://www.worksafe.vic.gov.au/managing-risk-covid-19-exposure-construction-industry> (accessed 23 July 2021) (*Construction Industry*); WorkSafe Victoria, *Managing the Risk of COVID-19 Exposure: Agriculture Industry*, updated 13 June 2021, at <https://www.worksafe.vic.gov.au/managing-risk-coronavirus-covid-19-exposure-agriculture-industry> (accessed 23 July 2021). In Queensland the WHS regulator contributed to government information for industry (personal communication with regulator).

involve work methods (administrative controls) and the use of PPE and, as such, are lower order measures in the WHS hierarchy of control discussed in the previous section.[62]

Across the various guidance materials there are rare examples of higher-order measures that seek to isolate, reduce or contain the SARS-CoV-2 virus. These include adjusting air conditioning and ventilation systems (in premises and vehicles) to supply external air (rather than recirculated air) or increase ventilation rates and, in some healthcare settings, installing high-efficiency air filters and negative pressure ventilation to control virus spread. Other controls are full-height barriers, screens or partitions between workers and/or clients/customers, taps and bins that are foot-operated, virtual meetings, and contactless delivery methods involving phone/electronic communications and documentation. Rather than higher-order controls, it is as likely that the WHS regulators' guidance identifies ways around particular core practices when these cannot be maintained at work. For example, where physical distancing cannot be maintained, suggested practices are reducing the number of person-to-person interactions, modifying the alignment of workstations so workers do not face one another, and providing PPE.[63] Rather than preventing workers from sharing equipment and vehicles, where these are shared businesses are advised to use measures such as hand washing or sanitising and wiping down of touched surfaces before and after every use.[64]

Regulator guidance materials also address mental health support (for example, employee assistance programs and digital resources) and some encourage the control of psychological health risks relating to COVID-19.[65] Guidance about working from home principally addresses physical work environment issues such as workstation set up and posture, lighting, access ways, slip or trip hazards, smoke detectors, and electrical equipment safety.[66] Beyond general advice about managing workloads, flexibility around working

62 See, eg, International Labour Organization, *A Safe and Healthy Return to Work during the COVID-19 Pandemic: Policy Brief*, ILO, Geneva, 2020.

63 See, eg, WorkSafe Victoria, *Managing the Risk of COVID-19 Exposure: Meat and Poultry Processing*, updated 13 July 2021, at <https://www.worksafe.vic.gov.au/managing-covid-19-exposure-meat-and-poultry-processing> (accessed 23 July 2021); Safe Work Australia, *Office — Physical Distancing*, updated 12 February 2021, at <https://www.safeworkaustralia.gov.au/covid-19-information-workplaces/industry-information/office/physical-distancing> (accessed 23 July 2021).

64 WorkSafe Victoria, *Managing COVID-19 Exposure Risks: Travelling in Vehicles*, updated 12 July 2021, at <https://www.worksafe.vic.gov.au/managing-coronavirus-covid-19-exposure-risks-travelling-vehicles> (accessed 23 July 2021).

65 See, eg, Comcare, *Coronavirus (COVID-19): Looking After Your Mental Health — Supporting Others in Times of Uncertainty*, Comcare, Canberra, 2020; Workplace Health and Safety Queensland, *Workplace Psychological Health Considerations*, updated 30 April 2020, at <https://www.worksafe.qld.gov.au/resources/campaigns/coronavirus/keeping-your-workplace-safe-clean-and-healthy-during-covid-19/workplace-psychological-health-considerations> (accessed 23 July 2021); WorkSafe Victoria, *Managing COVID-19*, above n 7.

66 Comcare, *Coronavirus (COVID-19): Working from Home — A Guide for Employers*, Comcare, Canberra, 2020; SafeWork NSW, *Working from Home: Workplace Health and Safety (WHS) Checklist*, SafeWork NSW, Gosford, 2020; Workplace Health and Safety Queensland, *Health and Safety for Working from Home*, updated 28 April 2020, at <https://www.worksafe.qld.gov.au/laws-and-compliance/work-health-and-safety-laws/specific-obligations/health-and-safety-for-working-from-home> (accessed 23 July 2021).

hours, and having a separate work space, this work at home guidance does not seriously engage with the work/life conflict issues discussed by Allen and Orifici elsewhere in this issue.[67]

