



Supporting and enforcing compliance with Australia's harmonised WHS laws

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In Australia, the Commonwealth, four state and two territory governments have harmonised their work health and safety (WHS) laws. However, consistency and efficacy in WHS regulation require more than a harmonised legislative framework. How regulators support, inspect and enforce WHS laws has as much, if not more, impact on workplace parties' experiences of and responses to WHS regulation. This article presents the findings of empirical research with WHS regulators in the seven jurisdictions with harmonised WHS laws. The research has revealed differences, strengths and weaknesses in the organisation of WHS regulators and their inspectorate resources, the training and development of inspectors, the regulators' core functions and activities, and their formal and informal models and frameworks for decision making. Some implications for WHS policy and practice are identified, with suggestions for ways to enhance the effectiveness of these WHS regulators.

1 Introduction

In Australia, work health and safety (WHS) is regulated by the Commonwealth, six state and two territory governments,¹ with the result that there are nine sets of general WHS laws,² and nine regulators administering and enforcing these laws.³ In July 2008, all nine governments endorsed the *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety* (the IGA).⁴ In so doing, they committed to harmonise their legislative frameworks and to develop, monitor and maintain

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The empirical research presented in this article was conducted as part of a research project supported by funding from Safe Work Australia. The views expressed in this publication are those of the authors and do not necessarily represent those of the funding organisation. We thank Neil Gunningham for his role in data collection with two WHS regulators, and his contribution to analysis of empirical materials.

1 See R Johnstone, E Bluff and A Clayton, *Work Health and Safety Law and Policy*, 3rd edn, Thomson Reuters, Sydney, 2012, chap 3.

2 In some jurisdictions there are separate laws for dangerous goods or for mining, transport, electrical or public safety, and there is Commonwealth legislation for maritime and for offshore petroleum and gas safety. For relevant legislation see CCH Australia, *Australian Occupational Health and Safety Law*, Vols 1–3.

3 In this article 'administration and enforcement' encompasses all aspects of WHS regulators' work including their promotional, advisory, authorisation (registration, licensing, approvals), inspection, investigation, enforcement (notices, undertakings, prosecution), data management and review activities.

4 Council of Australian Governments (COAG), *Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*, Australian Government, Canberra, 2008 (the IGA).

nationally consistent compliance promotion and enforcement policies and provisions.⁵ The objectives of these reforms are to: provide equitable standards for protecting Australian workers; reduce the regulatory burden for businesses and undertakings operating in more than one jurisdiction; create efficiencies for governments in regulating WHS; and achieve significant and continual reductions in work-related deaths, injuries and disease.⁶ Although these objectives are contested,⁷ they remain the policy parameters.

Seven jurisdictions⁸ have adopted the Model Work Health and Safety Act (WHS Act)⁹ and the Model Work Health and Safety Regulations,¹⁰ albeit with some variations.¹¹ The seven WHS regulators that administer and enforce these harmonised laws are Comcare, Workplace Health and Safety Queensland (WHSQ), SafeWork in New South Wales and in South Australia, and WorkSafe in the Australian Capital Territory, the Northern Territory and Tasmania. These regulators work to common statutory objectives, one of which is to facilitate a consistent national approach to work health and safety (WHS Act s 3(1)(h)). The regulators also operate within a consistent framework of statutory functions and powers. The WHS Acts¹² empower the WHS regulators to provide WHS advice and information to duty holders and the community, promote and support education and training on WHS matters, monitor and enforce compliance with the WHS Act, conduct and defend legal proceedings under the Act, and accept enforceable undertakings in lieu of taking legal proceedings for some types of offences.¹³ Inspectors within the WHS regulators also have consistent statutory functions and powers, which include providing information and advice about compliance with the WHS Act, assisting in resolving WHS issues, requiring compliance with the

5 Ibid cls 1.2, 1.3(b), 2.1.3(a), 3.2.2(b), 5.1.5.

6 Ibid cl 1.4(a)–(d).

7 See, eg, E Windholz, 'The Harmonisation of Australia's Occupational Health and Safety Laws: Much Ado About Nothing?' (2013) 26 *AJLL* 185.

8 Victoria and Western Australia have not adopted the model WHS laws.

9 Model Work Health and Safety Act (23 June 2011). For a detailed analysis of the WHS Act, see R Johnstone and M Tooma, *Work Health and Safety Regulation in Australia: The Model Act*, Federation Press, Sydney, 2012.

10 Model Work Health and Safety Regulations (9 January 2014) (WHS Regulations). Victoria and Western Australia have not adopted these model instruments.

11 Several of the variations are relevant to regulators' or inspectors' statutory functions and powers, but are not significant in practice for the matters examined in this article. For example, there are additional infringeable offences in construction in the Australian Capital Territory, co-regulatory arrangements for mining and workplaces generally in New South Wales, specific arrangements for inspector notices for asbestos removal in Queensland, and the privilege against self-incrimination has been retained for natural persons, when an inspector enters a workplace in South Australia. For a summary of all variations see Safe Work Australia, *Jurisdictional Progress on the Model Work Health and Safety Laws*, at <<http://www.safeworkaustralia.gov.au/sites/swa/model-whs-laws/pages/jurisdictional-progress-whs-laws>> (accessed 22 March 2017). See also A Stewart et al, *Creighton & Stewart's Labour Law*, 6th edn, Federation Press, Sydney, pp 548–88. For further discussion of self-incrimination see Part 6 of this article.

12 The 'WHS Acts' are: Work Health and Safety Act 2011 (ACT), Work Health and Safety Act 2011 (Cth), Work Health and Safety Act 2011 (NSW), Work Health and Safety (National Uniform Legislation) Act 2011 (NT), Work Health and Safety Act 2011 (Qld), Work Health and Safety Act 2012 (SA), Work Health and Safety Act 2012 (Tas).

13 WHS Acts ss 152, 216–218.

WHS Act by issuing notices, investigating contraventions of the Act and assisting in prosecuting offences.¹⁴ In order to carry out their functions, inspectors have broad powers to enter workplaces to inspect and examine anything (including documents), make enquiries, take measurements, conduct tests, and make sketches or recordings.¹⁵ They can also issue different types of notices — improvement notices to remedy or prevent contraventions of the Act,¹⁶ prohibition notices to prevent serious risks emanating from immediate or imminent exposure to a hazard,¹⁷ non-disturbance notices to preserve or prevent disturbance of a site,¹⁸ and infringement notices to impose a fine for certain prescribed offences.¹⁹

Beyond these statutory functions and powers, there is a *National Compliance and Enforcement Policy* (NCEP),²⁰ to which all Australian WHS regulators are signatories, and a suite of common operating procedures, protocols and frameworks developed by the Heads of Workplace Safety Authorities (HWSA).²¹ The NCEP and HWSA documents are intended to provide a common platform for the regulators and their inspectors to consistently administer and enforce WHS laws (in order to provide equitable protection, reduce the regulatory burden and create efficiencies for governments). Yet, the NCEP contains broad statements of principle which are open to interpretation, and the HWSA documents are complex. Both these factors have provided fertile ground for changes to, and in some cases non-adoption of, these instruments in some jurisdictions. In addition, each WHS regulator must operate within the resources available to it and the priorities or constraints imposed by the government of the day, as guided by industry and union stakeholders through tripartite advisory bodies and advisory committees.²² The result is that WHS regulators may favour jurisdictional priorities and interests over a nationally consistent approach. In short, a wide range of variables influence how WHS regulators carry out their activities and with whom.

Early in the reform process, in 2010, the COAG Reform Council cautioned that '[t]here is a significant risk that a nationally harmonised occupational health and safety system will not proceed, or will not be achieved because of ... inconsistent enforcement approaches'.²³ With the implementation and

14 Ibid, s 160.

15 Ibid, ss 163–165.

16 Ibid, ss 191–192.

17 Ibid, ss 195–196.

18 Ibid, s 199.

19 Ibid, s 243.

20 Safe Work Australia, *National Compliance and Enforcement Policy*, Safe Work Australia, Canberra, 2011.

21 E Bluff and N Gunningham, 'Harmonising Work Health and Safety Regulatory Regimes' (2012) 25 *AJLL* 85; E Windholz, 'OHS Harmonisation: Delivering a more Consistent (and Effective and Efficient) Regulatory Experience' (2012) 18 *Emp LB* 89.

22 For general discussion of these issues see F Haines, 'Addressing the Risk, Reading the Landscape: The Role of Agency in Regulation' (2011) 5 *Regulation & Governance* 118 at 119.

23 COAG Reform Council, *National Partnership Agreement to Deliver a Seamless National Economy: Performance Report for 2009–2010*, Australian Government, Canberra, 2010, p 17. See also COAG Reform Council, *Seamless National Economy: Report on Performance 2011*, Australian Government, Canberra, 2011, p xi, chap 4.

operation of the model WHS laws scheduled for national review in 2017,²⁴ this article provides valuable insights from empirical research conducted in 2014–15, examining the policy and practice of WHS regulators in the seven jurisdictions with harmonised WHS laws. The research focused on the nature of compliance support, inspection and enforcement policy and practice across the seven WHS regulators, because how regulators carry out their activities has implications for achieving the harmonisation objectives of equitable standards of protection, reduction of the regulatory burden and creating efficiencies for governments. The research did not examine outcomes in terms of work-related deaths, injuries and disease, which would require a different type of study and data to distinguish the complex range of factors that contribute to changes in outcomes.

