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Harmonisation of Construction Health and Safety Laws in Australia

Manikam Pillay¹

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For over four decades all states and territories in Australia have maintained their own and separate set of laws for the management of health and safety risks in construction. This resulted in at least ten different sets of health and safety legislation. Responding to calls for national uniformity, a harmonised set of laws were issued in 2011 by the Federal Government, in the form of Model Work Health and safety Act and Regulations. These, together with industry-specific codes of practice, are expected to provide construction organisations their first ever common set of standards and benchmarks across the states and territories they operate in. However, the objectives of harmonisation appear not to have been fully realised because the harmonized legislation have not been adopted by all states and territories. This paper traces the development of health and safety laws in Australia, and briefly examines the application of these laws in the three states of New South Wales, Queensland and Victoria. It concludes with a discussion on what the laws mean in terms of managing health and safety risks in the Australian construction industry.

Keywords: Harmonisation, Work Health and Safety Act, Work Health and Safety Regulations, Codes of Practice, Construction Health and Safety.

1. Introduction

The current Constitution of the Federation of Australia does not give the Commonwealth a general power to legislate for health and safety, hence each of the six states, two territories and the Federal Government has developed its own set of health and safety laws for protecting workers health and safety (National Research Centre for OHS Regulation). For this reason health and safety protection of Australian workers were, for over four decades, were based on myriad of laws. Historically, these were derived from the British system of laws and, in early days were largely prescriptive and relatively easy to comply with because they told duty-holders what they were required to do to comply with the laws (Johnstone 2004; 2008). There were, however, also a number of shortfalls and limitations of these forms of legislation. For example, they included a mass of detailed and technical rules which were often difficult to understand by those who the laws were designed to protect; many standards were developed ad hoc to resolve problems as they arose, and concentrated mainly on factory-based physical hazards (resulting in uneven coverage across the industries), the specification standards did not encourage employers to be innovative in terms of seeking

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cheaper or more cost-efficient solutions (Gunningham and Johnstone 1999; Johnstone 2004). They also ignored the now well-accepted view that many hazards do not arise from the static features of the workplace but from the way work is organised. The traditional factory legislation created a climate of dependence on state regulation, with little involvement by workers, unions, health and safety representatives or committees.

1.1 Early reforms

The first major reforms, initiated in the 1970's, followed the recommendations of the Robens' Report (National Research Centre for OHS Regulation ; Productivity Commission 2004). The two major changes involved streamlining the traditional by creating a more unified and integrated system by consolidating existing legislation for health and safety under a single 'umbrella' statute, and the creation of "a more effectively self-regulating system promoting the involvement of workers and management, at workplace level, working together to achieve, and improve upon, the OHS standards prescribed by the state" (National Research Centre for OHS Regulation). The initial reforms involved moving away from prescriptions to performance standards (Bluff, Gunningham et al. 2004; Johnstone 2004). The laws focussed on fostering safe and healthy working environments and safe work systems (National Occupational Health and Safety Commission (NOHSC) 2002) and included a three-tiered structure; a principal act, subordinate regulations supported with codes of practice (Johnstone 2004; Tuck and Pillay 2012). The reforming Acts placed broad 'general duties' of care on parties who had a significant influence on health and safety, including employers, self-employed persons, persons in control of workplaces, employees, designers, manufacturers and suppliers of plant and substances, and erectors and installers of structures. The standards were moved from the Acts into subordinate regulations, which also included a number of processes (such as consultation, identification of hazards, assessment of risks, and methods of controlling risks) that needed to be followed in achieving (Johnstone 2004; 2008). To assist the industry comply with the Act and the regulations codes of practice (CoPs) which were either hazard-based, process-based or systems-based were also developed and issued as guides (Gunningham 2007; Tuck and Pillay 2012).

