

***Sherriff
Consulting***

**Report to
The WorkCover Tasmania Board**

**Review of the Work Health and Safety
Regulator**

December 2018

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Executive summary

The review

Sherriff Consulting has been engaged by The WorkCover Tasmania Board (“**The Board**”) to review the functions, activities and effectiveness of the Work Health and Safety regulator (“**the Regulator**”) and the WorkSafe Tasmania Inspectorate (“**the Inspectorate**”). References in this report to the performance and activities of the Regulator are intended to be references to those matters as effected by the Regulator directly and through WorkSafe Tasmania and the Inspectorate.

Details of the scope and matters relevant to the scope are set out in parts 1.1 and 1.2 of this report. The performance of the Regulator has been assessed by reference to the effectiveness of the Regulator, directly and through WorkSafe Tasmania, in promoting the objects of the WHS Act through the performance of his functions.

The methodology

In undertaking this review, we have adopted the methodology described in part 1.3. We have been concerned to not only undertake a ‘desk-top’ analysis of documentation, but to also hear and consider a sample of the experiences and views of those within WorkSafe Tasmania and those with whom the organisation interacts. We have also made enquiries of key people within other WHS regulators around Australia, and consultants undertaking reviews of other regulators, to obtain current information on performance and improvement initiatives. A list of persons consulted is provided in Appendix 1.

Putting current performance and issues into context

This report should be read as a whole, to ensure that specific issues are understood in the overall context and that the interdependency of the recommendations is appreciated. The context within which gaps and opportunities for improvement have been identified should be borne in mind when considering the detail in this report.

We have throughout this report sought to provide contextual discussion of each issue, provide comparative analysis with other jurisdictions, and set out our findings taking into account documents and information provided during consultation. Our recommendations, which are set out at relevant points and collated at the end of this Executive Summary, are based on our assessment of what we have seen and been told, and our view of what may assist the Regulator to overcome gaps and to provide for ongoing improvement.

There are a number of issues on which we have been told markedly different things by various parties. We have assessed what we believe the reality to be, and in some cases have accepted that perception (whether true or not) may of itself be a negative factor that needs to be overcome.

This report identifies a number of gaps and opportunities for improvement. This should not be taken as a criticism by us of any person, particularly the Regulator and individual inspectors, and we would like to make clear that we have found no reason to doubt their motives or work ethic. Rather, we have been concerned to identify why gaps or deficiencies exist, or are perceived to exist, and what can be done about them.

There has been a recognition by the Regulator of a need for significant and urgent change, resulting in change having been introduced over a short period of time – exacerbating the commonly encountered difficulties and concerns when implementing change. Stakeholder criticisms of the Regulator and Inspectorate in this respect need to be considered in that context. Historical deficiencies in the provision of supporting processes and training should be taken into account when considering criticisms or concerns about the skills and behaviours of inspectors. Gaps in outward looking activities of WorkSafe, particularly in stakeholder engagement, long pre-date the appointment of the current Regulator in early 2018.

Assessing performance against a benchmark of regulator excellence

We discuss contemporary views of regulator excellence in part 3.1 and Appendix 6 of the report, to provide a benchmark against which the performance of the Regulator can be assessed.

The following questions are those we have considered to be most applicable to benchmarking the activities of the Regulator and the Inspectorate for the purposes of this review, with our associated findings:

1. Does the Regulator and the Inspectorate have and communicate clear objectives to maximise public benefits from the Regulator's activities?

Yes, although this may be improved by the development and publication of an operational plan supporting the draft Strategic Plan that is out for public consultation.

2. Does the Regulator and the Inspectorate have a clear strategy and supporting plans to achieve the stated objectives, and:
 - a. have they been informed by research and consultation with stakeholders; and
 - b. are they published?

Yes, although this may be improved by the development and publication of an operational plan supporting the Strategic Plan.

3. Does the Regulator and the Inspectorate have adequate resources to achieve the stated objectives?

The overall performance of the Regulator and Inspectorate may be improved through the implementation of recommendations in this report, particularly around training and support of the Inspectorate. Additional inspectors and support staff may be needed in the short to medium term, as identified in this report, to support the 'day to day' activities of the Inspectorate during the change process. Findings on the long term resource requirements of the Regulator and Inspectorate should be deferred until the changes have been completed.

4. Does the Regulator and the Inspectorate adopt the 'state of the art' by using practices and tools used by other WHS regulators in Australia, adapted as appropriate to the specific environmental factors in Tasmania?

Yes, to the extent that this has been feasible in the circumstances. The Regulator should continue to explore further opportunities to share the practices and tools of other WHS regulators.

5. Does the Regulator and the Inspectorate seek out evidence and generate new knowledge of poorly understood risks and potential areas of concern, before making regulatory decisions and incorporate that evidence into decision making?

Yes, although this could be improved by enhanced stakeholder engagement.

6. Does the Regulator and the Inspectorate engage in analysis to learn what works and what could work better to achieve the stated objectives and support the associated strategies and plans?

We have seen examples of this occurring.

7. Does the Regulator and the Inspectorate (and if so, how) select and apply through the Inspectorate and other business units a full range of tools and practices, that is sensitively applied to particular circumstances, and maximise benefits?

The Regulator has undertaken a large amount of work in selecting, developing and adapting tools and practices. Historically, there have been significant gaps in the application of those

tools and practices, and further efforts need to be focussed on embedding, enabling and enforcing the use of the tools and practices.

8. Is the range of compliance and enforcement tools and practices transparent, communicated to and understood by duty holders and the community?

This is an area for improvement, through a more detailed document being developed and published to support the Compliance and Enforcement Policy.

9. Does the Regulator and the Inspectorate target inspections through the Inspectorate in such a manner as to maximise the chance of finding and reducing significant contraventions?

This is an area for improvement, with inspections being predominantly responsive to incident notifications and complaints. Increased resources would be needed to enable a more targeted proactive approach to be taken to inspections.

10. Does the Regulator and the Inspectorate deploy enforcement tools responsively, calibrating consequences to ensure compliance and promote positive cooperation?

The changes made to policies and processes and the need for training and other assistance has meant that the focus of the Regulator on this has been less than would be expected during 'business as usual'. The promotion of positive cooperation by duty holders does not appear to have been pursued consistently in every case. In the absence of such promotion, the approach of requiring the issuing of improvement notices and not seeking voluntary compliance prior to issuing a notice may discourage positive cooperation.

11. Are the approaches and decisions of the Regulator properly understood by the Inspectorate and business units and are there measures in place to promote this and require consistent compliance by them?

Inspector understanding of the Regulator's approaches and decisions is patchy. Measures to enforce compliance with the Regulator's approaches and decisions need to be taken once further steps have been taken for their implementation and inspector training.

12. Does the Regulator and the Inspectorate ensure that a sufficient body of advice and guidance is widely available to stakeholders on the duties and other key aspects of the WHS Act and regulations, codes of practice, and other sources of information?

While the website contains some information, we consider the amount of information and navigation through the website can be improved.

13. Does the Regulator obtain support and resource supplementation from stakeholder representatives (informing and influencing duty holders and others)?

There is scope for significantly increased support by stakeholders working with the Regulator in informing and influencing duty holders and others, with some criticism made by stakeholders of an asserted lack of proactive engagement by the Regulator. We have received inconsistent messages on this, but this is clearly an area where significant improvement can be made.

14. Does the approach of the Regulator and the Inspectorate conform to the National Compliance and Enforcement Policy? Is that policy and the way in which it will be actioned clear and sufficiently detailed as to ensure clarity of stakeholder expectations?

The approach of the Regulator conforms to the NCEP, subject to the very limited application of the tool of permitting voluntary compliance. Providing for clear stakeholder expectations of the actioning of the policy, through clear supporting documents, is an area for improvement.

Assessing performance against the Regulator's functions and objects of the WHS Act

We have considered the performance of the Regulator in the exercise of his functions and summarise our conclusions in the following table:

Function	WHS Act object	Findings	Recommendations
(a) Advising the Minister	All elements	Satisfactorily undertaken	Nil
(ab) Strategies and planning	All elements	Satisfactory approach but publicly available operational detail required once the strategic plan has been finalised.	Improvement in formalisation and promotion of supporting plans. Recommendations 27, 29 & 30
(b) Monitor and enforce compliance	Element (e)	Room for improvement, with limited structured proactive monitoring and relatively poor outcomes from investigations.	Improvement in inspector skills and the use of tools and ongoing monitoring of inspector numbers and allocation. Recommendations 31 to 34.
(c) Advice and information to duty holders and community (not including Advice Line, which is out of scope)	Element (d)	Room for improvement.	Improvement in website information and engagement with stakeholder representatives Recommendations 12, 13, 14, 29, 30, 31, 32, 35 & 36.
(d) Collect, analyse and publish WHS statistics	Elements (d)(f)(g)&(h)	Collection and analysis appears appropriate but publication could be improved.	Improvement in information to duty holders and the community See recommendations for (c)
(e) Foster co-operation between stakeholders and their representatives	Element (c)	Room for improvement.	Improvement in stakeholder engagement and supporting workers and representatives in the workplace Recommendations 12, 13, 14, 36 & 37.
(f) Promote and support education & training	Element (d)	Room for improvement.	See (d) and (e) and associated recommendations.
(g) Sharing information, including with other regulators (not including Advice Line, which is out of scope)	Element (g) & (h)	Sharing with other regulators is satisfactory. Improvement needed in sharing information with stakeholders.	See (c) and (d) and associated recommendations.
(h) Conduct and defend proceedings	Element (e)	Room for improvement in investigations to increase prosecution numbers and support successful outcomes.	Improvements required in investigations. Recommendations 10, 18, 21, 22, 34, 39 and 46.

Comparison with other WHS regulators

A comparison of performance of the Regulator with other jurisdictions is difficult given the significant differences noted in part 3.2 of this report. There are a number of areas in which the Regulator and WorkSafe Tasmania do not compare favourably with other jurisdictions, being areas associated with demonstrated/publicised planning, stakeholder engagement, the skills of inspectors, and low prosecutions success rates.

Prioritisation of recommendations

A collated list of our recommendations is provided at the end of this Executive Summary. The implementation of our recommendations will require a significant body of work and will not be able to be undertaken in full without an increase in resources. Many of the recommendations are interdependent and they should be treated as a whole, not merely as separate recommendations.

The following comments of counsel assisting the Independent Commissioner Against Corruption undertaking the review of SafeWork SA in her closing submissions are equally appropriate to the recommendations from our review:

... the proposed recommendations, if implemented prudently, are likely to increase the overall capacity of Safework SA and ultimately result in better functioning of the organisation ...

... Improper implementation of change can result in the creation of poor workplace cultures, reduction in the quality of work, inappropriate expenditure, increased organisational cost and, potentially, less efficient work practices.¹

The perception of change weariness of inspectors in South Australia has also been identified by us in our review. We would not describe the culture within WorkSafe Tasmania as 'dysfunctional' (as has been said of the culture within SafeWork SA), but the culture historically within WorkSafe Tasmania has not been one of collaboration, or consistent and harmonious pursuit of positive change. The effective management of change, both currently underway and as may be required to implement further improvements we recommend, will be a key to success in improving the culture and the performance of the Regulator and the Inspectorate.

Our recommendations on enabling factors in Part 4.2 of this report should be considered as first priority. While it will take some time for the approval, recruitment and induction of additional inspectors, this should be considered a first order priority as those additional inspectors will better enable other measures to be implemented (for example, providing flexibility to allow day to day activities to continue while training is undertaken). This should also help to improve morale.

While it will be a matter for the Regulator and the Department of Justice to determine the order of priority for all of our recommendations as are accepted, our recommendations relating to human resources, training and change management should be given priority (particularly recommendations 3, 7, 16, 19, 21 and 25). Our recommendations for improvements in investigations and prosecutions should also be prioritised.

A number of our recommendations may be implemented quickly, and produce early benefits. Improvement of the website through the harvesting of information available from other sources (even if only through short summary information and hyperlinks to other sites) is an example. Those activities may be undertaken while structural and resource recommendations are being actioned, but care should be taken to ensure that they do not divert resources from more substantial changes.