In regard to inspection and enforcement, the Victorian regulator has a policy framework established in 2018, which balances information and other measures to support compliance with inspection, notices, and other enforcement measures to deter noncompliance.[68] All of the other WHS regulators have adopted a 'Statement of Regulatory Intent',[69] published nationally by Safe Work Australia, to guide their activities during the pandemic. According to this statement

> compliance and enforcement activity will continue; however [the focus] will ... be on matters that pose [serious risks] to health and safety [as well as advisory support] ...
>
> Generally, WHS Regulators will take a supportive and educative approach to compliance [during this time] provided duty holders have made genuine attempts to comply with [requirements, but compliance is affected due to factors outside] their direct control. However, WHS Regulators may use enforcement tools [such as prohibition notices where appropriate, particularly] where actions or omissions have resulted in serious health and safety risks to workers or the community ...
>
> The method of [investigating serious incidents or fatalities] may vary depending on the site, emergency services on site or other ways of gathering evidence and information.[70]

In broad terms, the regulators can inspect and enforce compliance proactively, or reactively in response to reported incidents or requests for assistance.[71] The New South Wales regulator actively encourages workers to telephone the agency or use the agency's 'Speak up' platform to report concerns about coronavirus infection in their work that have not been resolved, and workers can report concerns anonymously, tag their location, include photos, and choose to be updated on the issue they have reported.[72] The big issue is potential victimisation. In the harmonised jurisdictions, Part 6 of the WHS Acts seeks to provide protection against discriminatory conduct and coercion. In all jurisdictions, for businesses covered by the Fair Work Act 2009 (Cth), the adverse action provisions in Part 3-1 attempt to protect employees from action taken for discriminatory reasons.

While the WHS regulators have a broad mandate to inspect and enforce compliance, during the pandemic they have elected to 'minimise face to face interactions' and use 'a risk assessment protocol to identify under what

---

67 Allen and Orifici, above n 7.

68 WorkSafe Victoria, *Occupational Health and Safety Compliance and Enforcement Policy*, Edition 2, WorkSafe Victoria, Melbourne, 2018.

69 Safe Work Australia, *Statement of Regulatory Intent: Regulatory Approach to Australian Work Health and Safety Legislation — COVID-19*, Safe Work Australia, Canberra, 30 April 2020 (*COVID-19*).

70 Ibid, at 1.

71 E Bluff and R Johnstone, 'Supporting and Enforcing Compliance with Australia's Harmonised WHS Laws' (2017) 30 *AJLL* 30 at 40–50.

72 SafeWork NSW, *Speak Up to Report a Work Health and Safety Concern*, at <https://www.safework.nsw.gov.au/resource-library/blogs/blogs-accordions/speak-up-to-report-unsafe-work> (accessed 23 July 2021).

circumstances inspectors will continue to visit workplaces'.[73] Inspection and enforcement in relation to COVID-19 have been limited, with most occurring from mid-2020. For example, in June, WorkSafe Tasmania reported that its inspectors were visiting workplaces to ensure they had COVID-19 safety plans and were applying coronavirus controls.[74] In New South Wales, from late July, inspectors from the SafeWork NSW, NSW Fair Trading, and Liquor and Gaming NSW visited hospitality premises and, by late September, had issued 150 fines totalling $658,000, with most breaches relating to the absence of a COVID-19 safety plan, a lack of proper social distancing and poor record-keeping.[75] In Victoria, also from July, WorkSafe Victoria inspectors joined Emergency Management Victoria and Victoria Police in targeting at-risk workplaces, including distribution centres, call centres and meat processing plants, inspecting and enforcing the use of face masks.[76] Over a 5-week period, WorkSafe Victoria inspected 873 businesses in high-risk industries and issued 196 notices to businesses failing to comply with 'overall' restrictions, inadequate cleaning and inadequate physical distancing measures.[77] For some workplaces, the Victorian regulator has conducted 'virtual inspections' in which inspectors discuss issues with workplace parties and view conditions in workplaces through the digital interface, and review electronic documentation, photos and videos uploaded from workplaces.[78] WorkSafe Victoria has also reported investigating more than 20 other companies for possible COVID-19-related breaches of WHS laws, including some businesses involved in hotel quarantine, and others in meat processing, retail, and health and aged care.[79]

Other examples of enforcement have involved union interventions. For example, in New South Wales, in late January 2020, a worker health and safety representative (HSR) who was an aircraft cleaner asked Qantas about COVID-19 measures and consultation in relation to this.[80] Qantas stood the HSR down, initially advising that this was for giving a direction to cease unsafe work and causing anxiety to other workers, but subsequently saying it was for spreading misinformation and inciting unprotected industrial action. The Transport Workers' Union NSW requested assistance from SafeWork NSW and, in early March 2020, a SafeWork NSW inspector issued improvement notices, including directions to Qantas to consult with an expert

73 Safe Work Australia, *COVID19*, above n 69, at 2.

74 'COVID-19 Work Recovery Plans', *OHS Alert*, 17 June 2020.