The research was carried out in accordance with recognised principles for the ethical conduct of research, including approval from the researchers' respective universities' Human Research Ethics Committees. We collected data through interviews with 2–3 senior managers and 3–5 field inspectors in each of the seven study agencies, using a common semi-structured interview schedule to inquire into a consistent set of topics for each jurisdiction. There were question sets for each of the subjects addressed in Parts 2–8 of this article.²⁵ In addition to interviews, we collected documents and materials from the regulators' websites and during interviews. These materials included policies, procedures, information and guidance materials, annual reports,²⁶ strategy documents²⁷ and evaluations,²⁸ and details of training programs. We analysed interview transcripts, documents and materials using standard qualitative analytic procedures of: organisation of and immersion in the data;

24 The former COAG Workplace Relations Ministers' Council (WRMC) agreed that the content and operation of the model WHS laws should be reviewed 5 years after their commencement. The review is due to commence in 2017 as most jurisdictions passed and then enacted the model WHS Act on 1 January 2012. See WRMC, *Response to Recommendations of the National Review into Model OHS Laws*, Department of Employment and Workplace Relations, Canberra, 2009.

25 In total the interview schedule contained 70 questions, and interviewers selected from these according to the role and responsibilities of each interviewee.

26 ACT Justice and Community Safety, *Annual Report 2013–2014*, ACT Government, Canberra, 2014; Comcare, *Annual Reports 2013–2014*, Australian Government, Canberra, 2014; Department of Justice and Attorney-General, *Annual Report 2014–15*, State of Queensland, Brisbane, 2015; Department of Premier and Cabinet, *Annual Report 2013–14*, Government of South Australia, Adelaide, 2014; Office of Regulatory Services, *Annual Plan 2014–2015*, ACT Justice and Community Safety, Canberra, 2014; SafeWork SA Advisory Council, *Annual Report 2013–14*, Government of South Australia, Adelaide, 2014; Work Health Authority, *Annual Report 2013–2014*, Northern Territory Government, Darwin, 2014; Work Health and Safety Advisory Council, *Annual Report 2014–2015*, Northern Territory Government, Darwin, 2015; WorkCover NSW, *WorkCover Authority Annual Report 2014–2015*, New South Wales Government, New South Wales, 2015.

27 Comcare, *First in Work, Health, Safety and Support, Strategic Plan 2010–2015*, Australian Government, Canberra, 2010; WorkSafe Tasmania, *Strategic Plan 2013–2018*, Government of Tasmania, Hobart, 2013; H Jeffrey, *WorkSafe Tasmania Workforce Development Inspectorate Survey, Preliminary Report*, WorkSafe Tasmania, Hobart, 2014; SafeWork SA, *Work Health and Safety Strategic Framework for South Australia*, SafeWork SA, Adelaide, 2013; WorkCover NSW, *Regulatory Response Strategy*, Work Health and Safety Division, WorkCover NSW, Sydney, 2013; WorkSafe Tasmania, *Strategic Plan 2013–2018*, WorkSafe Tasmania, Hobart, 2013.

28 Comcare, *Evaluation of Regulatory Activities: The Effectiveness of Regulatory Activities*

generating categories and coding data; and applying inductive reasoning to construct explanations grounded in the data.²⁹ This explanation was descriptive and comparative as we produced an account of each regulator's operations and activities for each subject of interest, and compared the agencies' operations and activities to identify potential policy implications.

The article highlights and demonstrates the diversity in WHS regulators' compliance support, inspection and enforcement activities, and canvasses some implications for WHS policy and practice. It begins by outlining differences in the organisation of WHS regulators and the resources allocated to their inspectorates (Part 2), and in the recruitment, qualifications, training and development of inspectors (Part 3). It then examines different aspects of the WHS regulators' activities — their awareness raising, information and training initiatives (Part 4); proactive interventions (Part 5); reactive response to events and formal investigations (Part 6); and prosecutions and enforceable undertakings (Part 7). The article then considers the regulatory theories and models, and other factors, that influence *why* the regulators decide to take the approaches outlined in Parts 2–7, and how inspectors intervene in workplaces (Part 8). It concludes by summarising the implications for WHS policy and practice, and suggests ways to enhance the effectiveness of WHS regulators.

2 The Organisation of WHS Regulators and their Inspectorate Resources

The seven WHS regulators studied differ in size, resources and how they organise their resources across their different functions.³⁰ Two are large, well-resourced agencies (NSW and Qld), two are intermediate in size (Cth and SA) and three are small agencies with limited resources (ACT, NT and Tas). Each agency's responsibilities may also extend beyond WHS regulation: for example, to injury and disease compensation, rehabilitation, other safety-related legislation, industrial relations and/or other legislation (fair trading, business development, and so on). This may have implications for WHS regulation in that an agency's resources are spread across a number of different areas of regulation. This is a particular problem for smaller regulators and may influence, and even compromise, the monitoring and enforcement of compliance with WHS laws.

An enduring concern for WHS regulators is the organisation of staff resources for proactive interventions on the one hand, and reactive response to incidents and requests for assistance on the other. Specifically, the concern is

2010–2013, Australian Government, Canberra, 2013; H Magura, *Program Evaluation Framework for Workplace Health and Safety QLD*, Workplace Health and Safety Queensland, Brisbane, undated.

29 For an overview of these procedures see C Marshall and G Rossman, *Designing Qualitative Research*, 4th edn, Sage Publications, Thousand Oaks, 2006.

30 For a general discussion of the ways in which labour inspectorates are organised, see J Howe, T Hardy and S Cooney, 'Mandate, Discretion, and Professionalisation in an Employment Standards Enforcement Agency: An Antipodean Experience' (2013) 35 *Law & Policy* 81; R Pires, *Labour Inspection and Development: Some Reflections*, Working Paper No 9, Labour Inspection and Administration Programme LAW/ADMIN, International Labour Organisation, Geneva, 2011; W Von Richthofen, *Labour Inspection: A Guide to the Profession*, International Labour Organisation, Geneva, 2002.

whether there should be a clear distinction between proactive and reactive functions, or whether they should be combined within the role of individual inspectors. The approach adopted has implications for inspectors' capacity to move beyond responding to the immediate demands of reactive response work. As we discuss in Part 5, most regulators aim to shift the balance of their activities more towards proactive work. We found that some of the regulators have structured their inspectorates so that, at least in some areas of the agency's work, there are some inspectors who focus principally, sometimes exclusively, on reactive response work and others who focus on proactive interventions. In addition, more stringent triaging of reported incidents and requests for assistance (see Part 6 below) has helped to preserve inspectorate resources for proactive interventions in most, but not all regulators.

A key issue for WHS regulators is the mix between generalist inspectors and specialists. The most common focus is on a particular industry. Most of the regulators have inspectors who focus on the construction industry, and several have inspectors who focus on mining.³¹ No regulator has inspectors dedicated to any other industry but, as discussed below, the regulators target specific industry sectors in their proactive interventions (Part 5). Even in agencies with some industry focused inspectors, most of their inspectors are generalists who work across a diverse range of industries and hazards, and the firms they work with vary according to where the agency needs to deploy resources. For generalist inspectors the diversity of their role is challenging. As one inspector quipped, 'we may be working on a tower crane falling apart one day and a person falling apart the next, so it's so diverse'. Also, even industry-focused inspectors do not necessarily have a background in that industry (ie construction or mining), but may develop industry specific knowledge and skills through working with that industry over time.

Beyond an industry focus, some of the regulators have staff that specialise in particular hazards. More common specialty areas are plant and electrical safety, dangerous goods/substances, asbestos and major hazard facilities, and several regulators have specialists for ergonomics/hazardous manual tasks and for psychosocial hazards. Like industry focused inspectors, those who specialise in particular hazards may not have formal qualifications or expertise for that hazard, and may develop relevant knowledge and skills through specific purpose training or their focus on that hazard over time. Only the two largest regulators in this study have technical services provided by qualified engineers, occupational hygienists, ergonomists and psychologists. Further areas of specialist knowledge and skills are legal matters and formal investigation. Five WHS regulators have specialist investigators who conduct investigations to criminal prosecution standards and legal officers who advise on these matters, but two of the smaller regulators do not.

The final key resource for the WHS regulators is their data and information management system. One aspect of this is recording and retrieving information about interactions with duty holders (for example inspections/investigations, notices, telephone calls, letters and so on), and the way in which they document these (for example workplace visit records,

³¹ These are jurisdictions that have a mining industry but do not have separate WHS regulators for this industry.

statements, written communications). Several regulators have one records management system (for the agency), but four have separate systems for recording activities and for uploading scanned copies of documentation and photographs. Inspectors in some jurisdictions (or some locations within jurisdictions) can enter and retrieve electronic records while in the field, using laptops or tablets. Many interviewees, across most of the agencies, described their agency's recording methods and systems as cumbersome and time consuming to use. The second aspect of data and information management is the regulators' processes and resources for analysing workers' compensation claims, records of interactions with duty holders and other sources. While the intermediate and larger agencies have some staff resources allocated to researching and analysing information and data for the planning, development, targeting, and evaluation of strategies and programs, the smaller regulators tend to have little capacity to carry out these functions. Our research suggests that WHS regulators might well exchange information on 'best practice' in keeping and analysing data and information, and co-operate in developing systems and technologies to optimise their data and information management, including remote access to, and entry of, data and information. Greater sharing of systems and technologies, and of data and information, is justified by the need to monitor and enforce compliance with WHS laws in enterprises operating in more than one jurisdiction. It is also consistent with the harmonisation objective of creating efficiencies for governments.