¹ *Public Hearing – Evaluation of SafeWork SA: Closing submissions of Counsel assisting*; 31 August 2018 at p7.

Thank you

The cooperation and candour of the Regulator, inspectors and external stakeholders during our review has been exceptional and has contributed significantly to our ability to identify issues and provide recommendations.

The Regulator has embraced the review as an opportunity rather than a threat and has been open in providing information, including ongoing updates on initiatives in progress during this review. Other regulators around Australia have been generous in providing information, in many cases notwithstanding the scrutiny that they are presently undergoing through performance reviews being undertaken. We are grateful to all who have contributed to the process.

We would also like to thank Ms Vicki Tabor for her assistance throughout the review in marshalling information and ensuring that we were provided with the contacts and practical necessities for effective consultation to occur.

List of Recommendations

Recommendation 1

The Regulator/Chief Executive Officer should review and revise as necessary the organisational structure to take into account the recommendations in this report.

Recommendation 2

The Regulator/Chief Executive Officer should, as soon as is reasonably practicable following the finalisation of the organisational structure, ensure that the following documents are in place:

- a document providing a description of the organisational structure, roles and responsibilities and reporting requirements within it; and
- position descriptions (or similar) for all roles, including reporting requirements and accountabilities.

Recommendation 3

The Regulator should consider making a request for a further budget allocation to fund the increased costs of the Regulator and WorkSafe Tasmania in providing for an increase in numbers of personnel and for the implementation of other recommendations in this report.

The Department of Justice should also consider the funding of non-recurring and short term costs of adopting the recommendations in this report from the WST Trust Fund established by the Department for the promotion of workplace health, safety and wellbeing.

Recommendation 4

The Regulator and the Government should consider sources of funding that are alternative to or supplement the funding of the Regulator and WorkSafe Tasmania, including but not limited to:

- fee for service arrangements for training and advice; and
- the imposition of a levy or other charge on duty holders representing recovery of the cost of enforcement activities specific to them.

Recommendation 5

The Government should consider amending section 262 of the WHS Act to enable a court to order an offender to pay all or a part of a monetary penalty to the Regulator.

Recommendation 6

The Regulator should ensure that all currently budgeted but unfilled inspector positions are filled as soon as reasonably practicable.

Recommendation 7

The Regulator appoint additional inspector positions for a period of two years to be allocated as follows:

- Southern region – 3 additional inspectors;
- Northern region – 2 additional inspectors;
- North West region – 1 additional inspector;
- Mines inspectorate – nil additional; and
- ADG Unit – 1 additional inspector.

A review of workload should be undertaken after the implementation of our recommendations relating to processes, training and task allocation, and not later than late 2020, to determine the required number and allocation of inspectors on a permanent basis.

Recommendation 8

The Regulator, in consultation with the Team Leaders, should consider the feasibility of a process for the rotation of inspectors around the workplaces within each region to limit the risk or perception of regulatory capture.

Formal processes should be implemented for the review of inspector activity to provide further for the identification, or minimising risks or perceptions, of regulatory capture.

Recommendation 9

The Regulator should consider the feasibility of dedication of inspectors to specific industries or hazard areas, within each region and shared between regions. This may be deferred, or reconsidered, after assessing the workload, skills and processes after implementation of relevant recommendations in this report.

Recommendation 10

The Regulator should allocate specific inspectors in each region – determined by aptitude and attitude – to the investigation of incidents. Subject to workload, those inspectors would also undertake other inspector activities. If specific inspectors are dedicated to investigation, they should be provided with advanced training to enhance their investigation skills. The dedicated investigators should work with inspectors of the mines inspectorate in the investigation of incidents.

Recommendation 11

The Regulator/Chief Executive Officer should commission a review of the activities of administrative and support staff to determine and implement changes to ensure:

- the staff provide optimal support for the Inspectorate – activities and responsiveness;
- support staff activities lessen the administrative workload of inspectors where possible;
- optimal efficiency is achieved (for example through cycle time reduction or similar exercises);
- the staff are provided with processes and resources to enable them to fulfil their functions; and
- there are sufficient numbers of support staff to effectively carry out such activities.

Recommendation 12

The Regulator should develop and publish a formal stakeholder engagement plan that identifies at least at a high level with whom the engagement will occur, how it will occur, the frequency and the subject matters. The plan should recognise opportunities for the Regulator to partner with industry and union organisations in training initiatives, information dissemination and public messaging.

Recommendation 13

The Regulator/Chief Executive Officer should arrange for the WorkSafe Tasmania website to be reviewed and further information placed on it as soon as reasonably practicable. One of the benefits of harmonisation is that the regulators can share information and this should be pursued. Further links to information on other sites, such as the Safe Work Australia website, may also be useful.

Recommendation 14

The Regulator should consider whether WHS advertisements by other regulators may be useful in Tasmania and made available by the other regulators for use, both to inform the community and to raise the profile of WorkSafe Tasmania. Such advertisements may include the duties, the compliance and enforcement role of the Inspectorate, and specific hazard and risk areas (e.g. bullying, young and inexperienced workers). The cost of running these advertisements will have significant funding implications that will need to be taken into account, with the WHS Trust Fund being considered an appropriate source of funding.

Recommendation 15

The Regulator/Chief Executive Officer should finalise current work on processes and documents to provide a settled system for implementation with the assistance of a change manager and training manager (recommended elsewhere). Further modifications or additions to the system should at present be limited to that which is necessary to overcome significant deficiencies that are identified.

Recommendation 16

The Regulator/Chief Executive Officer should, with the assistance of the change manager, ensure that processes are in place to monitor the implementation of new processes and documents, both across WorkSafe Tasmania and by individual inspectors and members of staff. This should include monitoring and enforcing compliance with directions given as Chief Executive Officer and directions given as the Regulator pursuant to section 162 of the WHS Act.

Recommendation 17

The Chief Executive should undertake or commission a review of the functions, activities and operations of non-inspector staff. The objectives of the review would be to:

- identify the needs of the Regulator/Chief Executive Officer and the Inspectorate for support in fulfilling their functions and for the effective operation of WorkSafe Tasmania;
- determine the optimal structure and staff numbers to meet those needs; and
- assist the implementation of changes to determine by that review.

Recommendation 18

To provide inspectors with expert advice and guidance, the Regulator/Chief Executive Officer should:

- implement an operating procedure to document the process for the engagement of experts; and
- determine and provide an appropriate budget allowance, initially for two years, for the engagement of experts.

Recommendation 19

The Chief Executive Office should employ a training manager to ensure the implementation of recommended training, monitor compliance with training requirements, analyse training outcomes and undertake regular training needs analyses. The position will be required for the long term and should be, or be part of, a permanent role. This may over time be a shared role, combined with undertaking other initiatives, but for the first two years should be a separate full-time role.

Recommendation 20

The process underway for development/review of position descriptions for each role within WorkSafe Tasmania and the Inspectorate should be expedited. The position descriptions should include qualifications and minimum experience in work health and safety relevant to and necessary for the performance of the role.

Recommendation 21

The full WHSQ inspector training programme or equivalent should be provided to all inspectors, subject to some reduction to take into account elements that have already been undertaken, our recommendation for more advanced investigation training by a limited number of inspectors, and the arrangements made by the Regulator for the DPP to assist with an annual training program in relation to investigations and court processes. The Regulator, with the assistance of the proposed training manager, should continue to engage with SafeWork SA and HWSA on ongoing development of training and competency frameworks.

Recommendation 22

An assessment should be undertaken of the skills of individual inspectors and training should be provided for inspectors as required to enhance their skills in the following areas:

- emotional intelligence and their ability to effectively influence all stakeholders with whom they are required to engage;
- practical technical skills (e.g. electrical, machinery, psycho-social);
- risk management; and
- work health and safety management systems.

Recommendation 23

The Regulator/Chief Executive should ensure the proper and effective implementation and enforcement of formal processes across WorkSafe Tasmania for the use of the Departmental Performance Management Framework and "Employment Direction 26" "Managing Performance Guidelines for the Tasmanian State Service" to ensure effective performance management and career development.

Recommendation 24

The Regulator/Chief Executive working with the Department of Justice should take steps, as soon as reasonably practicable, for the effective implementation of career development and succession planning processes within WorkSafe Tasmania.

The recommendations made by *bWell4Work Pty Ltd* in their report dated May 2016 should be considered for adoption with relevant recommendations in our report. The Workforce Capability Framework developed by the Regulator/Chief Executive Officer, which covers many of the issues raised in this report, should be reviewed by the Regulator/Chief Executive Officer taking into account the discussion and recommendations in this report, and implemented as soon as reasonably possible.

Recommendation 25

A person with appropriate skills and experience should be engaged, on a temporary full time basis for not less than one year, to assist with change management.

The person should, as part of that role, work with the proposed training officer to undertake a training needs analysis to identify training requirements for effective implementation and embedding of the changes.

The change manager position should be reviewed after one year to determine any ongoing need and the feasibility of the work being part of the role of the proposed permanent training officer.

Recommendation 26

The Regulator/Chief Executive Officer should adopt, with the assistance of the proposed change manager, a formal change management process.

Recommendation 27

The Board should, following finalisation of the WorkSafe Tasmania Strategic Plan 2018-2023 obtain from the Regulator and consider operational plans that set out how the Strategies will be met and enable the Board to monitor performance against those plans.

The Board should require the Regulator to report regularly in the Regulator's Roundup on activities and how they relate to the Strategies.

Recommendation 28

The Board should require regular reporting by the Regulator on action taken towards adopting and implementing such of the recommendations in this report as are accepted.

Recommendation 29

The Regulator/Chief Executive Officer and the Department of Justice should consider the inclusion in the Strategic Plan of references to critical success factors and performance measures, and a summary graphic similar to that in the Strategic Plan of the Queensland Workplace Health and Safety Board.

The Regulator/Chief Executive Officer should ensure supporting operational plans, work plans and strategic tracking and performance reporting tools, are prepared as soon as possible after the Strategic Plan 2018-2023 has been finalised. Those documents should set out how each of the Strategies will be met and enable monitoring of performance against those plans. This should include a formal plan for data retention and analysis, to enable reporting and review of work activities, work allocation and reporting against plans.

The Operational Plan 2014-15 provides a valid approach and a useful precedent.

An abbreviated version of the operational plan should be published on the website of WorkSafe Tasmania to provide for transparency, and assist duty holders and the public to understand what the Regulator is doing in pursuit of the Strategic Plan and what they can expect from inspectors.

Recommendation 30

The Regulator/Chief Executive Officer should include in the Strategic Plan 2018-2023 or operational plan details of how the Regulator and Inspectorate will promote an understanding of, and compliance with, the duty in section 46 of the WHS Act for duty holders to consult, cooperate and coordinate activities.

Recommendation 31

The Regulator should develop and publish more detailed documents to support the Compliance and Enforcement Policy, providing information for inspectors and the public on how the Policy will be applied and specific powers exercised. Documents currently published and being developed by WorkSafe Victoria may provide useful guides as to the nature and content of such documents.

The Compliance and Enforcement Policy, or supporting documents, should include or provide a link to the detail contained in the DPP Prosecution Guidelines that are followed by the Regulator.

Recommendation 32

The Regulator should develop and publish more detailed explanation of the matters to be considered by an inspector in determining how to exercise their discretion to seek or permit voluntary compliance or issue an improvement notice and the process of consultation by the inspector with the duty holder and any relevant health and safety representative in reaching a decision.

This document should include a note that an improvement notice is a precautionary risk tool to provide for health and safety improvement, is not punitive, and while based on a reasonable belief that a breach has occurred does not mean that a breach has in fact occurred.

Recommendation 33

The Regulator should issue and enforce a direction requiring inspectors to complete and provide to the duty holder and any relevant health and safety representative an inspection record or like document, prior to or as soon as reasonably practicable after leaving the workplace.

Recommendation 34

The Regulator should develop with legal advice, and distribute to inspectors, guidelines to ensure that the protection of legal professional privilege applies to advice provided by the DPP during an investigation, prosecution decision making and other proceedings.