In spite of these reforms, the costs of work-related injuries and diseases were still relatively high (>\$20B) with over 200 000 workers staying away from work at any point in time, 270 000 forced to change jobs or reduce their hours of work because of work-related injuries, and industries such as mining, construction, transport and agriculture having relatively poor safety performance in comparison to other industry sector (Productivity Commission 1995). There were a number of reasons for this relatively poor state of health and safety, including:

- (a) 'apathy' arising from uncoordinated proliferation of standards, complex standards, failure to keep pace with technological, social and economic changes, and to formally and consistently involve workers and unions,
- (b) unclear legal rights and responsibilities, leading to confusion,
- (c) too much legislation, with over 150 statutes across the country,
- (d) inflexible regulations,
- (e) weak encouragement of best practice approaches,

- (f) inconsistency between jurisdictions, inefficient mandate standards and inadequate and unhelpful codes of practice, and
- (g) enforcement that was not directly aimed at preventing injury and disease by deterring non-compliance with the laws (Productivity Commission 1995).

Over the years further developments occurred leading to the development of 'new generation' health and safety laws that were more streamlined, with elements of goal-setting, performance-based and process-based approaches included (Gunningham and Johnstone 1999). However, while the legislation still followed the common three-tiered approach, there were still many differences in structure, details, coverage, and matters between the Acts, regulation and CoPs (Johnstone 2008; Tuck and Pillay 2012). For example, by 2009 there ten principal health and safety acts; one for each of the six states and two territories, one for maritime industry and another covering commonwealth employees (Table 10).

Table 1 A summary of health and safety acts in Australia as at December 2009

Jurisdiction	Act
Commonwealth	Occupational Health and Safety (Commonwealth Employees) Act 1991
	Occupational Health and Safety (Maritime Industry) Act 1993
Australian Capital Territory	Work Safety Act 2008
New South Wales	Occupational Health and Safety Act 2000
Northern Territory	Workplace Health and Safety Act 2007
Queensland	Work Health and Safety Act 1995
South Australia	Occupational Health, Safety and Welfare Act 1986
Tasmania	Workplace Health and Safety Act 1995
Victoria	Occupational Health and Safety Act 2004
Western Australia	Occupational Safety and Health Act 1994

Empirical research on the impact of the reformed Acts and health and safety performance does not exist in Australia. Studies from Britain, however, suggest there is some evidence that legislation was a primary driver for initiating improvements in health and safety management at the organisational level (David 2004), although there is little peer-reviewed research on the direct effect of legislation on workplace injuries (Health and Safety Executive 2009). The differences between states have been frequently suggested to place increased burdens of costs to organisations that operate across more than one state, as well as on state governments that are charged for enforcing (Access Economics 2009). Hence calls for more uniformity and harmonisation have been part of the Federal government's agenda for at least the twenty years (National Research Centre for OHS Regulation).

1.2 Initial attempts at harmonisation

The move towards national harmonization under the gambit of 'uniformity of health and safety' was first initiated in the 1990s by the National Occupational Health and Safety Commission, and later by the Australian Safety and Compensation Commission (Safe Work Australia 2012). In early days this included National Standards and National Codes of Practice in a number of key health and safety focus areas. These National Standards did not have legal status and were not enforceable unless they were adopted by the states and territories through formal instruments such as Acts and regulations. As there was no binding agreement nationally on how and when National Standards should be adopted, the level of consistency achieved was varied. For example, across the building and construction industry there were at least nine Acts which applied to health and safety of workers; with an additional "30 statutes that relate to some aspects of the industry's operations; and at least 20 principal regulations, and another 34 other regulations, most of which have some application to the industry," (Cole 2003). In essence this created a system of law that was deemed to be fragmented, disjointed and uncoordinated, inequitable, wasteful and inefficient (Cole 2003; Productivity Commission 2004).