In summary, the activities of WHS regulators are framed, and variously enabled or constrained, by a series of organisational factors — and the WHS agencies in this study varied in their approaches to these organisational systems and processes underpinning their regulatory functions. These differences are exacerbated for WHS regulators where the scope of responsibilities of the parent organisation further limits the resources deployed in WHS regulation. The current preference for generalist WHS inspectors, with limited specialisation by industry or hazard, means inspectors can be allocated to any organisation and hazard/risk problem, and this poses significant challenges for regulators to ensure that their inspectors are competent to monitor and enforce compliance across the diverse organisational and hazard profiles in contemporary businesses and undertakings. At the very least, this requires regulators to give careful consideration to the qualifications and experience of those recruited as inspectors, and their training and development once they are employed.³² As we discuss next, only some of the regulators have attempted to meet this challenge.

32 A Californian study found that inspector experience is associated with inspection effectiveness and reductions in injury rates. See A Haviland et al, *Are There Unusually Effective Occupational Safety and Health Inspectors and Inspection Practices?*, Working Paper No WR-914-CHSWC, RAND, California, 2012. However, as Gunningham and Sinclair note, the literature on regulatory competence on WHS is sparse: see N Gunningham and D Sinclair, *Managing Mining Hazards: Regulation, Safety & Trust*, Federation Press, Sydney, 2012, p 165. See also D Walters et al, *Regulating Workplace Risks: A Comparative Study of Inspection Regimes in Times of Change*, Edward Elgar, Cheltenham, 2011, pp 90–1, 283–5, and see also pp 295–8 for a discussion on international trends in the resourcing of inspectorates.

3 Inspector Recruitment, Qualifications, Training and Development

While historically, health and safety inspectors tended to be recruited from the trades,³³ WHS regulators in our study recruit generalist inspectors based on the key attributes regulators define for the role, rather than mandatory qualifications. They employ people with a range of qualifications and experience. For example, a new recruit may have experience as a WHS officer/adviser or worker health and safety representative (HSR), and/or WHS qualifications at certificate IV, diploma, degree or (less commonly) postgraduate level. They may have qualifications or experience in government inspection, investigation, or compliance in other areas of safety, security, the environment or policing; or they may have a trade background and/or experience working in other areas of the regulator's operations. While the WHS regulators require staff employed in roles as engineering specialists or legal officers to have a relevant degree for the profession, there appears to be a different standard for WHS roles, including other specialist roles (ergonomists, hygienists, psychosocial specialists), for which staff may be trained on-the-job with some organisational support to complete formal qualifications.

On-the-job training and development of newly recruited inspectors differs considerably across the regulators. One approach, as used by three of the regulators, relies on 'shadowing' in which the new inspector works with a more experienced inspector for a period of time, may be given some basic familiarisation with WHS and related safety legislation, and is subject to performance appraisal to confirm competency before the inspector is authorised to use statutory powers. The second approach, applied by four of the regulators, is a comprehensive training program conducted over a period of 6 or 12 months. New recruits rotate through different roles to gain supervised experiences and coaching on-the-job, and participate in 'classroom' training which encompasses the relevant legislation, the agency's policies and procedures, the use of enforcement mechanisms and other content. The trainee is assessed as s/he completes elements of the coursework and achieves required competencies. This training may contribute towards the inspector completing the Diploma of Government (Workplace Inspection) (the DoG(WI)).³⁴ With both approaches, completion of the DoG(WI) qualification may be a condition of staying in the inspector role, but this is not a requirement in all jurisdictions.

The WHS regulators also differ in the timing and criteria for deciding when new inspectors can use their statutory powers. In three jurisdictions, new inspectors are authorised to use their powers on completion of the inspector training program. They may, however, be able to participate in certain enforcement activities, such as writing a notice, provided that an inspector

33 See Walters et al, above n 32, pp 90, 283; R Johnstone, *Occupational Health and Safety, Courts and Crime: The Legal Construction of Occupational Health and Safety Offences in Victoria*, Federation Press, Sydney, 2003, p 51.

34 Department of Education, Employment and Workplace Relations (DEEWR), *Diploma of Government (Workplace Inspection), Core and Elective Units*, Australian Government, Canberra, 2013. The HWSA developed curriculum for this diploma for WHS regulators.

with full powers signs the notice. In other jurisdictions, new inspectors are given their powers progressively, after completing certain elements of the inspector training program. For example, they may be given limited powers to do some field activities and write notices under supervision after completion of initial training, and full powers after completing further elements of training and development. In a third arrangement inspectors are given their powers after probation, so that the new inspector goes to workplaces with a more experienced inspector, and is able to give directions or issue notices when s/he is deemed competent. The probationary period differs according to the individual's qualifications and experience at the time of recruitment. A new recruit with previous experience in an inspectorate role may have delegated powers soon after her/his appointment, while others may be on probation for several months.

In summary, there are quite different pathways to becoming a fully-fledged WHS inspector, ranging from attendance at training and development programs, to learning by shadowing other inspectors. Yet inspectors face the same complex issues and demands in monitoring and enforcing compliance with WHS laws. There are also implications for achieving the harmonisation objective of equitable standards of protection. When we asked inspectors about the types of knowledge and skills they had developed through organised programs and resources provided by the regulator (initial and ongoing training), most commonly they told us that they developed knowledge and skills relating to provisions and interpretation of the WHS legislation. Some had learned about compliance monitoring and enforcement policy, procedures and protocols, but it is notable that not all had. As one inspector stated, '[t]here are loads of policies, there are loads of procedures ... and do we get trained in them? I think you're just told where they are and you go and find them ...'. There also appeared to be weaknesses in learning about risk management principles and systematic WHS management even though these are central to the WHS legislative framework.³⁵ Likewise, skills in communicating and interacting with duty holders, building rapport, gaining cooperation, negotiating outcomes, and related skills for effective engagement with workplace parties did not feature strongly.

We now examine different aspects of the WHS regulators' activities. We begin by discussing initiatives to support compliance.

4 Awareness, Information and Training Initiatives

As we noted in the introduction, the statutory functions of WHS regulators include providing information and advice about compliance with the WHS Act. Our research revealed that they raise awareness of WHS matters through a core set of activities, which include text-based and audiovisual material on their websites, and media releases or alerts about newsworthy incidents, legal proceedings and their outcomes, and proactive interventions. They regularly disseminate news and updates electronically and/or in a periodic newsletter. The regulators also raise awareness through social media communications, and showcase achievements and foster positive motivations

³⁵ See also Walters et al, above n 32, pp 159, 193–4, 284–5, where similar observations were made about the training of inspectors in the United Kingdom and Sweden.

to improve WHS through annual SafeWork/WorkSafe awards. Many of these awareness raising activities have the potential to reach a wider audience, although some only reach a self-selecting audience of recipients who register to receive certain updates or alerts. The regulators target other activities to specific industry or business sectors, or groups in the community. There is no doubt that electronic media have enhanced the regulators' capacity to deliver WHS messages widely, without relying on paid advertising. Indeed, we found only three of the regulators had conducted mass media campaigns in the recent past, utilising television, radio and/or public transport advertising.

As well as awareness raising, the WHS regulators use various modes to provide information and advice. Their websites are platforms for organising and making available different types of information resources. These include hazard or safety alerts that provide succinct information about incidents and measures to minimise associated risks; fact sheets and FAQs (frequently asked questions); and more detailed information in codes of practice, guidelines, guides and handbooks. All of these sources may address particular provisions of the WHS legislation, WHS management processes, or the management of particular hazards. Other formats are self-assessment tools and checklists for workplace parties to use in monitoring their performance for particular legislative requirements, hazards or aspects of WHS management. Some regulators have produced their own, high quality audio visual material, delivered through YouTube, and others provide links to resources produced by other Australian or overseas agencies.

Most of the WHS regulators also have some form of help desk/centre/line in which advisory staff provide basic WHS advice in response to enquiries made by telephone, email or via their website, refer enquirers to information resources (as above), and/or transfer those requiring specific expertise to relevant staff. All of the WHS regulators provide information through presentations, especially through events organised in an annual SafeWork/WorkSafe month (or week), and some regulators make presentations available through webinars and YouTube, which are accessible from their websites. All of the regulators administer the statutory approval of some third party providers and courses for WHS training, and assessors of competency for some vocational education and training. However, the WHS regulators seldom provide training directly to workplace parties. One that does is Comcare, which has a dedicated education services team that provides training to regional forums, 1-day training on the WHS Act, and tailor made training for firms on a fee for service basis. Other initiatives are special purpose forums on specific risks and Comcare's annual conference which brings together some 700 WHS managers, HSRs and other participants to discuss strategies and practices for addressing contemporary WHS issues.

In summary, there is a wealth of information and advice available to workplace parties, provided they take the first step of seeking out sources and assistance from WHS regulators. While the scope and depth of the regulators' awareness raising, information and training differs, reflecting the resources dedicated to compliance support activities in each jurisdiction, this is an area where regulators can and do share and adapt initiatives and materials from each other. A challenge for all regulators is to work out ways to channel and take information out to firms that do not access it of their own volition: for

example, through organisation portals, dissemination to workplace contact officers and similar mechanisms. These measures would complement the current practice of the WHS regulators to take their message directly to firms and other duty holders through proactive interventions, which often combine different types of initiatives and resources in integrated strategies, programs or campaigns, as we discuss next.

5 Proactive Interventions

In our introduction, we noted the challenge for WHS regulators to shift the balance of inspections further towards proactive inspections, and our research provides evidence that there has been some progress in improving proactive approaches to inspection in recent years.³⁶ Collectively, the WHS regulators have a diverse repertoire of proactive interventions aimed at creating safe and healthy work, or preventing hazardous exposures, rather than responding to incidents after they happen. These interventions typically incorporate a combination of program elements, and are targeted to particular firms or industry sectors, or for the management of specific hazards. The larger and intermediate sized regulators have systems and some staff resources dedicated to the analysis of data and information, and the design and planning for proactive interventions. They also have a greater capacity to implement proactive interventions than the smaller regulators, although the Australian Capital Territory regulator ensures some capacity for proactive interventions through a team of inspectors dedicated to conducting programmed inspections, including preparing plans, audit tools and support materials.