Recommendation 35

The Regulator should regularly (e.g. quarterly) provide to stakeholder organisations statistical information and information about the initiatives of the Regulator and WorkSafe Tasmania. The information may comprise information from the Regulator's Roundup provided quarterly to the Board. The Regulator should also regularly publish condensed versions of that information on the WorkSafe Tasmania website.

Recommendation 36

The Regulator/Chief Executive Officer should as part of a review of the WorkSafe Tasmania website provide more prominent information for PCBUs and workers about consultation, issue resolution and HSRs, including their functions and powers and protection against unlawful discrimination.

Recommendation 37

The Regulator should, for clarity and certainty, issue and enforce a direction to inspectors under section 162 of the WHS Act requiring them when attending workplaces to seek out HSRs elected to represent relevant workers and to engage with workers and HSRs when monitoring compliance and considering health and safety concerns, as required by section 164(2). The direction should include a requirement that this be recorded on an inspection report relating of the workplace visit.

Recommendation 38

The Regulator/Chief Executive Officer should with assistance from the Manager, Accreditation and Licensing, effect the following changes within the ADG Unit:

- remove inspectors from involvement in licensing and accreditation processes not requiring their experience and expertise (continuing as an expert resource for CSOs and to conduct field audits of accredited assessors);
- improve efficiency of the ADG inspectors by streaming work to meet their expertise;
- following a reduction in the licensing role of inspectors identify and direct them to proactive field activities - including workplace compliance auditing in their fields of expertise, providing advice to duty holders, assisting the general inspectorate in workplaces, assisting inspectors with technical advice during investigations, and pursuing specific risk-based initiatives;
- consider the feasibility of specific training of an inspector in the North and North-Western regions to provide local support to the ADG inspectors and other inspectors in the region;
- provide for an additional inspector in the ADG Unit, with experience in high risk work;
- undertake a training needs analysis for the CSOs and provide recommended training;
- increase the number of CSOs by at least one permanent role (initially) and one temporary administrative support, and determine after embedding IT and process changes whether any further increase is needed; and
- appoint a senior person with relevant training and skills to the role of Team Leader of the CSOs, to assist in the management of the licensing process and provide technical support, which will free up the inspectors.

Recommendation 39

The Regulator/Chief Executive Officer should implement as soon as this can reasonably be done, a 'state of the art' system and supporting information technology platform for the processing of licences (which may be by adopting and adapting processes used in other jurisdictions). The systems and IT platform should be aimed at improving efficiency and removing duplication.

Recommendation 40

The Regulator/Chief Executive Officer with the Chief Inspector of Mines should ensure supporting operational plans and work plans specific to the activities of the mines inspectorate are prepared as soon as possible after the Strategic Plan 2018-2023 has been finalised. This should include a formal plan for data retention and analysis, to enable reporting and review of work activities, work allocation and reporting against plans. Draft activity reports sighted by us would be useful starting points.

Recommendation 41

No increase is currently required in the number of inspectors and support staff in the mines area. Further consideration of any need for additional resources should be deferred until our various recommendations have been adopted.

Recommendation 42

The Regulator and Chief Inspector of Mines should develop and implement documented procedures to support the activities of the mines inspectorate, applying those used broadly within WST supplemented only by further documents necessary for and relating to specific activities of the mines inspectorate.

Recommendation 43

The Regulator and Chief Inspector of Mines should provide for rotation of mines inspectors around workplaces, with processes for handover and ongoing communication between inspectors in respect of specific workplaces, to minimise the risk of actual or perceived 'regulator capture'. This may also be assisted by processes for the review of inspection reports.

Recommendation 44

The Regulator and Chief Inspector of Mines should provide for the mines inspectors to be able to be deployed from time to time assisting the general inspectors, and the general inspectors assisting the mines inspectors.

Recommendation 45

The Regulator should move responsibility for monitoring compliance in smelters from the mines inspectorate to the general inspectorate.

Recommendation 46

The Regulator and Chief Inspector of Mines should provide for the mines inspectors to be assisted by general inspectors in undertaking investigations.

Barry Sherriff
Principal
Sherriff Consulting
December 2018

1. Scope of the review and methodology

1.1. Scope

Sherriff Consulting (“**we**” or “**us**”) has been engaged by The WorkCover Tasmania Board (“**The Board**”) to review the functions, activities and effectiveness of the Work Health and Safety regulator (“**the Regulator**”) and the WorkSafe Tasmania Inspectorate (“**the Inspectorate**”).

The Regulator is appointed under the *Work Health and Safety Act 2012* (“**the WHS Act**”). Save in relation to the exercise of specific powers of the Regulator, the Regulator provides for and enables effective regulation under the WHS Act through the activities of WorkSafe Tasmania (a part of the Department of Justice) and the activities of inspectors appointed by the Regulator and directed by them. References in this report to the performance and activities of the Regulator are, for this reason, references to those matters as effected by the Regulator directly and through WorkSafe Tasmania and the Inspectorate.

The scope of the review includes:

1. a review of all functions specified under the WHS Act and *Work Health and Safety Regulations 2013* (“**the WHS Regulations**”) undertaken by the Regulator and the Inspectorate;
2. an assessment of the activities of the Regulator and the Inspectorate against the objectives of the WHS Act;
3. an assessment of all compliance and enforcement activities performed by the Inspectorate in line with the Compliance and Enforcement Policy;
4. an assessment of the effectiveness of the powers and legislative tools provided under the WHS Act;
5. an assessment of the activities of the Regulator and the Inspectorate against those performed by similar jurisdictions; and
6. identification of opportunities for improvement and the making of recommendations as to actions to be undertaken in respect of –
 - improving the Regulator’s effectiveness;
 - improving the legislative tools available to the Regulator and Inspectorate;
 - improving the strategic management of the Inspectorate; and
 - improving the Board’s role in monitoring the Regulator.

Business units within scope are:

- a. Inspectorate;
- b. Mines Inspectorate;
- c. Licensing and accreditation; and
- d. Office of CEO (Regulator).

Business units and activities out of scope are:

- a. Major Hazardous Facilities;
- b. Dangerous Goods;
- c. SSDS regulations;
- d. Workers Compensation;
- e. Asbestos Compensation;
- f. Helpline;
- g. Advisory Services; and
- h. all other non WHS Act activities.

1.2. Matters relevant to scope

It follows from the above that the scope necessarily includes identifying and making recommendations in relation to any opportunities for improvement in relation to:

- the legislative tools available to the Regulator and Inspectorate, including any recommendations for amendments to the WHS Act or any other legislation relevant to the functioning or performance of the Regulator and Inspectorate (e.g. in relation to funding);
- the capacity and capability of the Regulator, through the Inspectorate and his office, including
 - structure;
 - resources (e.g. human resources, information technology, physical);
 - processes;
 - other matters;
- the performance of the Regulator, directly and through WorkSafe Tasmania and the Inspectorate, in promoting and supporting the object of the WHS Act, including reference to
 - strategies, plans and initiatives;
 - the Compliance and Enforcement Policy adopted by the Regulator;
 - the approach taken to the management of the Inspectorate;
 - comparison with the approaches and performances of other WHS regulators;
- engagement of the Regulator with unions, industry representatives and others to further the object of the WHS Act and the effectiveness of the Regulator and Inspectorate in doing so;
- the means through which advice and information is provided to duty holders;
- collaboration with other WHS regulators, which may include the adoption or adaptation of policies, programs or initiatives of other regulators; and
- data analysis and reporting, including reporting to the Board.

1.3. Methodology and activities undertaken

We have been concerned to ensure that our findings and recommendations are as fully informed as can reasonably be achieved in the available time. We have to this end undertaken the following activities during the course of the review:

- consulted with relevant stakeholders and other parties able to provide relevant information and views, being
 - The Regulator
 - Members of the WorkCover Tasmania Board
 - Inspectors and other personnel within WorkSafe Tasmania and their representatives
 - Unions
 - Industry associations
 - Duty holders
 - Lawyers
 - Regulators in other jurisdictions and their personnel
 - Persons undertaking reviews of other WHS regulators

(a list of the persons consulted is provided as Appendix 1);

- obtained a large number of documents from persons consulted, including policy and procedure and other documents from the Regulator;
- undertaken research in relation to contemporary regulator practice and specific issues arising in relation to the WHS Act and the enforcement of it;
- considered all of the information obtained; and
- formulated the findings and recommendations contained in this report.

2. The objectives of the WHS Act and relevant functions

2.1. The object of the WHS Act

The effectiveness of the Regulator and the Inspectorate must be assessed against the promotion and achievement of the objects of the WHS Act through their activities.

The object of the WHS Act, set out in section 3(1), is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces. Specific elements or means for meeting the object are set out in sub-paragraphs of section 3(1) and are reproduced in Appendix 2.

The elements most directly applicable to this review of the Regulator and Inspectorate are the provision of advice and information etc in relation to work health and safety, and securing compliance through effective and appropriate compliance and enforcement measures. It is our view, however, that all of the elements are relevant to the activities of the Regulator and the Inspectorate and have been considered by us in this review.

The Regulator and the Inspectorate at the workplace have a significant role in providing for and encouraging workplace consultation and issue resolution (element (b)) and stakeholder engagement (element (c)). The Regulator has a significant role in reviewing actions taken by the Inspectorate and others exercising powers and functions under the WHS Act (element (f)), providing a framework for continuous improvement and progressively higher standards of work health and safety (element (g)) and facilitating a consistent national approach to work health and safety in the jurisdiction (element (h)).

The functions of the Regulator are set out in section 152 of the Act and reproduced in Appendix 4. Each of the functions of the Regulator can be directly referenced back to and should be interpreted by reference to the elements set out in section 3(1) for pursuing the object of the WHS Act.

2.2. The relevant functions of the Board

Part 2 of Schedule 2 to the WHS Act sets out the functions of the Board under the WHS Act. These functions are reproduced in Appendix 4.

The functions of the Board specifically include to monitor and review the Regulator in connection with the exercise of powers and the performance of functions under the WHS Act. This review and regular reporting provided to the Board by the Regulator are examples of the exercise of that function.

Other functions of the Board are also relevant to and are supported by this review, particularly to monitor and report to the Minister on the operation and effectiveness of the WHS Act and on the performance of the systems to which the WHS Act relates; and to make recommendations to the Minister with respect to such matters as it considers necessary for the purposes of the WHS Act.

2.3. The functions and powers of the Regulator

The functions of the Regulator are set out in section 152 of the WHS Act. The functions and how they relate to the elements or means for achieving the object referred to in section 3(1) are noted in Appendix 3. All of the functions are relevant to this review.

Section 153 of the WHS Act provides that the Regulator has the power to do all things necessary or convenient to be done for or in connection with the performance of the functions; and has all the powers and functions of an inspector. Section 162 of the WHS Act provides that an inspector is subject to the Regulator's directions in the exercise of the inspector's compliance powers.

The Regulator also has administrative functions and powers as the Chief Executive Officer of WorkSafe Tasmania. Those functions and powers assist the Regulator in administrative matters that provide the enablers and support for the effective conduct of the functions and exercise of powers under the WHS Act.

2.4. The functions and powers of inspectors

A broad statement of the functions and powers of inspectors is set out in section 160 of the WHS Act. More specific functions and powers that are consistent with and support section 160 are found throughout Part 9 of the WHS Act. Section 160 is reproduced in Appendix 6, with reference to how they relate to the elements or means for achieving the object referred to in section 3(1). Other powers are referred to where relevant in this report.

Many of the functions and powers of inspectors relate to the enforcement of compliance with the WHS Act, including providing them with enforcement tools.

Inspectors are, however, also given important functions and powers to support and assist persons conducting a business or undertaking (“PCBUs”) and workers and their representatives to facilitate compliance through risk management. That is, inspectors are not only enforcers, but also play an important role in encouraging and supporting workplace improvements in risk management. There are two key elements to this:

- (i) actions taken in relation to worker representation, workplace entry by permit holders, and issue resolution; and
- (ii) the provision of information and advice about compliance with the WHS Act.

3. Setting the context

3.1. A contemporary benchmark of a good regulator

This review necessarily requires consideration of the performance of the Regulator to contemporary standards, including a comparison with approaches in other jurisdictions. We have considered information from a number of sources and provide in Appendix 6 a short summary of the general findings of research in relation to general regulatory practice in other jurisdictions.