75 Liquor and Gaming NSW, *Hospitality Venues Told to Play It Safer after Weekend Crackdown*, Media Release, 30 July 2020; SafeWork NSW, *Buffet Restaurant Busted as Patrons Caught Serving Themselves*, Media Release, 21 September 2020.

76 'Workplace Blitz, Face Mask Rule Announced for COVID-19', *OHS Alert*, 20 July 2020.

77 L Christopher, 'Corona Virus Update', *The Age*, 26 August 2020.

78 'COVID-19 and Healthcare', Webinar, WorkSafe Victoria, at <https://www.worksafe.vic.gov.au/events/covid-19-and-healthcare> (accessed 23 July 2021).

79 Public Accounts and Estimates Committee, *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic*, Parliament of Victoria, Melbourne, 2021, at 120; Public Accounts and Estimates Committee, *Inquiry into the Victorian Government's Response to the COVID-19 Pandemic*, Transcript of Hearing, Melbourne, 26 August 2020, at 12–13, 21, at <https://www.parliament.vic.gov.au/images/stories/committees/paec/COVID-19_Inquiry/Transcripts_Round_2/DJCS_26_August_verified_transcript.pdf> (accessed 23 July 2021).

80 'WHS Notice Prescribes Controls for COVID-19', *OHS Alert*, 5 March 2020.

on infection control, consult aircraft workers on implementing a safe system of work, provide adequate PPE, and assess workers' contact with bodily fluids.[81] SafeWork NSW also served notice on Qantas and its CEO Alan Joyce advising that it would formally investigate allegations of discriminatory conduct against the HSR[82] which, if confirmed, could be prosecuted under the prohibition of discriminatory behaviour provision in s 104 of the Work Health and Safety Act 2011 (NSW).

Overall, it is through guidance materials that the WHS regulators have made their biggest contribution to the management of COVID-19 at work, albeit echoing the public health response to COVID-19. In principle, the WHS agencies' guidance could have made more of the potential for businesses to come up with higher-order measures to control, contain or restrict exposure to the SARS-CoV-2 virus, through consultation with their workers. And, as a means to motivate businesses, they could have made more of the obligations of senior officers to exercise due diligence (in harmonised jurisdictions) or their liability for breaches (in Victoria and Western Australia). Inspection and enforcement of compliance with WHS laws in relation to COVID-19 appears to have been limited, which resonates with other countries.[83]

Compliance — Core Practices vs Minimising Risks so Far as Reasonably Practicable

Various union surveys have pointed to deficiencies in the implementation of the public health core practices in workplaces. According to a survey for the Australian Council of Trade Unions (ACTU) involving 1,367 workers, of those still in the workplace in April–May 2020 (that is, not working from home), 70% said social distancing was implemented, but only 11% said that additional hygiene measures were provided (for example, hand sanitiser or access to soap and water); 9% said there was a plan in place in case they or a co-worker developed symptoms or tested positive; 4% said there was additional cleaning or disinfection occurring; and 0% said their employer had made any effort to support their mental health.[84] A United Workers Union (UWU) survey of 531 cleaners, conducted in May 2020, found 74% did not have adequate PPE, and the majority had insufficient time (91%) and equipment (80%) to complete essential cleaning work to a high standard.[85] A further UWU survey of more than 1,000 aged care workers, conducted in July 2020, found 30% had not received training in COVID-19 safety

81 Ibid.

82 Transport Workers' Union, *Qantas Faces Prosecution from SafeWork NSW after Virus Investigation*, Media Release, 2 April 2020.

83 Lippel, above n 4, at 477; A Watterson, 'COVID-19 in the UK and Occupational Health and Safety: Predictable Not Inevitable Failures by Government, and Trade Union and Nongovernmental Organization Responses' (2020) 30 *New Solut* 86 at 89–90.