All of the WHS regulators use workers' compensation claims data to inform their proactive interventions. The regulators with dedicated operational support for proactive interventions appear more actively to 'mine' and analyse trends in that data. They may address some of the weaknesses in compensation data³⁷ by seeking information from a wider range of sources, which may include industry standing committees and stakeholders, local networks or focus groups, inspectors or specialist staff, or hospital admissions and research studies. A senior manager with WHSQ explained that agency's approach:

[H]ow we focus our priorities ... for our proactive work ... starts with the claims data. We've got a team within our organisation who look at that data for us and give us some ... raw rates and numbers. And then we start to drill that down to things like mechanisms and agencies of injury ... We also have our industry sector standing committees which are union and employer representatives appointed by the minister,

36 For further discussion of proactive inspection programs internationally, see Walters et al, above n 32, pp 286–95.

37 For discussion of the weaknesses of workers' compensation data, and the absence of reliable data as to either the nature or the extent of the problem of work-related injury, disease and death in Australia, see M Quinlan, P Bohle and F Lamm, *Managing Occupational Health and Safety: A Multidisciplinary Approach*, 3rd edn, Palgrave MacMillan, Melbourne, 2010, pp 44–60. See also Industry Commission, *Work, Health and Safety: An Inquiry into Occupational Health and Safety*, Report No 47, Industry Commission, Melbourne, 1995, Vol 1, chap 2; Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Framework*, Inquiry Report No 27, Productivity Commission, Melbourne, 2004, pp 41–3; Johnstone, Bluff and Clayton, above n 1, pp 12–18.

and they obviously give us some good advice about what we should be doing ... The other thing that we look at too [is] the fatality data ... [the] team give us a summary of the last five years of fatals so we can see those really high potential incidents ... We've got our inspectors as well ... some people come from like for example the TWU. So they've got an industry background ... So they're some of our main ... ways of identifying what our priorities ... they are also influenced by Queensland Government priorities such as reducing red tape and enhancing work health and wellbeing which is all around the stuff you know around obesity and workplaces for wellness ...

In targeting their proactive interventions the WHS regulators broadly work within the framework of the *Australian Work Health and Safety Strategy 2012–2022* (AWHS).³⁸ This strategy sets national targets for reductions in work-related fatalities and incidence rates for workers' compensation claims, and identifies seven national priority industries and six priority injury and disease types (disorders). The regulators' efforts are more concentrated in the 'blue collar/high viz' priority industries of agriculture, road transport, manufacturing and construction. There is less attention to the 'white collar' accommodation and food services, public administration and safety, and health care and social assistance, although these are priority industries. That said, the regulators tend to conduct interventions in sub-sectors of the broad industry groups that have the poorest performance in their jurisdiction, or are local priorities due to wider government, stakeholder, public and media pressure (see also Part 8). As a result, firms within a sub-sector are often targeted in one jurisdiction but not in another, which creates an uneven playing field for firms and individuals operating in different jurisdictions and/or with competitors in different jurisdictions. Such inconsistency in inspection and enforcement can engender resistance to compliance,³⁹ and is contrary to the harmonisation objective of providing equitable standards of protection for workers.⁴⁰

One intervention method used by a number of WHS regulators is to inspect targeted firms to assess aspects of compliance or arrangements for managing WHS. The method is variously called a compliance, planned or programmed assessment, audit or inspection, and the interventions in which this method is used are called 'campaigns' or 'projects' by some regulators. It is generally based on the provisions of the WHS Regulations, approved codes of practice and relevant Australian Standards, and involves the development of a checklist or tool, which sets out what an inspector should assess. The WHS regulator provides information to targeted firms about the intervention, why the firm has been selected, and what the inspector is going to do. When the inspector attends the workplace s/he typically observes the relevant work/conditions/equipment, asks questions and talks to different people (including some workers, and HSRs if there are any), and looks at paperwork

38 Safe Work Australia, *Australian Work Health and Safety Strategy 2012–2022*, Safe Work Australia, Canberra, 2012.

39 E Bluff, *Safe Design and Construction of Machinery: Regulation, Practice and Performance*, Ashgate, Farnham, United Kingdom, 2015, pp 147, 157, 179; N Gunningham, D Thornton and R Kagan, 'Motivating Management: Corporate Compliance in Environmental Protection' (2005) 27 *Law & Policy* 289 at 310.

40 IGA, above n 4, at cl 1.4.

(for example safe work procedures or method statements). When the assessment is complete the inspector gives feedback to workplace parties on what s/he found and any matters requiring action by the firm or other duty holders, and issues notices if needed (unless this is not part of the method for the intervention).

In addition to this compliance assessment process, the larger and intermediate sized WHS regulators have increasingly diversified their approaches to proactive interventions over the last decade. They design and implement multi-faceted strategies and programs and/or engage with multiple parties in and outside workplaces.

For example, Comcare conducts *Planned Campaigns* to address priority hazards, which target a number of workplaces and aim to influence long-term behavioural change. Campaigns typically include general awareness raising through various media and Comcare's website, and engagement through meetings and forums with stakeholders, WHS practitioners and HSRs. Better practice guides and self-assessment tools, and workshops, seminars and training programs may be provided. Planned campaigns also include liaison inspections in which the inspector assesses firm performance with reference to an audit tool and gathers information through discussions with managers, workers and HSRs, provides a report of the inspection and negotiates with workplace parties about improving WHS outcomes. A Comcare inspector outlined his experience of a campaign on musculoskeletal disorders (MSDs):

[W]e've been given the support materials, and the expectations and the limitations ... The organisation would have been contacted prior by letter and so they are aware. So we then contact locally and say this is what we're doing ... Getting down into the detail for a particular campaign activity undertaken for the MSD campaign, I attended [the location] with one other inspector, and we met with the site management and explained again our intentions. We performed a general site inspection, physical inspection of the site, just a general one. We then set up camp in a dedicated room and we had a series of conversations ... We then exit briefed the management, and clarified expectations from them and from us, and deliverables. And then the observations were written up and commentary was given on the observations in context with the campaigns expectations. And that was delivered in writing to the points of contact and to the regional management for that employer ... [And if non-compliance was identified] We'd follow up with another intervention, separate to the campaign. So we would take information out of the campaign and use that to monitor, negotiate, assess and influence the employer to improve safety outcomes.

In New South Wales, SafeWork designed the *Focus on Industry Program* to improve WHS, return to work and injury management outcomes in industry sectors with high rates of workers' compensation claims, or fatal or serious injuries. The agency analyses data, and consults industry associations and unions to validate and better understand trends, contributing factors, and solutions. The agency then visits a sample of workplaces to confirm the hazards in the work setting, consults with workplace parties and identifies hazards not raised in data analysis or consultation. The aim is to achieve 'industry ownership' and to approach the program as a partnership. Typical elements of the program are awareness raising, and information for firms about hazards and controls for them. Participants are given the time and

opportunity to make changes, and poorer performers may be case managed more intensively. If noncompliance persists, inspectors may issue notices or take further action.

In Queensland, WHSQ has shifted from its former compliance assessment approach (the general method described above), to an 'evidence-based engagement approach'. Inspectors, advisors or other staff of the regulator engage with various interested parties who may be participants from firms, industry associations, unions, other government agencies and/or civil society organisations. Through consultation, the participants clarify the problem(s) for resolution and identify possible solutions. The approach consciously takes into account potential economic or other impediments to implementing identified solutions. The regulator determines the need for an intervention based on workers' compensation claims data, incident reports, requests for assistance and other information available to the regulator.

The Queensland regulator applies the engagement approach in campaigns, hazard and risk programs, industry partnership programs, and its flagship Injury Prevention and Management (IPaM).⁴¹ In IPaM advisors work intensively with the poorest performers for workers' compensation claims, over a number of visits, and using self-assessment tools, resources and advice to help workplace parties establish and maintain effective WHS and injury management. There is some evidence to suggest that programs such as IPaM have contributed to reductions in claims numbers, duration, costs and the average premium rate for participating firms.⁴² However, there is a trade-off as intensive engagement programs replace other types of interventions. Proactive workplace visits by WHSQ inspectors dropped by 13% in 2013–14, and reactive workplace activities dropped by 59%, compared with the previous year, which the regulator attributes to its engagement approach, including developing networks and providing advice to workplaces.⁴³

There is now considerable evidence that worker representation improves WHS in workplaces, whether measured by improvements in WHS management activities or, to a lesser extent, by reduced exposure and injury rates.⁴⁴ These effects of worker representation are strengthened where inspectorates support worker representation. Our study found that worker representation is a focus of some of the WHS regulators' proactive interventions. Arrangements for consultation are incorporated in checklists and other methods for assessing WHS performance, and inspectors generally

41 Workplace Health and Safety Queensland, *Injury Prevention and Management Program (IPaM), Mid-term Evaluation Report*, WHSQ, Brisbane, 2012; Workplace Health and Safety Queensland, *Injury Prevention and Management Program (IPaM) Participation Perception Report*, WHSQ, Brisbane, 2013.

42 Ibid.

43 Safe Work Australia, *Comparative Performance Monitoring Report: Comparison of Work Health and Safety and Workers' Compensation Schemes in Australia and New Zealand*, 17th edn, Safe Work Australia, Canberra, 2015, pp 15–16.