We consider it is important to note that benchmarking the performance of a regulator in WHS should take into account these matters and not be based on statistics of outcomes over which the regulator has no or little control.

Statistical targets or measures set out in documents such as the Australian Work Health and Safety Strategy 2012-2022, the Comparative Performance Monitoring Reporting and various strategic plans may be useful indicators of the current state and areas of concern to which a regulator should direct activities, but may be of limited use as measures of regulator performance. Jurisdictional variances in industry diversity, size and sophistication of business and the types of activities undertaken make jurisdictional comparisons difficult and of limited use.

Taking all of the matters discussed in Appendix 6 into account, the following questions are those we consider to be most applicable to benchmarking the activities of the Regulator and the Inspectorate for the purposes of this review:

1. Does the Regulator and the Inspectorate have and communicate clear objectives to maximise public benefits from the Regulator's activities?
2. Does the Regulator and the Inspectorate have a clear strategy and supporting plans to achieve the stated objectives, and:
 - a. have they been informed by research and consultation with stakeholders; and
 - b. are they published?
3. Does the Regulator and the Inspectorate have adequate resources to achieve the stated objectives?
4. Does the Regulator and the Inspectorate adopt the 'state of the art' by using practices and tools used by other WHS regulators in Australia, adapted as appropriate to the specific environmental factors in Tasmania?
5. Does the Regulator and the Inspectorate seek out evidence and generate new knowledge of poorly understood risks and potential areas of concern, before making regulatory decisions and incorporate that evidence into decision making?
6. Does the Regulator and the Inspectorate engage in analysis to learn what works and what could work better to achieve the stated objectives and support the associated strategies and plans?
7. Does the Regulator (and if so, how) select and apply through the Inspectorate and other business units a full range of tools and practices, that is sensitively applied to particular circumstances, and maximise benefits?
8. Is the range of compliance and enforcement tools and practices transparent, communicated to and understood by duty holders and the community?
9. Does the Regulator and the Inspectorate target inspections through the Inspectorate in such a manner as to maximise the chance of finding and reducing significant contraventions?

10. Does the Regulator and the Inspectorate deploy enforcement tools through the Inspectorate responsively, calibrating consequences to ensure compliance and promote positive cooperation?
11. Are the approaches and decisions of the Regulator properly understood by the Inspectorate and business units and are there measures in place to promote this and require consistent compliance by them?
12. Does the Regulator and the Inspectorate ensure that a sufficient body of advice and guidance is widely available to stakeholders on the duties and other key aspects of the WHS Act and regulations, codes of practice, and other sources of information?
13. Does the Regulator obtain support and resource supplementation from stakeholder representatives (informing, influencing and informing the Regulator)?
14. Does the approach of the Regulator and the Inspectorate conform to the National Compliance and Enforcement Policy? Is that policy and the way in which it will be actioned clear and sufficiently detailed as to ensure clarity of stakeholder expectations?

3.2. A discussion of environmental considerations

The effectiveness of the Regulator and Inspectorate is subject to the circumstances in which they operate. It is accordingly important to identify the environmental considerations that influence performance and need to be accommodated in planning and implementation.

The following are key factors affecting the activities of the Regulator and the Inspectorate:

1. **Diversity of industry and activities** – While Tasmania hosts a wide variety of industries, there are significant hazardous industries that predominate, being agriculture, aquaculture, forestry, mining and construction. With the possible exception of construction, these industries are spread across the State and in remote locations. Each require specific knowledge, skills and experience to understand and manage risks.
2. **Geographic spread of industry and activities** – This is referred to above, but also includes support services such as health, local government, emergency services and retail.
3. **The relatively micro nature of businesses in Tasmania** – As a number of people with whom we consulted commented, ‘micro’ businesses predominate in Tasmania. This means that there is a disproportionately large number of workplaces for initiatives to reach and inspectors to visit; and a lower likelihood that workers in a workplace will be supported by a trained elected health and safety representative or union. This also means that businesses are generally less sophisticated in their business and WHS management and less likely to have systems and resources to enable and support good WHS risk management.
4. **Climatic conditions** – The seasonal conditions add to risks and provide difficulty during some seasons in access to remote workplaces. They may also produce fluctuations in work activities, the number of WHS incidents that occur, and the workload of the Inspectorate.
5. **Changing economic conditions** – Variations in economic activity (extent and focus) can provide challenges for a regulator and inspectors in maintaining sufficient expertise and attending workplaces. The current heightened construction activity in the South of the State is an example. The cyclical nature of mining activity, particularly in Tasmania, also presents a challenge. While this occurs in all jurisdictions, the size of the workforce, the size of the inspectorate, combined with the other factors noted above, produce greater challenges for the Regulator and Inspectorate in Tasmania.
6. **Budgetary constraints** – While a good deal of infrastructure and processes that are essential to the operation of WorkSafe Tasmania are required in other jurisdictions, the

smaller population in Tasmania leads to budgetary constraints. Economies of scale are not available.

These factors, separately and collectively, mean that the Regulator is required in effect “to do more with less”; and to balance consistency of structure and strategy with the need for flexibility and agility in the management of WorkSafe Tasmania and the Inspectorate.

4. Analysis, associated findings and recommendations

4.1. Jurisdictional comparison

Comments are made at appropriate points throughout this report to comparisons between the activities and performance of the Regulator and Inspectorate in Tasmania and regulators in other jurisdictions. The extent to which comparisons may be made and be valid will differ depending on the subject matter and the relevant conditions in the jurisdictions. Tasmania has one of the smallest regulators by size, jurisdiction and Budget in Australia, yet is required to perform the same functions as its interstate regulatory colleagues.

The following summarises our conclusions (based on informed opinion and experience) on the comparative performance of the Regulator and Inspectorate:

Structure

The organisational structure employed by the Regulator has been undergoing change. Comparison with structures used in other jurisdictions is, in our view, of only limited assistance given the need for the organisation to be structured in a way as to enable it to respond to the conditions and needs in the jurisdiction.

The structure being put in place by the Regulator is generally consistent with that used in other jurisdictions, taking into account the Tasmanian operating environment.

Comments and recommendations in relation to this are set out in part 4.2.1.

Strategy and action planning

The draft Strategic Plan 2018-2023 better aligns with the approach and content of similar plans in other jurisdictions than previous strategic plans to date. Some jurisdictions have more detailed operational plans and work plans to provide for action to support the Strategic Plan, and this is an approach that we recommend be adopted by the Regulator. It is noted, however, that the draft Strategic Plan 2018-2023 is in the final stage of stakeholder feedback and, once finalised, detailed operational plans can be prepared.

Comments and recommendations in relation to this are set out in part 4.4.

Performance analysis and reporting

We have found the analysis of WHS outcomes and various activities, and the reporting on those activities to the Board, to be consistent with most other jurisdictions. Variations on analysis and reporting are usually associated with the sophistication and detail of plans against which performance can be measured.

Comments on the analysis and reporting are set out in parts 4.3 and 4.4.

Stakeholder engagement

This is an area for improvement with the Regulator and Inspectorate lacking the formality, consistency and continuity of many of the other jurisdictions.

The need for stakeholder engagement has been recognised by the Regulator in parts of the Strategic Plan and is reflected in the process for consultation on the draft Strategic Plan 2018-2023.

Comments and recommendations for improvement in this area are set out in part 4.2.4.

Providing information to the community

The information provided by the Regulator on the WorkSafe Tasmania website is significantly less than is provided in a number of other larger and better resourced jurisdictions. While the considerations referred to in 3.2 above are relevant, there are opportunities for the Regulator to improve the amount and quality of information available to the public, through adopting or referencing (through hyperlinks) information found in other jurisdictions and the Safe Work Australia website.

We are informed that the Board has approved redevelopment of the relevant websites as a project in the 2018-2019 Budget.

Comments and recommendations on this are contained in part 4.2.4.

Compliance and enforcement policies

The adoption by the Regulator of the National Compliance and Enforcement Policy (“NCEP”) is consistent with all other jurisdictions. Some jurisdictions have subsidiary and more detailed documents setting out in more detail how the relatively general NCEP is operationalised in the jurisdiction.

We recommend this approach be adopted and refer to comments and recommendations made in part 4.6.3.

Inspector and support staff numbers

Inspector and support staff numbers in Tasmania are significantly below the numbers employed in most of the other jurisdictions. We caution, as noted in part 4.2.3, about reliance on raw numbers as these need to be considered in light of the needs and resourcing capability peculiar to each jurisdiction (and we note the considerations in Tasmania referred to in part 3.2).

We discuss this issue and make recommendations in part 4.2.3.

Skills

There is considerable variance between jurisdictions as to the clarity of roles and required capabilities, training needs analysis and training programmes, and legal and technical support provided to a regulator and inspectors to augment their skills and capability. The larger and better resourced jurisdictions are more sophisticated in managing this key issue. This is an area in which the approach and performance in Tasmania has historically been relatively very poor and this needs to be addressed as a matter of urgency. This need is recognised by the Regulator and responses are currently being developed and implemented.

Comments and recommendations on this issue are contained in part 4.2.6 and in other parts relating to specific areas or issues.

Work health and safety outcomes

We note the caveat above in relation to reliance on work health and safety outcomes or experience data as a measure of regulator performance, and the need to consider the environmental conditions that influence that performance. The size of the dataset in Tasmania also means that there can be significant fluctuations in outcomes from relatively small numbers of fatalities and injuries. We also note limitations on comparison due to the age of information contained in public documents such as the Comparative Performance Monitor. Subject to this, the work health and safety outcomes

measured in serious injuries and fatalities per hours worked in Tasmania have historically been relatively poorer than those experienced in other jurisdictions.²

It is pleasing to note that data in the August 2018 Regulator's Round-up shows a decline in recent years in serious injury, severe injury and fatalities in Tasmania (which is consistent with similar declines in other jurisdictions).

In making this comment we would like to make clear that we do not consider the level of fatalities or serious injuries in Tasmania to be acceptable, and note that this sentiment is shared by the Regulator and the Inspectorate and all of those with whom we have consulted during this review. Sustained effort by the Regulator and Inspectorate is required to positively influence those outcomes, supported by all stakeholders and the community, and the recommendations made in this report are intended to assist this.

4.2. Enabling factors

4.2.1. Organisational structure

Discussion

The organisational structure of WorkSafe Tasmania, including the Office of the Chief Executive Officer, has recently undergone changes in the roles and reporting lines for various personnel. We understand that further changes may occur following ongoing consideration by the Regulator (Chief Executive Officer) and the leadership team.

We consider the organisational structure to be best determined by the Regulator/Chief Executive Officer, in consultation with the leadership team. The structure and supporting documents should be optimal for the proper and effective management of the various activities of the Regulator and WorkSafe Tasmania, provide for clear lines of reporting and accountability, avoid duplication or confusion of responsibility or action, and make best use of the limited human resources.

Findings and Recommendations

We understand that the Board is familiar with the current organisational structure of WorkSafe Tasmania and that the Regulator informs the Board of changes that are made from time to time. We will accordingly not describe the structure in this report.

We understand that further changes or refinement of the organisational structure are being deferred by the Regulator/Chief Executive Officer pending consideration of the recommendations of this report and any changes necessarily required by the implementation of the recommendations.

We consider the most recent iteration of the structure of WorkSafe Tasmania that we have sighted to be fundamentally sound, but that it should be modified to accommodate the changes we recommend, particularly those relating to the Accreditation and Dangerous Goods Unit ("**ADG Unit**") and the Mines Inspectorate.

In addition to the activities of individuals, the Regulator/Chief Executive Officer is supported by an Executive Leadership Team ("**ELT**") of six key people across WorkSafe Tasmania. The Regulator is also supported by, and consults through, a broader WorkSafe Tasmania Leadership Group ("**WLG**"), which includes Team Leaders and Managers and equivalents. We have considered various documents provided by the Regulator in relation to these teams and consider them to provide good

² See Part 1 of Edition 19 of the Comparative Performance Monitoring report for the 5 years up to the 2015/16 financial year.

forums for the review of information and plans, to assist consultation through WorkSafe Tasmania, and to assist the Regulator/Chief Executive Officer to make decisions.