84 ACTU, *Poll Shows Less than 10% of Workers Have Basic COVID Protections at Work*, Media Release, 21 May 2020.

85 UWU, *Cleaner Survey: Not Enough Time to Deliver Essential Cleaning Work during Coronavirus*, Media Release, 19 May 2020.

measures or the correct use of PPE, and home care workers had not received adequate supplies of hand sanitiser or gloves.[86]

The various COVID-19 outbreaks centred around workplaces also suggest noncompliance with the public health measures and the potential contribution of precarious work to that noncompliance: for example, clusters centred in and/or spreading from meatworks, hotel quarantine and aged care. It is by no means clear, however, that even if businesses were diligently implementing the public health restrictions and core practices, workers and others at workplaces would be protected from the SARS-CoV-2 virus. There is cause for concern that some of the core practices will not achieve the standard of care required of employers and other PCBUs to minimise or reduce exposure to the virus, so far as is reasonably practicable. For example, there is evidence that respiratory droplets and aerosols can travel further than 2 metres, and disperse in workplace air, challenging the social distancing separation of one and a half metres (and 4 square metres per person).[87] There has also been concern about the presence in the market of fake, faulty, counterfeit and substandard respirators and masks.[88]

For particular types of work, certain aspects of core practices have not minimised or reduced the SARS-CoV-2 risk, so far as is reasonably practicable. A case in point is health and social care where, in July–August 2020 in Victoria, around 2,500 workers contracted COVID-19. Of those, 70% – 80% were infected at work, particularly in hospital and aged care settings.[89] In hospitals, key causes were believed to be transmission in shared spaces, including break and change rooms, and inadequate respiratory protective equipment. At that time, infection control guidelines for healthcare suggested that aerosol transmission of SARS-CoV-2 is only possible during aerosol-generating procedures (AGPs), and therefore required P2/N95 particulate filtering respirators only for AGPs, deeming surgical masks to be sufficient for routine care of confirmed or potential SARS-CoV-2-infected patients.[90] However, aerosol concentrations of SARS-CoV-2 in and around hospitals can be infectious for some hours.[91] Also, surgical masks fit loosely

86 UWU, *Pandemic Failures in Aged Care Revealed in Survey*, Media Release, 27 July 2020.

87 Morawska and Milton, above n 1; He et al, above n 2; Li et al, above n 2.

88 K Cole and J Whitelaw, *A Guide to Buying P2, or Equivalent, Respirators for Use in the Australian and New Zealand Work Environment*, Version 1.0, Australian Institute of Occupational Hygienists, Melbourne, 2020. See also SafeWork NSW, *Supply of Fake Face Masks*, 5 May 2020, at <https://www.safework.nsw.gov.au/safety-alerts/safety-alerts/supply-of-fake-face-masks> (accessed 23 July 2021); Workplace Health and Safety Queensland, *Fake Disposable Respiratory Protective Equipment*, WHSQ, Brisbane, 29 July 2020, updated 31 March 2021.

89 A Dennis, 'Here's the Proof We Need: Many More Health Workers than We Ever Thought are Catching COVID-19 on the Job', *The Conversation*, 26 August 2020; Department of Health and Human Services (Vic), *Protecting Our Healthcare Workers*, DHHS, Melbourne, 2020.

90 The guidance as at July 2020 was ICEG, *COVID-19 Guidance on the Use of Personal Protective Equipment by Health Care Workers in Areas with Significant Community Transmission*, Australian Government, Canberra, 2020. Guidance issued in 2021 makes more provision for the use of particulate filter respirators. See ICEG, *Guidance on Use of PPE in Health Care*, above n 11.

91 Morawska and Milton, above n 1; He et al, above n 2; Li et al, above n 2.

around the mouth and nose and allow inward leakage of smaller aerosols.[92] Health and WHS researchers and professionals called for healthcare workers in the vicinity of AGPs to have a powered air-purifying respirator, and for a visor and P2/N95 respirator for routine care.[93] There is a strong case to be made that minimising/reducing the risk so far as is reasonably practicable demands a higher standard of PPE and procedures for its use.