44 For the most recent review of the literature, see D Walters and E Wadsworth, *Worker Participation in the Management of Occupational Safety and Health: Qualitative Evidence from the Second European Survey of Enterprises on New and Emerging Risks (Esener-2)*, European Agency for Safety and Health at Work, Luxembourg, 2017, chap 2. See also D Walters and T Nichols, *Worker Representation and Workplace Health and Safety*, Palgrave Macmillan, Basingstoke, 2007, chap 2.

ask if there is an HSR who can be involved when they visit a workplace. Some regulators have provided grants to unions to encourage, support and train worker representatives, and produce industry-specific guidance for them. Especially noteworthy is SafeWork SA's *Workplace Consultation Program*, in which the regulator has dedicated liaison officers who support HSRs, HSC members, firms and their workers in establishing and maintaining effective arrangements for worker consultation and participation in WHS matters. A SafeWork SA liaison officer explained their role:

We often deal with reps over the phone, giving them guidance about what point they're at and what steps they need to take ... whether to issue a PIN [provisional improvement notice] or whether to lodge a complaint with SafeWork in place of a PIN ... We try and alert them to the fact that they can't be dismissed or terminated ... we give them their options on how to talk to their managers about raising issues and what sort of words to use, and what sections of the Act they can refer to if necessary. Any resources they might need we'll be able to give it to them in whichever format they need them as well. So we're really there to be their sounding board, their referral area ... if they want to they can send us the PIN and we can have a look at it, but also make sure that they've undertaken all the previous consultative steps before issuing that PIN ... to make sure there is a good likelihood that it would be upheld [by the inspector] ... So trying not to make them appear as if they're a troublemaker or whatever in the workplace, because we don't want them to have that sort of label or anything. We always tell them they're not the policeman, they're not the one that has to fix it. They're involved in raising the matter and keeping track of it ... I try and give them some practical ways of making sure that they can consult effectively, but also keep track of what the situation is that's happening.

Across the regulators and for different types of interventions, there is debate about whether inspectors should issue notices when breaches are discovered in proactive interventions. Most interviewees considered that if an inspector finds something that does not comply s/he must issue a notice, unless the matter is resolved while s/he is at the workplace. A minority view is that notices do not have a place in proactive interventions as they are based on cooperation, and provision of advice and information to support compliance. For example, we were told that Comcare inspectors are unlikely to issue notices in planned campaigns. If an inspector does consider that the degree of risk/noncompliance warrants a notice, s/he would discontinue the proactive intervention, seek authorisation to issue a notice from their manager, and resume the inspection 'under powers'.

In summary, most of the WHS regulators interact with workplace parties through proactive interventions, which mix and match different elements of compliance support and performance monitoring, and may include enforcement action. Such interventions only reach a small proportion of targeted firms and duty holders, particularly in 'blue collar/high viz' sectors of industry. As there is good evidence that inspection improves compliance with WHS legislation,⁴⁵ we argue that there is a case for wider application of the

45 The strongest evidence is from the United States. See J Baggs, B Silverstein and M Foley, 'Workplace Health and Safety Regulations: Impact of Enforcement and Consultation on Workers' Compensation Claims Rates in Washington State' (2003) 43 *American Journal of Industrial Medicine* 483; W Gray and J Scholz, 'Does Regulatory Enforcement Work? A Panel Analysis of OSHA Enforcement' (1993) 27 *Law Society Review* 177; K Ko,

general method of compliance assessment, applying this to a wider range of industry sectors and disorders, and focusing on core processes for managing WHS risks on an ongoing basis as required by WHS legislation.⁴⁶ The current uneven inspection in priority industry sectors and sub-sectors is not compatible with the harmonisation objective of equitable standards of worker protection.

6 Reactive Response to Events, and Formal Investigation

The NCEP and the HSWA Framework for a Common Approach to Work Health and Safety Regulator Event Triaging are intended to guide the WHS regulators' response to 'events', which are broadly defined to include incident notifications, complaints and requests for assistance with resolving WHS issues. Although both documents were developed for the purpose of achieving greater consistency among regulators, there is no obligation on the WHS regulators to adhere to either the NCEP or the HWSA triaging framework. In practice, across the seven WHS regulators there are differences in the level of responsibility (management team, senior inspector(s) or team leader) of those determining whether and/or how to respond to reported events and varying approaches to deciding whether events other than those involving fatalities, serious injuries, and/or a high risk of such outcomes are priorities for investigation at the workplace. Matters that are determined not to require a visit by an inspector/investigator are dealt with by telephone enquiries, administrative action letters, and/or other advice and directions, or no action is taken. Across the regulators there is generally a presumption that if investigation at the workplace substantiates noncompliance, the inspector will issue one or more notices. There is less scope for provision of advice and information to workplace parties in the context of investigating incidents, than there is for complaints and other unresolved WHS issues. Because of family or public expectations, regulators are more likely to consider investigating serious events, especially fatalities and/or serious injuries. Other matters considered as potential prosecutions are noncompliance with inspectors' notices or directions; offences against inspectors, HSRs and union official entry permit holders; discrimination against workers on the basis of their WHS activities; and failure to report notifiable incidents.

Those events deemed as potential prosecutions are formally investigated with evidence gathered to criminal prosecution standards.⁴⁷ In determining the level of resources to deploy, the regulators apply principles established in the NCEP. They consider the severity and scale of potential or actual harm; the

J Mendeloff and W Gray, 'The Role of Inspection Sequence in Compliance with the US Occupational Safety and Health Administration's (OSHA) Standards: Interpretations and Implications' (2010) 4 *Regulation & Governance* 48; J Mendeloff and W Gray, 'Inside the Black Box: How Do OSHA Inspections Lead to Reductions in Workplace Injuries?' (2005) 27 *Law & Policy* 219; D Weil, 'If OSHA is So Bad, Why is Compliance So Good?' (1996) 27 *Rand Journal of Economics* 618; D Weil, 'Assessing OSHA Performance: New Evidence from the Construction Industry' (2001) 20 *Journal of Policy Analysis and Management* 651.

⁴⁶ Johnstone, Bluff and Clayton, above n 1, pp 27–8.

⁴⁷ See generally Attorney-General's Department, *Australian Government Investigations Standards*, Australian Government, Canberra, 2011.

seriousness of any potential breach of the law; the duty holder's compliance history including prior convictions and notices; whether the duty holder was licensed or authorised to undertake certain types of work; strategic enforcement priorities; the practicality of achieving results; and the wider relevance of the event, including matters of significant community concern.⁴⁸

Investigators across the seven WHS regulators take a broadly similar approach to formal investigations. They ensure that the site has been preserved, check that appropriate steps have been taken to ensure the WHS of remaining workers and others on site and speak with management, witnesses and other people to gather information and evidence. A SafeWork SA inspector explained his experience of conducting investigations:

So when we first get there we identify ourselves, talk about why we're there. We'll always ask for a health and safety representative and see if they can get involved ... our inspection and investigation is always situation specific. Sometimes there's not many people to ask or nobody to ask. Sometimes the injured party's still there, in which case we'll talk to them while we can. We'd largely try and speak with the manager or the person in charge, with some of the workers, with the health and safety rep ... in a good investigation we'd speak with a number of different people ... We'll take information and we'll record that down. That guides us but we don't take statements on the spot ... We're just trying to get to the bottom of things and probably our primary concern is to make the situation safe. So as a priority, before starting to take statements, we'd be looking to take our evidence, photographs, measurements, video, all that sort of stuff, issue enforcement notices as required and then start thinking about statements a little bit further down the track ... It's rarely, in that first instance, a focus on the systems and the bigger picture because you can have a lack of a good safety management system but you can still have good controls in place for individual things. So we don't tend to focus on what I'd call the big picture stuff ... We focus on the stuff that's directly related to an incident.

Some, but not all, of the WHS regulators have specialist investigators who are dedicated to conducting formal investigations (four regulators) or assigned to investigations as the need arises (one regulator). In these jurisdictions, generalist inspectors may also play a role in conducting preliminary investigations, especially in country locations. In the two jurisdictions that do not have specialist investigators, generalist inspectors are solely responsible for conducting investigations. A distinctive feature in South Australia is the retention of the principle that a natural person is not required to answer an inspector's questions or provide information or documents on the ground that this might incriminate them. The regulator provides guidance for its inspectors on how to deal with this issue.⁴⁹

48 Safe Work Australia, *National Compliance and Enforcement Policy*, above n 20, pp 4–5, 20.

49 In South Australia, s 172 of the WHS Act differs from the other WHS Acts in preserving the privilege against self-incrimination for natural persons, and excusing them from answering questions, or providing information or documents, on the ground that this might incriminate them. SafeWork SA emphasises that the privilege is not available to incorporated entities; that a natural person who is authorised by a company to speak for and on its behalf can be required to answer questions, although they might incriminate the company; and s 172 does not excuse a person from answering solely because they might incriminate someone else (either a natural person or legal entity). See SafeWork SA, *Information about Section 171 and 172 of the Work Health and Safety Act 2012*, 2016, at <http://www.safework.sa.gov.au/show_page.jsp?id=112111> (accessed 16 March 2017). None of our interviewees

Overall, guided by the NCEP and HWSA triaging framework, or their own approach to triaging, the larger and intermediate sized regulators have honed their approach to prioritising which reported incidents and requests for assistance to respond to, and how to respond. The smaller regulators have paid less attention to triaging and, as a consequence, reactive response work may consume limited inspectorate resources at the expense of proactive interventions. That said, all regulators expend considerable resources conducting formal investigations to evidentiary standards for matters involving work-related fatalities and serious injuries, and little progress has been made in prioritising hazardous exposures (before the event) for investigation and prosecution. The WHS regulators do, however, use data from this reactive work to promote prevention. Through case conferencing and similar decision making processes there is now greater consideration of prevention activities that may be required in all firms confronting particular types of risks identified through processes of investigation.