The effective operation of the ELT and WLG, with regular meetings and positive engagement by all members, will be critical to the effective implementation of the recommendations in this report.

Clarity of the respective roles, reporting requirements and accountability of each person within the structure would be enhanced by clear supporting documents, such as a brief narrative document describing the overall structure and operation, position descriptions and reporting protocols.

We understand that changes have been made to the organisational structure and roles etc over the past year or so to provide improvements. Considerable concern has been raised by people within WorkSafe Tasmania and their representatives of confusion caused by those changes over the past year or so, and a lack of clarity around roles and accountabilities.

The management of change can be difficult for all concerned and it is important that significant changes be limited and implemented expeditiously. For this reason, we recommend that early decisions be made on recommendations in this report that affect the organisational structure and accountabilities, to enable changes to be made and the structure etc to then be finalised as soon as possible. We note our discussion and recommendations below on change management.

Recommendation 1

The Regulator/Chief Executive Officer should review and revise as necessary the organisational structure to take into account the recommendations in this report.

Recommendation 2

The Regulator/Chief Executive Officer should, as soon as is reasonably practicable following the finalisation of the organisational structure, ensure that the following documents are in place:

- a document providing a description of the organisational structure, roles and responsibilities and reporting requirements within it; and
- position descriptions (or similar) for all roles, including reporting requirements and accountabilities.

4.2.2. Funding

Discussion

We understand that the funding of the Regulator and WorkSafe Tasmania is provided through direct budget allocation as an output within the Department of Justice, Tasmania. A further source of funding for advisory initiatives and approved projects (outside the scope of this review) is available from the WorkCover Tasmania Board. The Regulator is accordingly reliant on budget allocation for funds to enable the Regulator's functions to be carried out and for the Inspectorate to operate.

We have been informed (and regularly reminded by all stakeholders) that the budget allocation to the Regulator was significantly reduced in or around 2014, as part of across Government savings, leading to reductions in head count.

The Rowan & Associates report dated 13 March 2017 into the activities of the mines inspectorate ("**the Rowan report**") recommended (in recommendation 1) that a levy be introduced as a matter of priority to fund all of the activities of the mines inspectorate. We understand that recommendation remains under review.

While we understand the reasoning for the recommendation for a levy to be imposed on businesses subject to the regulatory activities of the mines inspectorate there are, in our view, policy concerns with doing so. To single out one cohort to bear the costs of regulation, when others are not subjected to that cost, may be considered to be unfair. The funding of the mines inspectorate in this way may release funds for use by the general inspectorate and the Regulator more broadly; meaning that those who pay are not only paying for their own regulation but also subsidising the regulation of others. It may be argued that other industries are equally hazardous and deserving of like funding arrangements.

Comcare³ does not require direct budget allocation for its operations; it is effectively self-funding. Many of the services provided by Comcare (e.g. training) are provided on a 'user pays' basis. The costs of regulating self-insured licensees are recovered by Comcare directly from the licensees. Section 97D(2)(d) of the **Safety, Rehabilitation and Compensation Act 1988** (Cwth) provides for part funding of Comcare through the payment of a regulatory contribution representing that part of the estimated cost of Comcare in carrying out its functions under the WHS Act as are determined to be referable to that entity. That is, the cost of Comcare in attending to activities specifically related to an entity (as distinct from activities across the jurisdiction) are recovered from the entity.

An advantage of the approach taken to fund Comcare through regulatory contributions is that the interactions of Comcare with the organisation (and by association issues with compliance) are known 'at the top' as they have direct financial consequences, and there is an incentive to eliminate or minimise those interactions through compliance and good performance. There is also a sense of fairness to this element of 'user pays' that may be lacking from the recommendation for a levy in relation to the mines inspectorate.

In making the above comments, we acknowledge that the government budgeting processes and the dynamics between government bodies and Comcare and the Government that support cost recovery are not applicable to the Regulator and the Department of Justice in Tasmania, who deal with a broader range of regulated entities.

Relevant legislation in some jurisdictions provides for the payment by an offender to a person or entity for losses sustained by that person or entity as a result of the offence. Section 243A of the WHS Act provides for payments in relation to infringement notices to be paid to the Board. Section 262 of the WHS Act provides for the payment of penalties imposed by a Court for a breach of the WHS Act to be made to the State.

In New South Wales, the court may (and usually does) order a moiety – that is, one half of the penalty – be paid to the prosecutor⁴. That payment is in addition to cost orders and helps to recover some or all of the investigation and other costs.

Findings and Recommendations

Many of the issues discussed in this report – most significantly inspector numbers, but also resources to apply to process improvement and expert advice – have funding at their source. While the budget reductions in 2014 were no doubt made for good reasons, experience has since demonstrated that those cuts may have been too great. That is certainly the view that has been expressed by an overwhelming majority of stakeholders with whom we have consulted.

³ Comcare is the regulator of WHS for the Commonwealth public sector and for some of the organisations who are licensed to self-insure for workers' compensation.

⁴ A moiety is able to be ordered pursuant to s 122(2) of the *Fines Act 1996* (NSW).

Many of the recommendations made in this report will require additional funding. At least until such time as alternative funding arrangements are properly considered, that funding will need to come from the budget allocation made to the Regulator and WorkSafe Tasmania.

Policy positions would need to be determined and legislation passed to enable other funding sources of they are to be adopted.

We consider there to be good policy reasons for the recovery of costs from duty holders against whom coercive measures are required to be taken (e.g. notices issued) and from those found guilty of an offence. These approaches provide for the cost to be borne by those who have not complied with the law, and do not provide for cross-subsidisation by compliant duty holders.

While consideration should be given to a 'user pays' approach for training and other services that may be provided by the Regulator through WorkSafe Tasmania, we appreciate that this may be opposed on policy grounds as potentially deterring duty holders from seeking and utilising those services (even though they would have to be paid for if sourced commercially). We note that until measures are taken to address resourcing and other issues raised in this report, the Regulator and WorkSafe Tasmania may not be in a position to provide the proactive services to which such a user pays system may be applied.

Recommendation 3

The Regulator should consider making a request for a further budget allocation to fund the increased costs of the Regulator and WorkSafe Tasmania in providing for an increase in numbers of personnel and for the implementation of other recommendations in this report.

The Department of Justice should consider the funding of non-recurring and short term costs of adopting the recommendations in this report from the WST Trust Fund established by the Department for the promotion of workplace health, safety and wellbeing.

Recommendation 4

The Regulator and the Government should consider sources of funding that are alternative to or supplement the funding of the Regulator and WorkSafe Tasmania, including but not limited to:

- fee for service arrangements for training and advice; and
- the imposition of a levy or other charge on duty holders representing recovery of the cost of enforcement activities specific to them.

Recommendation 5

The Government should consider amending section 262 of the WHS Act to enable a court to order an offender to pay all or a part of a monetary penalty to the Regulator.

4.2.3. Personnel numbers and allocation

Discussion

The activities of the Regulator and the Inspectorate are conducted through offices in three regions of Tasmania being Southern, Northern and North Eastern. In addition to the regional operations, inspectors and other staff are located within the Accreditation and Dangerous Goods Unit ("ADG") Unit and the Mines Inspectorate. The most recent information on the numbers and allocation of inspectors is available to the Board in the Regulator's Roundup document 148 dated August 2018.

We note our comments above concerning the environmental conditions. The geographic spread and remoteness of some workplaces, amongst other considerations, are relevant to determining the number of inspectors needed to attend to activities within a region.

The *Mines Work Health and Safety (Supplementary Requirements) Act 2012* and regulations require specific activities to be undertaken by inspectors 'assigned primarily to mines', and is also relevant to the numbers and allocation of inspectors.

Inspectors are undertaking various activities within the ADG Unit, including administrative tasks associated with licensing and field auditing. The ADG Unit also comprises Client Service Officers who undertake administrative activities related to licensing.

The ability of inspectors to carry out proactive (auditing and advisory) activities is dependent on their workload in attending to reactive work (responding to incident notifications and issues raised by stakeholders). The amount of reactive work required to be undertaken by inspectors is determined in part by the number of inspectors in the region.

The efficiency and effectiveness of inspectors can be significantly affected by their skill and experience. The more familiar an inspector is with the technical issues at a workplace, the less research they will need to undertake and the more likely that decisions made by them will be appropriate. Some jurisdictions have teams of inspectors dedicated (formally or informally) to particular industries and hazard areas (e.g. psychosocial issues). These are typically the larger jurisdictions, as the numbers of inspectors enables the regulator in those jurisdictions to allocate inspectors in that manner.

An issue which was raised in the Rowan report and by a number of stakeholders during consultation, is the perception of 'capture'⁵ of the Regulator and Inspectorate by the duty holders that they regulate. While some stakeholders asserted 'capture' of the Regulator by the Government⁶, some asserted 'capture' of individual inspectors.

Findings and Recommendations

The number of administrative staff supporting the inspectors and carrying out other activities of the Regulator is also below that in similar jurisdictions. The ratio of inspectors to workers in the South region (0.9 per 10,000) is less than half that in the North region (2.1) and just over half that in the North West region (1.6).

With the exception of proactive work being undertaken by the mines inspectors and occasional proactive work undertaken by inspectors in the North West region, the Inspectorate is currently only undertaking reactive work. Inspectors, and through them the Regulator, are generally unable to carry out their function of providing information and advice to duty holders at workplaces about compliance with the WHS Act. Advice to duty holders about compliance with the WHS Act is generally limited to the information contained on the WorkSafe Tasmania website.

The question of inspector numbers is a vexing one, while being the one most consistently raised by most stakeholders. There are two elements to be considered on this issue - how the numbers compare with other jurisdictions, and whether the numbers and location of inspectors provide for optimal performance.

The use of data for a jurisdictional comparison is rendered difficult by the many differences between the jurisdictions, the delay in consolidated reports, and constant changes. The greater concentration

⁵ This refers to an actual or perceived lack of proper enforcement of the law against duty holders being regulated by a regulator or inspector. The reasons most commonly given for this are familiarity from extended and regular interactions, and reliance by the regulator or inspector on the expertise of the duty holder.

⁶ Allegedly represented by a failure to take enforcement action against government undertakings, particularly in the health and emergency services area.

of businesses in larger jurisdictions (meaning less travel) and the micro nature of businesses in Tasmania, mean that reference to ratios of inspectors to worker numbers to compare Tasmania with other jurisdictions may not be a valid approach.

With the exception of the mining sector, very few proactive inspections have historically been undertaken by the Inspectorate. This has been attributed to inspector numbers (and skills), but time available for proactive work may increase significantly from improved efficiencies and skills.

Our recommendations relating to training, embedding of new procedures and some change in the allocation of work would necessarily take inspectors out of the field, and possibly less efficient, in the short term.

We understand that there are currently a number of budgeted but unfilled inspector positions, but have been informed that recruitment is underway.

We consider that efficiencies can be achieved through various measures recommended in this report – e.g. improved systems, supporting documents and training - many of which are underway. Even with those efficiency improvements, the inspectors will not in our opinion have sufficient opportunity to attend to proactive field work. We accordingly recommend targeted increases in inspectors in specific areas as noted in the recommendations below.

In making recommendations for additional inspectors we note the information we have received during consultation, including:

- the high level of activity in the Southern region;
- the need to allow for absences through illness;
- that filling currently budgeted but unfilled positions (which we understand is occurring) will relieve some workload pressure; and
- that various efficiency improvements from implementing other recommendations will assist inspectors to manage their workload.

An increase in inspector numbers is accordingly recommended for the short term, with a final analysis of required permanent numbers to be undertaken after say two years, once the changes have been embedded and there is a better indication of the capacity of the inspectorate.

We also note the relatively low numbers of administrative and support staff, which may compromise the efficiency of inspectors and the time available to them to attend to field work. The extent to which this is an issue, and the number of additional administrative or support staff that may be needed to overcome this issue is not clear to us. Resolving issues relating to the quality and stability of the database, resolving other IT issues and streamlining of forms and processes are likely to reduce the staff increases currently considered by many to be necessary. We make the recommendations below in relation to the administrative and support staff.