1.3 Later attempts at harmonisation

In 2006, the Council of Australian Governments (COAG), through the recently established Australian Safety and Compensation Council, began reviewing the national health and safety framework to improve national consistency and identify priorities for harmonisation. In 2008 the Workplace Relations Ministers Council agreed to the use of model legislation as an effective way to proceed to harmonisation, leading to the signing of an Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety (IGA). The IGA established the principles and processes for cooperation between the Commonwealth, states and territories to implement model legislation, complemented by consistent approaches to achieve compliance and enforcement by the end of 2011. This was the first attempt at committing towards harmonisation of health and safety laws within a set timeframe for the development and implementation of a complete and fully integrated package comprised of a model Act, supported by model Regulations, model Codes of Practice and a National Compliance and Enforcement Policy (Safe Work Australia 2012). The process commenced under the Labour Government of the (then) Prime Ministership of Kevin Rudd and continued under the current Gillard Coalition Government. A draft Model

Work Health and Safety (WHS) Act was released by SafeWork Australia for public comment in 2009, and a Model Work Health and Safety (WHS) Bill declared in 2010 following an extensive consultation process, and a final version made available on the Safe Work Australia website. A draft Model Work Health and Safety Regulation (WHSR), supported with a number of Draft Codes of Practice were also issued in 2010 and 2011, followed by a public consultation process in 2011 and 2012. The Federal government expected the Model WHS Act to be adopted by all states and territories by the end of 2011 and the model WHS Regulations by the end of 2012, so that by the beginning of 2013 all building and construction workers across the country will be covered by the same set of health and safety standards and benchmarks.

However, at the time of writing this article, this objective has not been achieved because the Acts and Regulations have not been fully adopted as expected. This certainly appears to be the case in the state of Victoria. The Baillieu government has argued that Victorian workplaces were already the safest, with the lowest workers' compensation premiums; and adopting the harmonised laws would add to the regulatory burden of compliance, particularly for small and medium-sized businesses, without any perceived gains (Baillieu 2012; WorkSafe Victoria 2012). What this means is that workers across some states may not necessarily be provided with the same set of health and safety protection, and building and construction organisations across some states could be subjected to higher than normal costs of complying with health and safety laws (Stewart-Crompton, Mayman et al. 2009; Productivity Commission 2010).

2. Introduction

In this section the health and safety laws as they relate to the building and construction industry in the states of New South Wales, Queensland and Victoria are critically examined.

2.1 New South Wales Health and Safety Laws

The New South Wales government enacted a new set of work health and safety (WHS) laws to replace the Occupational Health and Safety Act 2001 from on 1 January 2012. In taking this stance the NSW state government has argued the new Act provides greater consistency, certainty and clarity, and make it easier for building and construction organisations to understand their workplace health and safety duties; moreover, companies operating in several states are expected to develop health and safety policies and procedures that could be used nationally (WorkCover Authority of New South Wales 2012). The legal framework is a three-tiered structure comprised of a WHS Act 2011 (NSW), WHS Regulations 2011 (NSW), and supported with a series of codes of practice, illustrated in Figure 1. The NSW WHS Act 2011 has an 'object' of providing for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces (New South Wales Government 2012). The NSW law is largely performance-based and mirrors the Model WHS Act 2011, including an extended objective to include welfare (in addition to health and safety), is concerned with risk minimisation. The NSW WHS Regulations similarly mirrors that of the Model WHS Regulations 2011 in terms of matters covered.