Formal investigations, of course, provide the vital underpinnings of evidence for prosecutions. We discuss this next, together with the related mechanism of enforceable undertakings.

7 Prosecution and Enforceable Undertakings

Each of the jurisdictions studied has adopted the Directors of Public Prosecution (DPP) *Prosecution Policy*,⁵⁰ which is intended to guide prosecutorial decision-making in all criminal prosecutions. The NCEP incorporates three criteria common to all jurisdictions in the DPP *Prosecution Policy*. These are the existence of a prima facie case (sufficient evidence to justify the institution of proceedings), a reasonable prospect of conviction and a public interest test. In assessing the public interest, the regulators consider the seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature; any mitigating or aggravating circumstances; the characteristics of the duty holder; the age of the alleged offence; and the degree of culpability of the alleged offender. They also consider whether prosecution would be perceived as counter-productive (bringing the law into disrepute); the efficacy of any alternatives to prosecution; the prevalence of the alleged offence and the need for deterrence (specific and general); and whether the alleged offence is of considerable public concern. Several of the WHS regulators have supplemented the NCEP with further prosecution guidelines, but these are consistent with the criteria in the DPP guidelines and the NCEP. However, there does not appear to be a common process for making decisions to prosecute WHS offences, which has consequences for the rate of prosecution of offences in each jurisdiction.

suggested that this preservation of the privilege for natural persons in any way had a negative impact on SafeWork SA's approach to investigation and enforcement, and we note that to date SafeWork SA has launched three successful prosecutions against sole proprietors under its WHS Act. There have, however, been no successful prosecutions against individual officers or workers under ss 27 and 28 respectively.

50 See, eg, Director of Public Prosecutions, *Prosecution Policy of the Commonwealth*, 2014, at <<https://www.cdpp.gov.au/publications/prosecution-policy-commonwealth>> (accessed 16 March 2017).

By the end of June 2016, prosecutions for offences of the harmonised WHS Acts initiated by the intermediate sized and small WHS regulators were relatively sparse (Commonwealth 1, ACT 3; SA 10; Tas 2; and NT nil). Only the larger regulators have initiated a more significant number of prosecutions (NSW 61; Qld 77).⁵¹ The long lead time for prosecutions, the time it takes for investigators and prosecutors to get used to the provisions in the WHS Acts (especially in regulators with limited or no specialist investigators or their own legal officers), and a general conservative shift in politics in Australia during the early years of the harmonised WHS Acts, have resulted in the regulators emphasising compliance support and ‘business engagement’ initiatives, rather than formal prosecution⁵² (see Parts 4 and 5). It appears that the WHS regulators principally prosecute as a political response to fatalities⁵³ and very serious injuries at work, to deter offenders from repeat offences and for general deterrence. Also, prosecutions typically involve incidents arising from safety (rather than health) hazards, which means that matters involving high severity disorders such as musculoskeletal and psychosocial health conditions⁵⁴ do not tend to be prosecuted.

Although a key development in the harmonised WHS Acts is the s 27 duty of officers of businesses and undertakings to exercise due diligence to ensure that the person conducting the business or undertaking (PCBU) complies with its duties or obligations, this obligation has not attracted much attention in prosecutions. With the regulators generally taking prosecutions against corporate entities rather than individual duty holders, and under the PCBU duty,⁵⁵ there is little evidence that officers are facing the possibility of personal criminal liability for breaches of their positive duty.⁵⁶ For example, by the end of June 2016, only six successful s 27 prosecutions had been conducted in New South Wales, only three in Queensland, and none in any of the other jurisdictions. In addition, most prosecutions are for category 2 offences which, as set out in s 32 of the WHS Acts, involve a failure to comply with a health and safety duty, which exposes an individual to a risk of death or serious injury or illness. To date none of the WHS regulators has completed a prosecution of a s 31 category 1 offence, which sets the prosecutor the demanding requirement of proving that a person with a duty was reckless as

51 R Johnstone, *Sentencing of Work Health and Safety Offenders*, Report to Safe Work Australia, National Research Centre for OHS Regulation, Canberra, 2016, s 4.

52 Ibid. Note that there is no evidence that the regulators are placing more reliance on notices in lieu of prosecution. See trends in Safe Work Australia, *Comparative Performance Monitoring Report*, above n 43.

53 This does not mean that all fatalities are prosecuted. For example, around one third of the 200 work-related traumatic fatalities each year in Australia arise from injuries involving a vehicle on a public road, and these matters are less likely to be prosecuted by WHS regulators. Also, fatalities involving self-employed workers are not prosecuted unless there is a third party with responsibilities in relation to that worker. See Safe Work Australia, *Work-Related Traumatic Injury Fatalities, Australia, 2015*, Safe Work Australia, Canberra, 2016. And, across all causes and circumstances of death or injury, the regulators must establish a prima facie case, have a reasonable prospect of conviction and satisfy the public interest test.

54 These conditions are recognised as high severity in Safe Work Australia, *Australian Work Health and Safety Strategy 2012–2022*, above n 38.

55 WHS Acts s 19.

56 Ibid, s 27.

to the risk of death or serious injury or illness arising from the duty holder's conduct.

In the two states with a larger number of prosecutions, there are significant differences in sentencing outcomes. The New South Wales courts (mainly the District Court) generally *convict* offenders and impose *relatively significant fines*,⁵⁷ while Queensland prosecutions generally result in penalties *without the court recoding a conviction*, and with *lower level fines* and often *court orders for WHS undertakings and/or for training*. Notably, only in Queensland had the courts imposed a significant number of non-pecuniary sanctions by the end of June 2016. There were nine s 241 training orders (two in one case),⁵⁸ and 17 court ordered undertakings under s 239. While sentencing is determined by the courts, each regulator's legal officers may play a role in guiding the courts to contemplate different sentencing outcomes, and appear to have different strategies in mind in these two jurisdictions. For example, the WHSQ legal officers have developed a strategy to encourage the magistrates to make training orders and/or enter into a WHS undertaking in suitable cases. In contrast, SafeWork NSW officers consider that non-pecuniary sanctions are not suitable for serious cases prosecuted in the District Court, and might only be suitable for exceptional cases in the Local Court.

As well as enabling the courts to impose orders for WHS undertakings, the harmonised WHS Acts also provide for the WHS regulators to accept undertakings from a duty holder in lieu of prosecution, except for the most serious category 1 offences.⁵⁹ Because of its experience with enforceable undertakings, the Queensland regulator's approach to vetting undertakings was the basis for the HWSA harmonised approach to enforceable undertakings, and the procedures for scrutinising offered undertakings. HWSA produced guidelines and information publications for enforceable undertakings, including broad parameters for the content of an undertaking (as proposed by the relevant duty holder), and for the regulator's evaluation of a proposed undertaking. Except for Tasmania, the WHS regulators have either adopted these HWSA guidelines and information publications, or published their own documentation containing similar information.

Only a small number of enforceable undertakings have been accepted under the harmonised WHS Acts — in the Australian Capital Territory (4), New South Wales (20), Northern Territory (3), Queensland (18) and South Australia (6).⁶⁰ The Queensland WHS regulator continues to have a more developed

57 Although by the end of June 2016 the Local Court in two cases had imposed non-pecuniary sanctions. In one, the Local Court ordered a corporate officer to enter into an undertaking (s 239) and also imposed a training order (s 241), and in another, the Local Court made an order for restoration (s 237) requiring a builder to respond to an inspector's notices requiring the builder to produce information and documents (s 155).

58 In 2016, a worker was prosecuted for failing to comply with a s 241 training order: *OHS Alert*, 7 July 2016.

59 WHS Acts Part 11. For discussion of enforceable undertakings in WHS regulation see R Johnstone and M King, 'A Responsive Sanction to Promote Systematic Compliance?: Enforceable Undertakings in Occupational Health and Safety Regulation' (2008) 21 *AJLL* 280; R Johnstone and C Parker, *Enforceable Undertakings in Action — Report of a Roundtable Discussion with Australian Regulators*, NRCOHSR Working Paper No 71, Regulatory Institutions Network, Australian National University, Canberra, 2010.

60 These data are as published on the WHS regulators' websites as at 27 October 2016.

approach to administering enforceable undertakings, which is the role of a dedicated EU unit. The unit has separate staff responsible for advising on EU requirements and negotiating the undertaking; and for advising on compliance with the undertaking and monitoring compliance.⁶¹ The reasons for accepting or rejecting the undertaking are published on the regulator's website, together with a copy of each accepted undertaking. Because the EU unit works so closely with applicants, not many applications are rejected.

Most of the regulators studied recognised clear benefits in encouraging duty holders to offer undertakings in lieu of prosecution, principally because prosecution takes resources away from improving health and safety in workplaces. Several regulators have a deliberate policy of promoting enforceable undertakings by advising businesses that an undertaking might be an alternative to prosecution. For example, the current practice in Queensland is to provide information about enforceable undertakings when a prosecution is initiated, and to ask the defendant whether they would like to offer an enforceable undertaking. Similarly, a WorkSafe ACT manager explained that:

If we've not received a proposal by the time it gets to the Enforcement Committee it may be decided that it could possibly be an appropriate case for an enforceable undertaking, in which case we may contact the company to ask if that's something that they would be interested in coming back to us with ... And we would have to be at the stage of the investigation where we've either substantially or totally completed our enquiries, so we'd have to be confident that ... there have been breaches of the Act.