Many regulators have internal legal support (including Comcare, WorkSafe WA, WHSQ). While WorkSafe Tasmania does not, it has the benefit of assistance from the DPP pursuant to arrangements made between them.

We have not been provided with evidence of regulatory ‘capture’, although we understand why some unions hold this concern. Counsel assisting the Independent Commissioner Against Corruption undertaking the review of SafeWork SA identified concerns of ‘capture’ of inspectors in her closing submission. The following risks may be equally applicable in Tasmania

There are risks of corruption, misconduct and maladministration that are inherent in the provision of such robust powers to regulators and inspectors. The IBAC report which I referred you to earlier, highlights how regulatory agencies can, by the very nature of their work, in issuing licences and ensuring compliance, combined with a high degree of discretion, face particular corruption risks and increased risks of employee misconduct. These risks are heightened (sic), where there is a lack of transparency within the organisation. Improved transparency and reporting, both of the performance and

decision-making of the regulators, can assist in ensuring risks of corruption, misconduct and maladministration are identified and addressed.⁷

We consider it is important to note that based on our enquiries, the comments above relating to issues with transparency do not apply to the Regulator and Inspectorate in Tasmania.

Whether regulator capture is reality or perception, we consider that reasonable measures need to be in place to minimise the risk of this occurring or being perceived to occur. While processes are available to provide for transparency of process and accountability of the Regulator⁸ and of the Inspectorate⁹, the rotation of inspectors to limit the continuity and duration of interactions with specific duty holders can assist in minimising the perception of capture. Any process of rotation should be sensitive to the particular circumstances and the need for continuity (for example, to complete a specific intervention or initiative with a duty holder).

We also consider that current informal processes for reviewing actions taken or not taken by inspectors should be enhanced through formal processes.

The numbers of inspectors and the environmental conditions in Tasmania explain the current lack of dedication of inspectors to specific industries or hazard areas or tasks, other than in the ADG Unit and mines inspectorate. Industry and unions alike have consistently expressed concern about the lack of skill and expertise of inspectors, attributing this in part to the lack of specialisation. Industry stakeholders have stated that the lack of specialist expertise has limited the usefulness of inspectors in providing advice and information, and caused them difficulties through what they consider to be inappropriate notices or directions. Unions have complained that the lack of specialisation (amongst other asserted skill deficiencies) has meant that inspectors accept what the PCBU says as they do not know otherwise.

We have been told by numerous stakeholders that the skills and performance of inspectors in investigating incidents is 'patchy' across the Inspectorate with some performing well and expeditiously, while others perform poorly. The dedication of some inspectors to investigations, would assist in ensuring that investigations are undertaken by those most suitable and skilled for that important task and increase the intensity of their experience in undertaking investigations, which is likely to produce better and more timely outcomes. Dedication of some inspectors to investigations will enable advanced training to be provided to them to further enhance their knowledge and skills, with less cost incurred than if that training was provided across the Inspectorate.

We recommend below that consideration be given to the dedication of inspectors to particular areas of specialty and to investigations. Whether this is feasible will depend in part on whether numbers of inspectors are increased.

Recommendation 6

The Regulator should ensure that all currently budgeted but unfilled inspector positions are filled as soon as reasonably practicable.

There are issues associated with the activities of the ADG Unit and the mines inspectorate that are relevant to personnel numbers and allocation. These are dealt with separately, to provide an integrated approach to each of those areas, and we refer to our comments and recommendations in parts 4.8.1 and 4.8.2 respectively.

⁷ *Public Hearing – Evaluation of SafeWork SA: Closing submissions of Counsel assisting*; 31 August 2018 at p16.

⁸ For example, through action taken under section 231 of the WHS Act for a review of a failure to prosecute.

⁹ For example, through an application under section 224 for internal review of a decision not to issue a notice.

Recommendation 7

The Regulator appoint additional inspector positions for a period of two years to be allocated as follows:

- Southern region – 3 additional inspectors;
- Northern region – 2 additional inspectors;
- North West region – 1 additional inspector;
- Mines inspectorate – nil additional; and
- ADG Unit – 1 additional inspector.

A review of workload should be undertaken after the implementation of our recommendations relating to processes, training and task allocation, and not later than late 2020, to determine the required number and allocation of inspectors on a permanent basis.

Recommendation 8

The Regulator, in consultation with the Team Leaders, should consider the feasibility of a process for the rotation of inspectors around the workplaces within each region to limit the risk or perception of regulatory capture.

Formal processes should be implemented for the review of inspector activity to provide further for the identification, or minimising risks or perceptions, of regulatory capture.

Recommendation 9

The Regulator should consider the feasibility of dedication of inspectors to specific industries or hazard areas, within each region and shared between regions. This may be deferred, or reconsidered, after assessing the workload, skills and processes after implementation of relevant recommendations in this report.

Recommendation 10

The Regulator should allocate specific inspectors in each region – determined by aptitude and attitude – to the investigation of incidents. Subject to workload, those inspectors would also undertake other inspector activities. If specific inspectors are dedicated to investigation, they should be provided with advanced training to enhance their investigation skills. The dedicated investigators should work with inspectors of the mines inspectorate in the investigation of incidents.

Recommendation 11

The Regulator/Chief Executive Officer should commission a review of the activities of administrative and support staff to determine and implement changes to ensure:

- the staff provide optimal support for the Inspectorate – activities and responsiveness;
- support staff activities lessen the administrative workload of inspectors where possible;
- optimal efficiency is achieved (for example through cycle time reduction or similar exercises);
- the staff are provided with processes and resources to enable them to fulfil their functions; and
- there are sufficient numbers of support staff to effectively carry out such activities.

Discussion

We consider that, for the reasons that follow, the engagement of the Regulator and others within WorkSafe Tasmania with stakeholders can play an important role in the effectiveness of the Regulator

and the promotion of the object of the WHS Act. Consideration of this issue could be undertaken when discussing the functions of the Regulator, but we have included it at this point in our report as in our view it is an enabler of performance.

Securing the health and safety of workers and the public depends heavily on the conduct of all who require work to be done, provide things necessary for it to be done, and who undertake the work (which we will refer to collectively as ‘work participants’). This in turn relies on the knowledge and understanding of each person of what the law and effective risk management requires, and compliant and cooperative behaviour. Each of the elements of the object of the WHS Act and the functions of the Regulator and inspectors are in some way directed towards providing for that knowledge and behaviour.

The Regulator and inspectors clearly have a significant role to play in enhancing the knowledge of work participants and in enforcing compliance with the requirements of the WHS Act and regulations – both roles being provided for in their functions and powers.

As identified throughout this report, there are limitations on the capacity of the Regulator and the Inspectorate to engage with each PCBU and with workers at workplaces. The environmental considerations that we refer to in part 3.2 are relevant to this – we were informed that there are some 37,000 small businesses in Tasmania. Some support is provided by the WHS Act through mechanisms for worker representation and work health and safety right of entry, providing for some ‘eyes and ears on the ground’ to identify and bring issues to the attention of the Regulator and inspectors. In practice this is predominantly, although not exclusively, to support the compliance functions of the Regulator and inspectors.

Organisations that represent and provide services to industry and workers are likely to be a source (and often the source, rather than the Regulator or inspectors) of information for their members on work health and safety. Those stakeholder organisations can supplement and support activities taken by the Regulator and inspectors of providing information and advice on what is required for work health and safety compliance and risk management.

Stakeholder organisations can also be a good source of information for the Regulator on what is occurring in workplaces and what their members consider to be significant health and safety issues. This can assist the Regulator in planning initiatives.

Stakeholder organisations can also be influencers of opinions and perceptions of their members.¹⁰

It follows from this that the Regulator can gain from engagement with stakeholder representatives in a number of ways:

- obtaining information from stakeholders to assist the Regulator to understand issues that need to be addressed (e.g. specific health and safety risks) or that may impede the Regulator and inspectors in their work (e.g. perceptions of the usefulness of approaching an inspector for assistance);
- enabling stakeholder review and feedback on strategies and plans of the Regulator;
- gaining stakeholder support for and promotion of initiatives of the Regulator, including providing information to members through regular publications and other communications (a regular medium for dissemination of information directly to target audiences);
- improving the effectiveness of public information sessions conducted by the Regulator (e.g. conferences and workshops), through promotion by stakeholder organisations and where appropriate through co-presentation;

¹⁰ The use of third parties as ‘surrogate’ regulators and influencers was noted by Professor Neil Gunningham as an appropriate element of a regulator’s intervention strategy (see the discussion and references in Appendix 7).

- extending the reach of the Regulator by providing for attendance and co-presentation by the Regulator or others from WorkSafe Tasmania at stakeholder organisation sessions; and
- providing for greater 'visibility' of the Regulator and WorkSafe Tasmania, resulting in enhanced perceptions of transparency and trust.

There is considerable variability between the health and safety regulators around Australia in the extent to which they engage with stakeholders, the ways in which they do so, and the structure and formality of their approaches. This is in part related to size and resources.

Comcare has a sophisticated and planned approach which is assisted by the well-defined and relatively limited base of duty holders and their representative bodies (e.g. the Secretaries' Board, Deputy-Secretaries' Working Group, the Australian Public Service Commission, the licensees' forum and the ACTU) allowing for specific engagement plans for each.

The formal structures and resources applied by WorkSafe Victoria to stakeholder engagement have been developed over a period of almost two decades, with the statutory OHS Advisory Committee providing both a template and a driver for tripartite engagement.

WorkSafe Victoria has a cascading approach to stakeholder engagement with industry and unions through legislated 'big picture' engagement; a formal Stakeholder Reference Group which regularly considers a wide range of issues, data and WorkSafe Victoria initiatives; and industry and risk specific working groups. A substantial amount of information is provided and detailed discussion undertaken with stakeholders on issues and initiatives, through those forums and that information is usually able to be disseminated by the representative organisations to their members. WorkSafe Victoria has published a document 'Stakeholder Engagement Framework' describing its stakeholder engagement processes and associated benefits.

The Queensland Health and Safety Board has Industry Sector Standing Committees that provide a forum for stakeholder engagement. Among the formal initiatives of Work Health and Safety Queensland is the facilitation of the Transport and Manufacturing Industry Network.

SafeWork SA does not have a formal approach to stakeholder engagement, but approaches specific stakeholder groups for particular issues.

Stakeholder engagement in WHS matters in the Northern Territory occurs through the Work Health and Safety Advisory Council, a tripartite body continued by section 297 of the WHS Act with functions set out in Schedule 2 of the WHS Act to advise the Minister. NT WorkSafe engages with stakeholders directly through various programs, undertaking activities during Safety Month and by contributions to various events undertaken by other organisations.

Findings and Recommendations

As with other aspects of the review, we have received conflicting information from different stakeholders on the question of stakeholder engagement by the Regulator and the Inspectorate. The following findings represent our understanding of the current situation and upon which our recommendations are based.

A significant amount of work is undertaken by the Regulator through the Advisory Services arm of WorkSafe Tasmania and through Better Work Tasmania, but that is out of the scope of this review. The following comments relate to activities with stakeholders that are or may be undertaken outside those educative events.

It is clear that the Regulator and others within WorkSafe Tasmania have from time to time engaged in a proactive manner with various industry organisations, through TCCI and individually, in relation to a range of matters. The response from industry has been that this engagement is less than they would like, but has increased in recent times. It does not appear that this is replicated with unions, collectively or individually, with engagement with unions usually occurring in response to issues raised

by them. We have been provided with differing reasons for the absence of any significant proactive engagement between the Regulator and unions.

There is a focus by the Regulator on reaching out to PCBUs, who have the primary duty and the resources and ability to influence WHS outcomes. This means that while some of the benefits noted above are being obtained from industry (reaching out through the industry bodies to the duty holders they represent), the benefits are not being gained from worker engagement.

The engagement of the Regulator with stakeholders may be appropriate and focussed on issues of importance. However, the lack of a clear and documented engagement plan makes this difficult to determine, and leads to the potential for inconsistent or inadequate engagement. Further engagement with and through unions may enhance the visibility of the Regulator, and the trust in the Regulator and WorkSafe Tasmania shown by unions and workers.