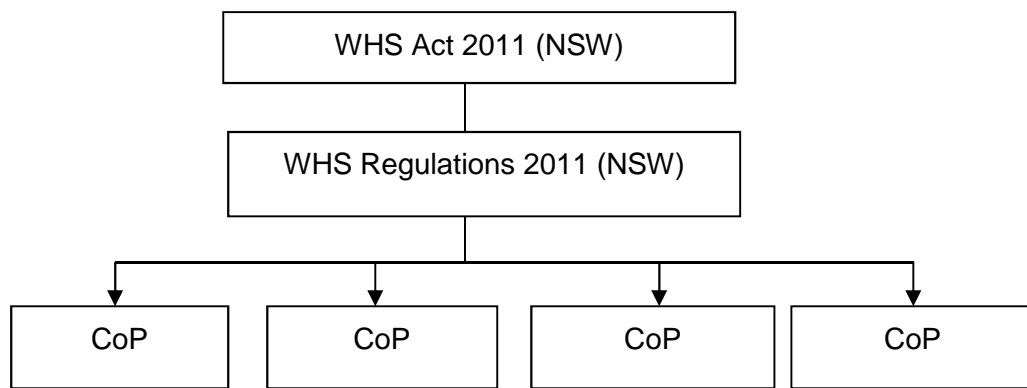


Figure 1: Legal framework for WHS legislation in NSW

2.2 Queensland Health and Safety Laws

The Queensland government also adopted a new set of work health and safety (WHS) laws to replace the Work Health and Safety Act 1995, comprised of a WHS Act 2011, WHS Regulations and supported with guidance materials and industry standards (Figure 2).

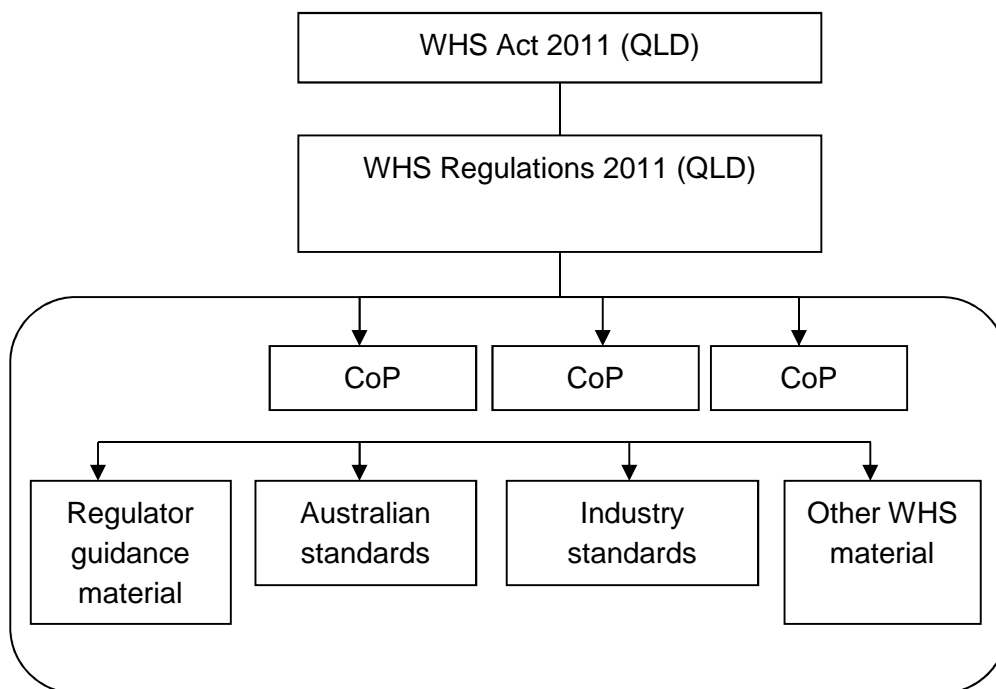


Figure 2: Legal framework for WHS legislation in QLD

The new Act provides a framework to protect the health, safety and welfare of all workers at work and of all other people who might be affected by the work (Workplace Health and Safety Queensland 2012). The new has a similar 'object' of providing for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces. It is also performance-based and mirrors the Model WHS Act 2011, including an extended objective to include welfare (in addition to health and safety), and is also concerned with risk minimisation (Workplace Health and Safety Queensland 2012). The WHSR 2011 specifies the way in which a duty under the WHS Act must be performed and prescribes procedural or

administrative matters to support the WHS Act, such as requiring licences for specific activities and the keeping of records (Workplace Health and Safety Queensland 2012). The WHSR 2011 is authorised under section 276 of the Work Health and Safety Act 2011 and section 165 of the State Penalties Enforcement Act 1999 (Queensland Government 2012). However, unlike NSW, the legal framework includes two additional types of guidance material in the form of (i) CoPs and (ii) regulator guidance material, Australian / industry standards and other WHS material (Queensland Government 2012). The latter three appear not to be part of the NSW framework