In summary, although the seven regulators studied apply the DPP *Prosecution Policy* and key criteria set out in the NCEP, differences in the regulators' decision making processes, resources and capacities, and the broader judicial and political contexts in each jurisdiction have given rise to marked differences in the prevalence of prosecution, in sentencing, and the use of enforceable undertakings in lieu of prosecution. Again, these differences have implications for achieving equitable standards of protection.

This completes our discussion on different aspects of the activities of WHS regulators. We now turn to the issue of regulatory theories and models, which may influence why the regulators, and their inspectors, decide to take certain action.

8 Regulatory Models and Frameworks for Decision-Making

As is the case with all kinds of regulatory inspectors, WHS inspectors have considerable autonomy and discretion in how they go about inspecting and enforcing the law, and in interacting with regulatees.⁶² It is clear from the discussion so far in this article that many variables may influence WHS regulators' decision-making and actions, and give rise to diversity in

⁶¹ Workplace Health and Safety Queensland, *Guidelines for the Acceptance of an Enforceable Undertaking*, Workplace Health and Safety Queensland, Brisbane, 2014.

⁶² J Black, 'Managing Discretion', paper presented at the *Conference on Penalties, Principles and Practice in Government Regulation*, Australian Law Reform Commission, Sydney, June 2001; V L Nielsen, 'Differential Treatment and Communicative Interactions: Why the Character of Social Interaction is Important' (2007) 29 *Law & Policy* 257; P May and

compliance and enforcement policy and practice. Did any of the regulators have an overarching framework that governed their strategic and tactical approaches to inspection, investigation and enforcement, and to guide inspectors in the field? In this part we examine whether any of the WHS regulators, at the agency level, consciously applied any particular regulatory theory or model in designing and implementing their strategies and programs. There are a number of normative theories or models that are potentially applicable to WHS regulation. In addition to the conventional command and control approach,⁶³ these include risk-based regulation, responsive regulation, smart regulation, the regulatory craft and strategic enforcement; and the potential to apply systems theory (the legal theory of autopoiesis), nudge theory and other theoretical frameworks in WHS regulation.⁶⁴ Among the WHS regulators studied, the regulatory theories or models with most resonance to the way the WHS regulators currently carry out their activities are risk-based regulation and responsive regulation.

Risk-based regulation entails the regulator targeting regulatory resources based on the degree of risk that the activities of regulated entities pose to the regulator's objectives (risk-based resource allocation); and applying principles of identifying, assessing and controlling risks in determining how inspectors intervene (risk-based intervention strategy).⁶⁵ As discussed in Part 5 above, consistent with the NCEP⁶⁶ and the AWHs,⁶⁷ most of the regulators focus their business engagement, inspection, investigation and enforcement effort on industry sectors (and sub-sectors), and firms that have the poorest performance for workers' compensation claims, and for work-related fatalities and serious injuries, or where there is a risk of such outcomes. In addition to

R Wood, 'At the Regulatory Frontlines: Inspectors' Enforcement Styles and Regulatory Compliance' (2003) 13 *Journal of Public Administration Research and Theory* 117.

63 For a brief introduction to, and criticisms of, the command and control approach to regulation generally, and to WHS regulation in particular, see Stewart et al, above n 11, pp 26–8, 537–40, and the references therein.

64 J Black, 'Risk Based Regulation: Choices, Practices and Lessons Being Learned', in G Bounds (Ed), *Risk and Regulatory Policy: Improving the Governance of Risk*, Organisation for Economic Cooperation and Development, Paris, 2008, p 185; I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York, 1992; J Braithwaite, 'The Essence of Responsive Regulation' (2011) 44 *UBCLR* 475; 'Special Issue: Twenty Years of Responsive Regulation: An Appreciation and Appraisal' (2013) 7 *Regulation & Governance*; N Gunningham, P Grabosky and D Sinclair, *Smart Regulation: Designing Environmental Policy*, Oxford University Press, Oxford, 1998; N Gunningham, 'Enforcing Environmental Regulation' (2011) 23 *J Env L* 169; M Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems and Managing Compliance*, Brookings Institution Press, Washington, 2000; D Weil, *Improving Workplace Conditions through Strategic Enforcement*, A Report to the Wage and Hour Division US Department of Labor, 2010; S Stewart and R Ayres, 'Systems Theory and Policy Practice: An Exploration' (2001) 34 *Policy Sciences* 79; R Rogowski, *Reflexive Labour Law in the World Society*, Edward Elgar, Cheltenham, 2013; R Thaler and C Sunstein, *Nudge: Improving Decisions about Health, Wealth, and Happiness*, Yale University Press, New Haven, 2008. See also Stewart et al, above n 11, pp 26–44, and the references cited therein.

65 See Black, *ibid*, at pp 185–224; N Gunningham, *Risk-Based Regulation*, National Research Centre for OHS Regulation, Australian National University, Canberra, 2015.

66 Safe Work Australia, *National Compliance and Enforcement Policy*, above n 20, ss 5, 7.

67 Safe Work Australia, *Australian Work Health and Safety Strategy 2012-2022*, above n 38.

the degree of risk to human health and safety, the regulators are very mindful of risks to the agency, risks to the government of the day and risks to the wider public (and media interest in these risks). In other words, their political, social and economic environments, including responsible Ministers, industry and union stakeholders, and societal pressures, weigh significantly in their decision making. While risk-based regulation resonates with the way that the WHS regulators conduct their activities, only SafeWork NSW consciously describes itself as a risk-based regulator.

On the other hand, there are elements of responsive regulation in the WHS regulators' approaches to inspection and enforcement. This theory recognises and harnesses state and non-state (public and private) facets of regulation, and the interplay between state and non-state institutions and actors. Monitoring by state regulators, in the context of responsive regulation, applies a hierarchy of regulatory strategies, and/or a hierarchy of enforcement mechanisms (both sometimes referred to as 'pyramids').⁶⁸ These elements are reflected in the WHS regulators' enforcement of self-regulation by firms as required by WHS laws, tripartism in WHS policy setting and implementation (for example in business engagement strategies), monitoring of compliance by worker and union representatives (as well as state inspectors), and the hierarchy of enforcement mechanisms (the pyramid) set out in the NCEP.⁶⁹

In day-to-day enforcement with duty holders, a responsive approach (which we refer to as 'responsive enforcement') entails an interactive and graduated response by the regulator on the assumption that some duty holders will comply voluntarily, some will comply with advice and persuasion, some will comply with mild enforcement action (such as notices) to spur them on, and others will not comply unless stronger enforcement action (such as prosecution or license suspension) is taken or at least signalled.⁷⁰ Whether the duty holder corrects noncompliance and takes steps to prevent it recurring is the key to whether the regulator escalates the enforcement response.⁷¹ Mechanisms higher in the enforcement pyramid are reserved for when more modest mechanisms (such as improvement or prohibition notices) have failed to elicit compliance.

Some of the WHS regulators studied described themselves as 'responsive regulators', but this appeared to mean being receptive to changing circumstances, evidence, community expectations and the environment in which firms or particular duty holders operate.⁷² We found no evidence of any of the regulators espousing or practising responsive enforcement holistically and as a nuanced strategy, as summarised above. Indeed, when we provided interviewees with a description of responsive enforcement, they presented us with a series of reasons why they believed it would be difficult to apply this

68 See Ayres and Braithwaite, above n 64, chap 2.

69 See Stewart et al, above n 11, pp 36–42.

70 R Johnstone, 'Rethinking OHS Enforcement', in E Bluff, N Gunningham and R Johnstone (Eds), *OHS Regulation for a Changing World of Work*, Federation Press, Sydney, 2004, p 146.

71 Ayres and Braithwaite, above n 64, p 36; Braithwaite, 'The Essence of Responsive Regulation', above n 64, at 30; J Braithwaite, *Restorative Justice and Responsive Regulation*, Oxford University Press, New York, 2002.

72 See also Safe Work Australia, *Australian Work Health and Safety Strategy*, above n 38.

model in practice, particularly in day-to-day inspection and enforcement in firms. They raised concerns about damage to regulator legitimacy if an inspector fails to issue a notice for noncompliance and there is subsequently an incident at the workplace; and the need for different points of entry to the enforcement pyramid (proportionate to risk rather than preferencing advice and persuasion as the first level in the hierarchy). They also perceived the need to use different mechanisms in a single visit (given regulator resource constraints); and considered that advice and persuasion are compatible with improvement notices, as these are remedial in nature (rather than designating these as different levels in the hierarchy). In addition, interviewees suggested that application of the enforcement hierarchy in day to day enforcement is best suited to interactions with larger firms and proactive interventions where inspectors have multiple contacts with a firm (or duty holder), and can monitor progress in WHS performance over time.

Rather than rigorously applying a particular theory or model, we found that the approach of the WHS regulators is more akin to 'regulatory smorgasbordism'. That is, they apply parts of models rather than a single methodology. In the words of a senior regulator, 'our approach tends to be ... what resources we've got available ... what the data's telling us and how we can pull a whole package of things together'. Even the two WHS regulators that have their own overarching models for securing compliance have mixed methodologies. The Comcare Regulatory Compliance Model,⁷³ as interviewees told us, was influenced by responsive enforcement, the regulatory craft and the concept of the regulator's authorising environment.⁷⁴ And SafeWork NSW, while describing itself as a risk-based regulator, has a 'segmented model' which calls for inspectors to be responsive to regulatees' willingness and capacity to develop and apply WHS systems.⁷⁵ A senior SafeWork NSW officer explained that:

They [inspectors] have a suite of tools that are available and open to them in dealing with health and safety issues. And what they need to do is choose wisely. Secondly they need to not only be looking at the hazard and the risk that they're seeing in front of them but they need to be looking at the workplace health and safety capability, culture and commitment. And if they consider all of that intelligence, all of that information then hopefully they'll make the right call in terms of which tool or range of tools they look to use.