Both industry and union organisations have expressed a preparedness to work with the Regulator to exploit their databases, various communications media (including conferences, network meetings, newsletters, alerts, Facebook, Twitter and other social media) to ensure the widest audience is reached by the Regulator with a consistent message supported by the stakeholder organisations. A number of people suggested the Regulator would be well advised to use social media extensively, and this may be multiplied by accessing the social media opportunities presented by the industry bodies and unions.

We recommend that the Regulator develop and publish a formal stakeholder engagement plan that identifies at least at a high level with whom the engagement will occur, how it will occur, the frequency and the subject matters. The plan should recognise opportunities for the Regulator to partner with industry and union organisations in training initiatives, information dissemination and public messaging.

We have considered the contents of the WorkSafe Tasmania website and compared it with the websites of other regulators around Australia. Common with other issues, there is inconsistency in the amount, detail and quality of information on the websites and ease of access to it.

The contents of the WorkSafe Tasmania website is relatively limited compared to the websites of other WHS regulators. A number of the people consulted by us during the review considered the website to be of little or no assistance to them.

The website should assist duty holders and workers and their representatives to understand their respective roles, responsibilities and rights. We refer to our comments in part 4.6.5.

We recommend that the WorkSafe Tasmania website be reviewed and further information placed on it as soon as reasonably practicable. One of the benefits of harmonisation is that the regulators can share information and this should be pursued. Further links to information on other sites, such as the Safe Work Australia website, may also be useful.

The Regulator should consider whether WHS advertisements by other regulators may be useful in Tasmania and made available by the other regulators for use, both to inform the community and to raise the profile of WorkSafe Tasmania. Such advertisements may include the duties, the compliance and enforcement role of the Inspectorate, and specific hazard and risk areas (e.g. bullying, young and inexperienced workers). The cost of running these advertisements will have significant funding implications that will need to be taken into account, with the WHS Trust Fund being considered an appropriate source of funding.

Recommendation 12

The Regulator should develop and publish a formal stakeholder engagement plan that identifies at least at a high level with whom the engagement will occur, how it will occur, the frequency and the subject matters. The plan should recognise opportunities for the Regulator to partner with industry and union organisations in training initiatives, information dissemination and public messaging.

Recommendation 13

The Regulator/Chief Executive Officer should arrange for the WorkSafe Tasmania website to be reviewed and further information placed on it as soon as reasonably practicable. One of the benefits of harmonisation is that the regulators can share information and this should be pursued. Further links to information on other sites, such as the Safe Work Australia website, may also be useful.

Recommendation 14

The Regulator should consider whether WHS advertisements by other regulators may be useful in Tasmania and made available by the other regulators for use, both to inform the community and to raise the profile of WorkSafe Tasmania. Such advertisements may include the duties, the compliance and enforcement role of the Inspectorate, and specific hazard and risk areas (e.g. bullying, young and inexperienced workers). The cost of running these advertisements will have significant funding implications that will need to be taken into account, with the WHS Trust Fund being considered an appropriate source of funding.

4.2.5. Supporting resources and processes**Discussion**

The Regulator is an individual appointed to the statutory position. The capacity of a regulator to effectively carry out the functions in the WHS Act is subject to the activities of the inspectors and the broader organisation, which in Tasmania is WorkSafe Tasmania (a part of the Department of Justice). The Regulator is the Chief Executive Officer of WorkSafe Tasmania.

It is axiomatic that the performance of the Inspectorate and others supporting the Regulator will be subject to the amount and quality of the resources and processes available to them, and their effective implementation and use.

There are marked contrasts between the WHS regulators in the amount and quality of resources and processes used by them. The regulators in larger jurisdictions tend to be better funded, have the benefits of economies of scale, and are accordingly better resourced than regulators in smaller jurisdictions such as Tasmania.

A direct comparison between WHS regulators on this important element is, in our view, of limited use. What is useful is to identify what resources and processes used by other regulators may be feasible and reasonable for adoption in Tasmania.

A significant benefit from harmonisation of WHS laws is the ability for policies and procedures developed in one or more jurisdictions to be adopted (and adapted as necessary) for use in other jurisdictions. This has, for example, occurred with various documents developed by Safe Work Australia (the NCEP, codes of practice and guidance material are examples), and the adoption by a number of jurisdictions of procedures and training modules developed by Work Health and Safety Queensland.

Information technology is an important enabler of implementation of processes, including mobile technology for inspectors. The availability for everyday use by inspectors of iPads, Surface Pro or similar equipment with appropriate software and applications is now common among the jurisdictions.

Findings and Recommendations

The Regulator is now supported by a leadership team with a good mix of skills and experience. The availability of this team, with appropriate skills and defined roles, will enable the Regulator to achieve more through delegation and consultation, while being supported with the implementation of process changes. With the large amount of development work undertaken, the Regulator will now be able to focus appropriately on strategic matters with less need to be concerned with development of detailed documents and processes.

As recommended by us in part 4.2.6 the Regulator/Chief Executive Officer should be supported by a full-time training officer. As recommended by us in part 4.2.6 the Regulator/Chief Executive Officer should be supported by a full-time change manager (for at least a period of one year with review of the position after that time).

To address identified deficiencies in technical skills, including in the investigation of incidents, we recommend that allowance be made in the budget of WorkSafe Tasmania for at least 2 years for the engagement of experts to advise and assist the Inspectorate, both in proactive work and in responding to incidents and work health and safety issues at workplaces. This should be supported by an operating procedure that documents the process for the engagement of experts.

As discussed at greater length in part 4.6.3, arrangements are being put in place for the Director of Public Prosecutions to provide training and legal assistance to the Regulator and inspectors. This will greatly enhance the ability of inspectors to conduct timely, quality investigations.

We were consistently told by a range of stakeholders that very little was done prior to the appointment of the current Regulator to provide policies and procedures for inspectors to operate under the WHS Act. While we were told various reasons for this, we consider this relevant for current purposes only as it explains the very low base from which the Regulator has endeavoured to move WorkSafe Tasmania and the Inspectorate forward.

The Regulator has since his appointment undertaken a very large amount of work in developing and disseminating for implementation a very large number of policies and documents. It is important that this effort be recognised.

Many of the processes and documents that have recently been provided for use by the Inspectorate have been largely based on WHSQ procedures, modified to take into account the specific requirements of WorkSafe Tasmania. This provides for consistency in approach with other jurisdictions, while taking advantage of processes and documents that have been proven through use to be appropriate and practical. Other documents have been specifically developed by the Registrar to provide further guidance and direction.

We have reviewed the policy and procedure documents and forms that are now available for and required to be used by inspectors. We consider them to be appropriate, useful and collectively comprise a substantial part of a quality system. The procedures and documents should inform the inspectors and make their work easier by the direction they provide. Minor changes to some documents may be required over time in response to experience in using them, and further procedures will be developed as required.

Our enquiries have identified that a significant proportion of the Inspectorate are not using the procedures and documents that have been provided by the Regulator over the past year. The reasons for this vary, but have been stated to include:

- an asserted lack of awareness of their existence;
- avoidance through a sense of being overwhelmed by the number and size of the documents and requirements;
- a lack of understanding of the procedures and documents, with concerns about a lack of training or other support being provided during implementation, particularly to the Team Leaders who were required to work with the inspectors in their teams to implement the procedures;

- concerns about the practicality of the documents;
- reluctance to change;
- concern about the need for further 'paperwork' without an understanding of the benefits;
- annoyance at perceived lack of consultation on the documents, with the feeling they have been imposed on them;
- perceptions of inconsistency over short periods of time with new procedures being replaced soon after introduction; and
- perceptions of a lack of cohesion or sense of an overall system.

We understand how these perceptions and concerns have arisen, but note that many are based on inadequate or inaccurate understanding of the documents and personal attitudes and perceptions. The urgent need for the development and introduction of a large body of procedures has resulted in what may be considered to be less than optimal consultation and implementation. The urgency and importance of the procedures and supporting documents has limited the opportunity to provide appropriate training and support.

In making these comments we note that we have received conflicting information about the process of consultation and implementation.

We have been informed that the 'documents for internal consultation' page on WorkSafe Tasmania's intranet provides a platform for staff to review and provide input into the development and finalisation of specific policy and procedural documents, and other initiatives or activities that may be considered from time to time. When a document is listed for consultation, all staff receive an email to advise them of such, encouraging a review of the listed documents and inviting feedback by the specified date.

Feedback is to be provided to a dedicated email address although if staff have any questions about a specific document they are invited to contact the applicable contact officer listed in the document. All feedback received by the specified date is taken into consideration prior to any document(s) or decision(s) being finalised. It is not intended that this page be viewed as the totality of consultation but merely a mechanism to encourage discussion and to capture feedback.

Since May 2018, five documents have been listed for consultation, with valuable feedback being received from staff in relation to each. This feedback has actively informed the finalisation or progression of the initiatives listed.

Information technology has been identified as a significant issue by the Regulator and Inspectorate. We are aware of the staged implementation of an approved and funded upgrade of hardware and software, which should meet the key concerns around the stability and efficiency of the system. No recommendations are considered necessary for this issue.

An issue that was raised with us was the absence of any or effective document control. This should be investigated by the Regulator/Chief Executive Officer and appropriate changes made.

The numbers of support and administrative staff available to assist inspectors and to more broadly administer the activities of WorkSafe Tasmania is low compared with other similar jurisdictions. Inspectors have queried the level of support they receive, which they believe is significantly affecting their ability to do their job efficiently and spend more time in the field. We also note the recommendations made by us in relation to stakeholder engagement and improvement of information to stakeholders, which will involve various staff.

We recommend that a review be undertaken of the non-inspector staff, similar to the Corporate Services Review currently being undertaken within SafeWork SA, and regularly occurs in other regulatory bodies. The requirements for administrative and other support staff may change following changes proposed in other recommendations. The review of non-inspector staff should accordingly occur after other changes have been implemented, with an exception being that the review of staff in the ADG Unit should occur while changes recommended in part 4.8.1 are being undertaken.

The objectives of the review of non-inspector staff would be to:

- identify the needs of the Regulator/Chief Executive Officer and the Inspectorate for support in fulfilling their functions and for the effective operation of WorkSafe Tasmania;
- determine the optimal structure and staff numbers to meet those needs; and
- assist the implementation of changes determined by that review.

The recommendations we make below are intended to assist the Regulator, the leadership team and Team Leaders, to embed the new procedures and documents and to enforce the use of them. The urgent recruitment of a change manager and training manager will be keys to assisting with this.

We recommend that further changes to procedures be avoided, unless clearly significant and urgent, until the current procedures and documents are effectively implemented.

Recommendation 15

The Regulator/Chief Executive Officer should finalise current work on processes and documents to provide a settled system for implementation with the assistance of a change manager and training manager (recommended elsewhere). Further modifications or additions to the system should at present be limited to that which is necessary to overcome significant deficiencies that are identified.

Recommendation 16

The Regulator/Chief Executive Officer should, with the assistance of the change manager, ensure that processes are in place to monitor the implementation of new processes and documents, both across WorkSafe Tasmania and by individual inspectors and members of staff. This should include monitoring and enforcing compliance with directions given as Chief Executive Officer and directions given as the Regulator pursuant to section 162 of the WHS Act.

Recommendation 17

The Chief Executive should undertake or commission a review of the functions, activities and operations of non-inspector staff. The objectives of the review would be to:

- identify the needs of the Regulator/Chief Executive Officer and the Inspectorate for support in fulfilling their functions and for the effective operation of WorkSafe Tasmania;
- determine the optimal structure and staff numbers to meet those needs; and
- assist the implementation of changes to determine by that review.

The review should be undertaken after the implementation of recommendations relating to the inspectorate.

Recommendation 18

To provide inspectors with expert advice and guidance, the Regulator/Chief Executive Officer should:

- implement an operating procedure to document the process for the engagement of experts; and
- determine and provide an appropriate budget allowance, initially for two years, for the engagement of experts.