To a large extent the regulations are very similar to the Model WHSR 2011 and the WHS Regulations 2011 (NSW). Most of the prescriptions specified in the previous Workplace Health and Safety Regulations 2008 is expected to be moved into the CoPs, allowing business operators some flexibility, while drawing a “line in the sand” regarding acceptable and unacceptable levels of safety (Queensland Government 2012). In adopting the harmonised laws the Queensland state government believes that safety standards will not be lowered as the national codes of practice have evidentiary status under the WHS Act 2011, and construction organisations can choose to adopt other ways that provide a level of safety equal to or better than those set out in the CoPs.

2.3 Victorian Health and Safety Laws

Unlike the previous two states, the state of Victoria has not adopted the Model legislation, and currently has its own standards. The legal framework includes the Occupational Health and Safety Act 2004, Occupational Health and Safety Regulations 2007, Compliance Codes, WorkSafe Positions and Non-statutory guidance (Figure 3).

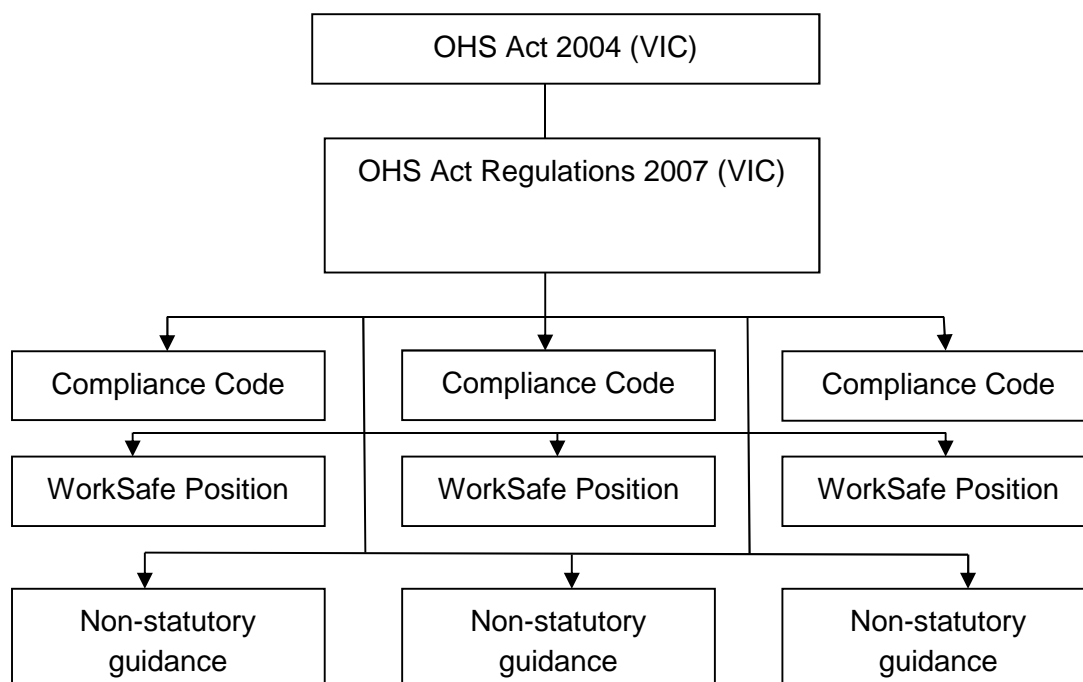


Figure 3: Structure of Victoria's health and safety laws

Similar to the WHS Acts of NSW and Queensland, the OHS Act sets out the key principles, duties and rights in relation to health and safety. Unlike NSW and QLD it has four objects which include:

- (i) to secure the health, safety and welfare of employees and other persons at work; and
- (ii) *to eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work; and*
- (iii) *to ensure that the health and safety of members of the public is not placed at risk by the conduct of undertakings by employers and self-employed persons; and*
- (iv) *to provide for the involvement of employees, employers, and organisations representing those persons, in the formulation and implementation of health, safety and welfare standards having regard to the principles of health and safety protection*

The central focus of the Victorian Act is the elimination of risks at its source, protection of workers and members of the public, and the involvement of unions and employer associations in setting health and safety policy and standards at workplace level. In contrast, the NSW and QLD WHS Acts have one main object, *'to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces.'* The OHS Regulations, similar to NSW and Qld, specify the way in which a duty imposed by the Act must be performed, or prescribe procedural or administrative matters to support the Act. Compliance Codes are similar to the CoPs in the Model, NSW and Queensland Acts, and provide practical guidance to duty holders, so if organisation complies with them they are 'deemed' to be in compliance with the Act or regulation duty covered by the Code. However, Compliance Codes are not mandatory, and a duty holder may choose to use some other way to achieve compliance.

WorkSafe Positions are guidelines made under Section 12 of the OHS Act that explain how WorkSafe Victoria will apply the Act or regulations, or exercise discretion under a provision of the Act or regulations. In the main they are aimed at providing certainty to organisations and other affected parties.

Non-statutory guidance includes information published by the regulator and is aimed at building people's knowledge and awareness of health and issues, risks to health and safety, and the disciplines and techniques that can be applied to manage and control risks. These are not mandatory, nor provide any "deemed to comply" outcomes for duty holders. Their main role is to inform the 'state of knowledge' regarding a health and safety issue.

3. Legal Requirements for Construction Health and Safety

The legal requirements for construction health and safety are not covered in the Acts but forms part of the regulations. These are found in Chapter 6 (NSW and QLD) and Chapter 5 Part 5.1 (VIC), and include duties of care

- a. in relation to (i) construction work and (ii) high risk construction work,
- b. for consulting with the designers of structures,
- c. requiring designers to provide a written report on health and safety,

- d. relating to safe work method statements (SWMS), excavation work and trenches,
- e. for written WHS management plans, signage and ensuring compliance with other Regulations,
- f. for general construction induction training and issuing of construction induction cards.

There are, however, a number of differences between the NSW, QLD and VIC regulations.

For example, the regulations in NSW do not require a PCBU to keep a record of their reasons for using lower end administrative control measures such as relying on training to prevent falls from height in high risk construction work. Similarly, the person having management and control, including a principal contractor in Victoria, is also not required to keep such a record. This has been considered to be a diminution of the existing standards in Queensland which require administrative controls to be used in combination with higher order control measures for a fall risk greater than 2 metres. The Queensland WHS Regulation 2011 hence requires a PCBU to document why higher order controls such as edge protection were not used (Workplace Health and Safety Queensland 2012). In VIC and NSW the main test for adequacy of risk control measures for work at heights depends on meeting the test of 'reasonably practicable'.

3.1 Risk Management of Construction Health and Safety

The ways by which risks can be managed are explained through a number of CoPs; an important one is the CoP for risk management of construction work. The main steps involve delineating construction work from high risk construction work, identifying hazards, putting in control measures to eliminate or minimise risk, and reviewing the control measures (Safe Work Australia 2012). Where high risk construction work is involved, there is a need to develop safe work method statements, and health and safety plans where a construction project (\$A250K) is involved.