In addition to the greater risk to those whose work as carers puts them in contact with infectious people, some work arrangements increase vulnerability to virus exposure. These factors came to the fore in the spread of COVID-19 from workers in hotel quarantine into the community — the cause of Victoria's second wave in mid-2020 — and the high incidence of COVID-19 in residential aged care in that state.[94] In hotel quarantine in Melbourne, outsourcing to private security firms and further sub-contracting resulted in a largely casualised, low-paid workforce of guards who were 'particularly vulnerable because of their lack of job security, lack of appropriate training and knowledge in safety and workplace rights, and their susceptibility to an imbalance of power resulting from the need to source and maintain work';[95] vulnerabilities that had previously been identified by that state government. In aged care, low-paid, low-skill, casual workers have been ill-equipped to control the spread of COVID-19, particularly in the context of understaffing, insufficient training and the need to work across multiple locations.[96] These systemic deficiencies were well-recognised prior to the pandemic,[97] not addressed by the aged care sector or its federal regulator, and contributed to the rapid spread of the virus as this disastrous outbreak unfolded. In this and other sectors, lack of or insufficient leave has been a factor in workers failing to stay/go home, get tested, and self-isolate if they have COVID-19 symptoms, further contributing to community spread of the virus. Compliance with this public health core practice requires paid 'pandemic leave' to enable workers with no leave entitlements, or no leave left, to stay away from work,[98] as Murray, Schaffer and Shribman-Dellmann discuss elsewhere in this issue.[99]

The extent of compliance with WHS legal obligations during the pandemic needs further research but there are signs of widespread deficiencies in the

92 S Vardoulakis et al, 'COVID-19 Environmental Transmission and Preventive Public Health Measures' (2020) 44 *Aust NZ J Public Health* 333 at 333.

93 Australian Medical Association, *Too Little Too Late: How Many More Healthcare Worker Infections Will It Take?*, Media Release, 25 August 2020; J W Cherrie, M Loh and R J Aitken, 'Protecting Healthcare Workers from Inhaled SARS-CoV-2 Virus' (2020) 70 *Occup Med (Lond)* 335; Australian Institute of Health and Safety, above n 31. See also F H Koh, M G Tan and M-H Chew, 'The Fight against COVID-19: Disinfection Protocol and Turning Over of CleanSpace® HALO™ in a Singapore Hospital' (2020) 72 *Updates Surg* 311. See also Lippel, above n 4, pp 480–2.

94 Coate, above n 5, at 14; Cousins, above n 5.

95 Coate, above n 5, at 23, 196.

96 Cousins, above n 5.

97 *Royal Commission into Aged Care Quality and Safety Interim Report: Neglect*, Vol 1, Royal Commission into Aged Care Quality and Safety, Canberra, 2019, chap 9.

98 ACTU, *Government Must Extend Paid Pandemic Leave to Cover All Workers*, Media Release, 28 July 2020.

99 J Murray, C Schaffer and B Shribman-Dellmann, '"Invidious Choices"? Adapting the Fair Work Safety Net during the Pandemic' (2021) 34 *AJLL* 60.

implementation of the public health restrictions and core practices in workplaces. There are also signs that more could be done to improve the quality of risk control measures employed, in order to minimise exposure to the SARS-CoV-2 virus.

Conclusion

Unlike some other areas of labour law, the response to COVID-19 in Australia has not revealed deficiencies in WHS laws, or the need for substantive changes to these laws during the pandemic. Rather, the shortfalls relate to the role of WHS regulators in promoting, inspecting, and enforcing compliance with WHS laws. The overarching public health response to COVID-19 is indisputably essential, including the various restrictions on travel, movement of people and the conduct of businesses, and the core practices for reducing exposure to the SARS-CoV-2 virus and contact tracing. However, in Australia, as in other countries, the public health response has not gone far enough to protect workers and others at workplaces.[100] There has been insufficient regard for the high standards required by WHS laws, and the WHS regulators have played an auxiliary role within the broader government responses to COVID-19. The SARS-CoV-2 virus is highly contagious, and it was always going to be extremely difficult to prevent COVID-19 outbreaks in workplaces. However, we question whether more could be achieved in controlling this formidable health hazard through full recognition of the interconnections between work and public health, and close integration of the WHS and public health regulatory responses.

100 R O'Neill, 'WHO Knew. How the World Health Organization (WHO) Became a Dangerous Interloper on Workplace Health and Safety and COVID-19' (2020) 30 *New Solut* 237 at 237–48. For deficiencies in Canada, see Lippel, above n 4. For the United Kingdom, see Watterson, above n 83.