In addition to examining agency-wide models or approaches to securing compliance, we asked interviewees what influences individual inspectors' discretion and their decisions about the action they take in the context of both proactive interventions, and response to incidents and requests for assistance (complaints and unresolved issues). We were interested in how inspectors personally decide whether to provide advice and information, whether to settle for oral advice or provide some form of written direction (in a report or record

⁷³ Comcare, *Regulatory Operations Guide Book 2014/2015*, Australian Government, Canberra, 2014.

⁷⁴ See above n 64; M Moore, *Creating Public Value: Strategic Management in Government*, Harvard University Press, Cambridge, 1995.

⁷⁵ WorkCover NSW, *Regulatory Response Strategy*, Work Health and Safety Division, WorkCover NSW, Sydney, 2013.

of required actions), whether to issue a statutory notice (improvement, prohibition or infringement), and whether to recommend some further action by the WHS regulator (for example, revoking, suspending or cancelling a license, or prosecution). Crucially, while inspectors make decisions about the mechanisms and tools to employ as they go about their work, their decisions are shaped, and may be directly supervised or authorised, by others away from the field.

Three factors are common to all inspectorates. The first of these is the application of *provisions* of the WHS Acts, regulations, codes of practice and Australian standards, which are perceived as providing an objective basis for assessing compliance, and hence whether they need to take some action. The second factor is *planned strategies or programs* of a proactive nature, to the extent that intervention plans predetermine and inform inspectors about the types of actions they should take in their implementation. Third, our interviewees generally stated that *experience and learning through others* informed inspectors' decisions about how to respond in particular circumstances, which may include formal mentors and supervisors (team leaders or managers), respected or experienced inspectors, and others that an inspector works closely with. Inspectors' personal views about 'what works' in eliciting compliance also come into play here: for example, whether advice and persuasion, or coercive measures are most effective. Some regulators also formalise the involvement of other staff in inspectors' decision making (or in some circumstances): for example, through case conferencing of the response to incidents, or supervisor oversight of whether to issue a notice.

From interviewees' accounts, a further two factors are influential for inspectors with five of the WHS regulators studied. One of these is the *risk* in the particular circumstances; that is, the inspector's assessment of the potential for hazardous incidents, exposures and serious consequences. This is an informal assessment, rather than stepping through the process of identifying, assessing and controlling risks, as inspectors are interested in whether there are uncontrolled or poorly controlled hazards as the basis for determining whether to prohibit certain activities, and/or give directions about the need for effective risk control. The other influential factor is the inspector's assessment of the duty holder's *willingness*, also referred to as motivation, commitment, attitude or whether the duty holder is cooperative.⁷⁶ As a senior inspector explained, 'commitment and attitude have got a lot to do with it, because if we've got somebody who has an extremely good attitude ... then we'll work our way through it with them [but] with those people who are not committed, and particularly those people with attitude who are unresponsive, we will look at the enforcement pyramid and act accordingly'. On the other hand, in two jurisdictions interviewees expressed equally strong views against taking duty holder willingness into account, suggesting that inspectors should preference

⁷⁶ This has long been seen as a key factor in some inspectorate's decisions about whether or not to take strong enforcement action, beginning with Kit Carson's famous study of the UK factory inspectorate in W G Carson, 'Some Sociological Aspects of Strict Liability and the Enforcement of Factory Legislation' (1970) 33 *MLR* 396. The regulatee's willingness to cooperate with the inspectorate is a key element in responsive enforcement: see, eg, the discussion in V L Nielsen and C Parker, 'Testing Responsive Regulation in Regulatory Enforcement' (2009) 3 *Regulation & Governance* 376.

objective considerations such as degree of risk, over duty holder willingness.

In the background are the *regulators' policies and procedures*, which operationalise their statutory functions and powers and, depending on the jurisdiction, may include the NCEP and HWSA model operating procedures. Inspectors typically have access to policies and procedures on their laptops and/or via the regulators' intranet systems, although they do not necessarily refer to these instruments routinely. Where a WHS regulator has its own model or principles these are part of inspectors' frames of reference for decision making in those agencies. Specifically, Comcare's Regulatory Compliance Model, SafeWork NSW's 'segmented model' and SafeWork SA's Principles of Operation⁷⁷ provide criteria for decision making that are part of inspectors' frames of reference in those jurisdictions. Nonetheless, inspectors still have discretion in how they apply these models and principles, especially in how they characterise regulatees. A Comcare inspector explained how she applies the agency's model:

In every inspection that I do, I attempt to relate the inspection to what part of the triangle it's working at; whether I'm going into enforcement, whether I'm looking at compliance, whether the organisation has had an accidental non-compliance or whether it's more systemic, or whether it's deliberate ignorance of the legislation; so constantly looking at that. Working with organisations and providing them with that visual tool in saying that the area that we would like to regulate and work with you in is this green zone. If you end up accidentally falling into the yellow zone, again we will work with you to attempt to help you help yourselves to come back into that.

A further factor named as a consideration by interviewees in four jurisdictions was *firm size*. Specifically, inspectors may put more effort into advice and assistance with small firms, or may discuss the type of preventive action required or the timeframes for complying with improvement notices. Small business size was not considered to be a reason to not issue notices if the risk warranted it. In the Commonwealth jurisdiction where all regulated firms are large, Comcare managers and inspectors apply data and information about particular firms and the industries in which they operate (tactical intelligence) to make informed decisions.

Considered overall, our interviewees' responses suggest that the WHS regulators have not consciously adopted any formal regulatory theory or model, but some elements of their approaches accord with risk-based and responsive regulation. Yet, as we observed at the beginning of this part, there is a much wider suite of regulatory theories and models that might be applied in WHS regulation. In particular, to protect workers and others from harm in the context of the complex web of state and non-state actors and mechanisms that influence WHS outcomes, WHS regulators will need to adopt a systematic and strategic approach to the allocation of their resources, and the design and implementation of their activities. There is value in the regulators understanding and applying the logics of, and evidence for, the regulatory theories and models most relevant to their core activities — detecting problems, setting priorities and targets, developing mechanisms and tools, designing strategies and interventions, and implementing, evaluating and

⁷⁷ SafeWork SA, *Principles of Operation for the WHS Inspector*, SafeWork SA, Adelaide, 2012.

reviewing strategies and interventions. The development of such an integrated theoretical framework is the subject of further research by the authors.

9 Conclusion

In conclusion, despite consistent WHS laws, statutory functions and powers for WHS regulators and their inspectors in seven jurisdictions, and efforts to achieve consistency in compliance and enforcement policy and operating procedures, there is considerable diversity in how the WHS regulators in these jurisdictions support, inspect and enforce compliance. Grounded in empirical research, this article has highlighted six areas for attention by WHS regulators and the governments they report to. The national review of the implementation and operation of the model WHS laws scheduled for 2017 is an opportune time to reflect on these matters.

First are *organisational factors*. These include differences in the overarching policy frameworks and resource constraints set by WHS regulators' parent departments or agencies; and the resources and capacities for managing data and information, and developing, supporting and evaluating the implementation of regulatory strategies and interventions. Organisational factors also include the scope of inspectors' responsibilities. For example, do they administer and enforce non-safety related laws, and does their reactive response work preclude proactive work?

Second are the different pathways to becoming a fully-fledged inspector with statutory powers, and the disparity in *inspector training and development*. Foundation knowledge and skills for all inspectors are understanding and interpreting the provisions of WHS legislation, and policies and procedures for monitoring and enforcing compliance. Equally important are core processes for systematic WHS management, and understanding of specific hazards and industries, and effective approaches to communicating and engaging with workplace parties to build rapport, and negotiate and secure outcomes.

Third is the diversity in the WHS regulators' awareness raising, information and training initiatives, and proactive interventions. This can be a strength, providing the *regulators systematically evaluate* these initiatives. Evaluations that examine the relationship between specific initiatives and preventive action in workplaces, and/or reductions in work-related injury and illness, can enable regulators to make informed choices about which initiatives to extend nationally and which to discontinue. And this means the regulators sharing the lessons from their evaluations, as well as their plans and materials for implementing them.

Fourth, is the potential to *enhance the reactive response* to incidents and requests for assistance by the WHS regulators sharing and evaluating their experiences in triaging. Such information is needed to determine whether matters of genuine priority are receiving attention, and whether there is a consistent approach across regulators. Trained investigators can enhance the rigour of investigation processes, as can systematic investigation procedures, and there is merit in the regulators jointly determining which methods are most cost effective.

Fifth, is the need for the WHS regulators to have a clear and consistent rationale for, and approach to, using *prosecution and enforceable*

undertakings, in view of the marked differences in the use of these higher order enforcement mechanisms across jurisdictions. Such an approach would sensibly be grounded in the practices of the regulators with most experience with these mechanisms, and would address the types of matters prosecuted as well as the types of duty holders. This research has also highlighted the need for WHS regulators to extend their focus from incidents (after the event) to hazardous exposures, and from corporate entities to the officers required to exercise due diligence under the WHS legislation, and to extend the range of sentencing options applied.

Sixth, and last, the WHS regulators use of regulatory theories and models is limited and rather ad hoc. Different aspects of the regulators' activities could benefit from the *strategic and integrated application of the theories and models* most relevant to the regulators' core activities, in a framework that can be consistently applied by all WHS regulators. In order for any theory or model to gain traction, it will need to take account of and address the factors most influential in senior regulators and inspectors' personal frames of reference for decision making, and their views about what works in eliciting compliance.