3.1.1 Identifying Construction and High Risk Construction Work

Construction work includes any work carried out in connection with the construction, alteration, conversion, fitting-out, commissioning, renovation, repair, maintenance, refurbishment, demolition, decommissioning or dismantling of a structure, and include any installation and testing carried out in connection with any of the above activities (Safe Work Australia 2012). The laws also distinguish between normal and high risk construction work, the latter includes a list of nineteen activities. In order to identify all hazards associated with the construction work safety managers and coordinators would need to think beyond construction hazards by considering other things such as (i) confined spaces, (ii) falls, (iii) high risk work, (iv) demolition work, (v) electrical safety, (vi) plant and structures, (vii) hazardous chemicals, (viii) asbestos, and (ix) manual handling (Safe Work Australia 2011; Safe Work Australia 2012).

3.1.2 Risk Control

Once hazards have been identified, they need to be controlled. Here, the regulations across all states are similar in that there is no requirement to undertake any assessment of risks

which were previously required in both NSW and QLD (this requirement was removed from VIC in 2007). Currently, risk assessment are only required if the construction work involves asbestos. Because the regulations require that risks be eliminated, minimised or reduced so far as is reasonably practical, the CoP recommends risks be eliminated first. If this cannot be achieved then means of minimising risks through substitution, isolation, engineering, administrative and personal protective equipment need to be considered (Safe Work Australia 2012). The CoP for construction work provides a range of examples which can be used. While the code points to examples, the effectiveness or otherwise of these various approaches is questionable.

3.1.3 Safe Work Method Statements

Safe Work Method Statements (SWMS) compulsory risk control measure when 'high risk construction work' is involved (Borys 2012; Safe Work Australia 2012), therefore forms the backbone of high risk construction safety management (Pillay, Borys et al. 2011). They were first introduced in Australia as part of the national Standard for Construction Work (National Occupational Health and Safety Commission (NOHSC) 2005). The regulations require that (i) SWMS be prepared before the work commences, (ii) all work must be carried out in accordance with the SWMS, and (iii) they be revised when control measures are revised, if changes are made to the way work is done, and following an incident (Safe Work Australia 2012). A SWMS (i) enables supervisors, workers and any other persons at the workplace to understand the requirements that have been established to carry out the high risk construction work in a safe and healthy manner, (ii) sets out the work activities in a logical sequence, and (iii) identifies hazards and describes control measures (WorkSafe Victoria 2008; WorkSafe Victoria 2008; Safe Work Australia 2012). Beyond this, research by the author suggests that they are also important in (i) planning work and resources, (ii) initiating interactions between supervisors, workers and contractors, (iii) making people aware of the hazards, risks and means of controlling them, and (iv) acting as a source of reference (Pillay, Borys et al. 2012).

3.1.4 WHS Management Plans

The regulations require that all construction projects (which are valued at >\$250 000) have a written WHS management plan before the project commences (Safe Work Australia 2012). Such a plan generally sets out arrangements for managing health and safety risks across the project's life cycle, hence ensures risks associated with a complex construction project are managed, as there are usually many contractors and subcontractors involved and circumstances can change quickly from day to day. The expectation is that if the construction project involves high risk construction, SWMS are included as a risk control strategy in the plan.

4. Conclusion

The harmonisation of health and safety laws in Australia, whilst not achieving the objective of a nationally consistent set of rules for safety in general, is an important and a necessary first step towards improving health and safety performance of the construction industry. The

current laws across the three states are consistent in terms of the duty of care requirements, and the guidelines issued by the regulators point organisations towards a systematic approach through definition of construction work (to avoid confusion between what it is and what it is not!), delineating of high risk construction work from other works, a risk management approach that can be uniformly applied across other types of construction work (in that there is no need for risk assessment unless there is asbestos on site), and documentation in terms of SWMS (for high risk construction work and WHS management plan for construction projects). The latter can be useful risk management strategy that can be applied to most construction work.

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