4.2.6. Skills and experience – assessment, maintenance and enhancement

Discussion

It is axiomatic that an inspector needs to have appropriate skills and experience to properly and effectively fulfil their functions and exercise their powers.

An inspector needs to have:

- a good understanding of the legislation, regulations, codes of practice and supporting guidance material;
- skills in risk assessment;
- technical knowledge and experience, and access to sources of information, to enable an inspector to assess what is reasonably practicable for a PCBU in the circumstances, and accordingly required for compliance; and
- skills in what has been described as ‘fieldcraft’ – the ability to engage with duty holders and others, investigate and analyse information, and encourage action by duty holders.

The Australian Government Investigations Standard 2011 sets out the expectations of a person undertaking an investigation, although some question the application of this general investigation standard to matters under the WHS Act.

All jurisdictions provide training to inspectors to assist them with these skills. There is wide variance between jurisdictions on the formality and sophistication of the approach to inspector training. Some have entrenched processes for skills matrices, organisation wide and individual training needs analyses, and targeted training programs. The approach taken in some jurisdictions is more ad hoc.

Regulators in a number of jurisdictions have expressed concern about the level of inspector skills and competency, and regulators in all jurisdiction understand the importance of investing in quality training and skills verification of inspectors.

The Heads of Workplace Safety Authorities (“**HWSA**”) has convened a National Training Reference Group which is developing a nationally standardised competency framework. The Regulator is engaged in that process.

We understand that WorkSafe Victoria has provided training for its inspectors and investigators to improve their ‘soft skills’ in dealing with people and this has been well received.

The training program of Work Health and Safety Queensland (“**WHSQ**”) has been utilised by a number of other jurisdictions, including by WorkSafe Tasmania having had parts of that training (focussed on investigation) being provided by WHSQ trainers.

The Inspectorate has recently also undertaken training in Incident Cause Analysis Method techniques, with very positive feedback being received.

SafeWork SA is working with Charles Sturt University to develop an ‘international best practice’ training program for inspectors, that will be linked to the university qualification framework. This training is aimed at providing practical application as well as theory, with a deeper understanding through solid practical learning. This is particularly focussed on statement taking, interview techniques, scene management and preparation of evidence. We have been informed that this training will be consistent with, but more advanced than, the WHSQ training.

Training of inspectors needs to be based on and support processes and documentation used by them, and be practical in its focus. This link between process and training means that the training needs to be tailored for the particular jurisdiction.

A benefit of harmonisation, with consistent laws and the ability to adopt and adapt processes and documents developed by other jurisdictions, is that the training provided by another jurisdiction may be utilised with minimal modification.

Findings and Recommendations

We first note that our findings in relation to the skills and competency of inspectors is based on information provided to us during consultation. We have not had the opportunity to review specific work undertaken by any inspectors, and it would not be appropriate for us to do so.

All stakeholders have consistently raised concerns about the skill levels and competency of inspectors. The inspectors and their representatives have expressed a need for further and better training to be provided to inspectors.

Skills of inspectors are considered to be inconsistent across the organisation. The move to a general inspectorate without specialisation has contributed to gaps in experience and skills that need to be addressed. This is exacerbated by the changing nature of workplace risks, including the increasing concern in relation to psychosocial risks.

A particular concern raised by a number of stakeholders was that some inspectors appear to lack knowledge of risk assessment and this has resulted in poor conclusions being reached by them (e.g. on what is reasonably practicable). Concern has also been raised of a lack of knowledge by inspectors of work health and safety management systems. This, it has been said, has resulted in inspectors' enquiries being too 'shallow' and not looking at underlying causes and enablers of good health and safety performance, and notices being issued for 'circumstantial' gaps in otherwise quality, accredited and robust systems.

In addition to technical knowledge, inspectors require high emotional intelligence and influencing skills to achieve optimal WHS outcomes and cannot rely solely on their enforcement powers to achieve health and safety improvements by duty holders. Several stakeholders have expressed concern that some inspectors lack these skills and have stated that this can be a barrier to achieving practical health and safety outcomes during and from their interactions with inspectors.

Some training of inspectors has recently been undertaken to address basic deficiencies, but the perceived urgency of the need for skills enhancement and operational considerations has meant that cut down and incomplete versions of training products have been used. The results from the training have been reported as variable.

We recommend that the full WHSQ inspector training programme or equivalent be provided to all inspectors, subject to some reduction to take into account elements that have already been undertaken and our recommendation for more advanced investigation training by a limited number of inspectors. The Regulator, with the assistance of the proposed training manager, should continue engaging with SafeWork SA and HWSA on the development of training and competency frameworks.

The serious and urgent training needs require a formalised process, with specific elements identified in the recommendations. The formalisation of organisational and individual training needs analyses, programme development and implementation should be supported by a dedicated training officer. That position will be required for the long term and should be or be part of a permanent role. This may over time be a shared role, combined with undertaking other initiatives, but for the first two years should be a separate full-time role.

The analysis of skills and training needs, including skills matrices for each role, should be based on clear position descriptions and requirements. The process of development/review of position descriptions and skills matrices is being undertaken by the Regulator/Chief Executive Officer, supported by the Director of Industry Safety, and this should be expedited, with priority given to inspectors. The position descriptions and skill matrices should include qualifications and minimum experience in work health and safety relevant to and necessary for the performance of the role.

Inspector position descriptions and skills matrices should be consistent across the organisation subject to additional requirements in specific areas, e.g. mines and the ADG Unit. An example of a position description is the Job and Person Specification for inspectors that SafeWork SA is finalising.

Concern was expressed by a number of people within WorkSafe Tasmania that recruitment and appointments have not been consistently based on meeting the skills and experience requirements of the particular roles. This has been said to have in part been by reason of recruitment being subject to policies within the State Service. These concerns are inconsistent with the Tasmanian State Service operating a merit-based recruitment framework consistent with the State Service Act 2000 and relevant employment directions. We have been informed by the Regulator that WorkSafe Tasmania, as an operational output of the Department of Justice is compliant with all recruitment policies and procedures.

The Regulator/Chief Executive Officer should continue to ensure that all appointments meet the skills and experience requirements set out in the position descriptions.

A number of persons within WorkSafe Tasmania have expressed concern about the actions or inactions of some inspectors being inconsistent with policies and procedures. The provision of information and training, and greater formalisation and clarity of policies and procedures may assist in overcoming these concerns. To the extent to which non-compliance is behavioural, this should be addressed by the proper and effective implementation and enforcement of formal processes across WorkSafe Tasmania for the use of the Departmental Performance Management Framework and "Employment Direction 26" to ensure effective performance management and career development.

The asserted absence of formal career development and succession planning is limiting the ability of the Regulator to ensure improved performance and that the maintenance of standards is not affected by retirements or departures. This has been raised by a number of people within WorkSafe Tasmania, the Inspectorate and their representative union. This is a significant issue given the ageing nature of the inspectorate, with a number of retirements anticipated in the next couple of years. We also note that this issue was considered by *bWell4Work Pty Ltd* who reported to the Regulator in May 2016 with a number of recommendations. Our findings on the culture and morale within WorkSafe Tasmania are consistent with their recommendations, the issues continuing to be matters of concern. We agree that the recommendations of *bWell4Work Pty Ltd* should be adopted.

We also note that a Workforce Capability Framework has been developed by the Regulator/Chief Executive Officer, which covers many of the issues raised in this report. That Framework should be reviewed by the Regulator/Chief Executive Officer taking into account the discussion and recommendations in this report, and implemented as soon as reasonably possible.

We recommend that steps be taken by the Regulator/Chief Executive working with the Department of Justice, as soon as reasonably practicable, for the effective implementation of career development and succession planning processes within WorkSafe Tasmania.

Recommendation 19

The Chief Executive Office should employ a training manager to ensure the implementation of recommended training, monitor compliance with training requirements, analyse training outcomes and undertake regular training needs analyses. The position will be required for the long term and should be, or be part of, a permanent role. This may over time be a shared role, combined with undertaking other initiatives, but for the first two years should be a separate full-time role.

Recommendation 20

The process underway for development/review of position descriptions for each role within WorkSafe Tasmania and the Inspectorate should be expedited. The position descriptions should include qualifications and minimum experience in work health and safety relevant to and necessary for the performance of the role.

Recommendation 21

The full WHSQ inspector training programme or equivalent should be provided to all inspectors, subject to some reduction to take into account elements that have already been undertaken, our recommendation for more advanced investigation training by a limited number of inspectors, and the arrangements made by the Regulator for the DPP to assist with an annual training program in relation to investigations and court processes. The Regulator, with the assistance of the proposed training manager, should continue to engage with SafeWork SA and HWSA on ongoing development of training and competency frameworks.

Recommendation 22

An assessment should be undertaken of the skills of individual inspectors and training should be provided for inspectors as required to enhance their skills in the following areas:

- emotional intelligence and their ability to effectively influence all stakeholders with whom they are required to engage;
- practical technical skills (e.g. electrical, machinery, psycho-social);
- risk management; and
- work health and safety management systems.

Recommendation 23

The Regulator/Chief Executive should ensure the proper and effective implementation and enforcement of formal processes across WorkSafe Tasmania for the use of the Departmental Performance Management Framework and “Employment Direction 26” “Managing Performance Guidelines for the Tasmanian State Service” to ensure effective performance management and career development.

Recommendation 24

The Regulator/Chief Executive working with the Department of Justice should take steps, as soon as reasonably practicable, for the effective implementation of career development and succession planning processes within WorkSafe Tasmania.

The recommendations made by *bWell4Work Pty Ltd* in their report dated May 2016 should be considered for adoption with relevant recommendations in our report. The Workforce Capability Framework developed by the Regulator/Chief Executive Officer, which covers many of the issues raised in this report, should be reviewed by the Regulator/Chief Executive Officer taking into account the discussion and recommendations in this report, and implemented as soon as reasonably possible.

4.2.7. Change management

Discussion

Throughout this report there are references to changes that have been taken or underway over the last year or so by the Regulator with the Inspectorate.

Many of the recommendations in this report require significant change to be undertaken within WorkSafe Tasmania and the Inspectorate.

The management of change within an organisation will depend on the characteristics of the organisation (e.g. structure, resources, culture) and the nature and extent of the change. Change that is focussed in a particular part of a business may be managed by the leaders of that part of the business, while change across the organisation may be managed centrally. Change may be managed by subject matter experts (e.g. human resources, operational, engineering) or by a person with change management skills and focus. The person managing change may do so as part of a broader role, or may be appointed and acting solely in the role of managing change.

A number of the WHS regulators have people dedicated to change management and have mature processes for managing change.

We note that the Department of Justice, as part of the State Service has change management capability and processes.

The management of change needs to take into account financial and human resources, the culture of the organisation, the nature of the change(s) to be made, the timing and staging of elements (particularly those that are interdependent), enabling or supporting requirements (e.g. training, IT) and the need to maintain day to day operations.

Findings and Recommendations

We refer to our comments above on feedback we have received from within the Inspectorate and WorkSafe Tasmania on the implementation of change. We also note that consultation is only one aspect of change management. A carefully considered approach should now be taken to address the actual and perceived deficiencies in the adoption of processes and documents, for the introduction and implementation of further processes and documents, and to accommodate the structural and process changes flowing from our recommendations.

We recommend a dedicated change manager be employed to work with the Regulator/Chief Executive Officer and the leadership team to develop and implement a change management approach for application within WorkSafe Tasmania, and to assist the organisation through the changes that are underway and will flow from the implementation of our recommendations. This will enable the Regulator/Chief Executive Officer and the leadership team to focus on strategy and action planning and on day to day operations, rather than being distracted by the implementation of change.

An example of a change management system is that used by Comcare; and the documents on the Comcare website relating to the management of psychosocial risks of workplace change provide useful information and checklists. SafeWork SA is currently undertaking a series of Business Process Improvement projects, noted on their one page 'roadmap' and has engaged a dedicated change manager to assist with the process.

Recommendation 25

A person with appropriate skills and experience should be engaged, on a temporary full time basis for not less than one year, to assist with change management.

The person should, as part of that role, work with the proposed training officer to undertake a training needs analysis to identify training requirements for effective implementation and embedding of the changes.

The change manager position should be reviewed after one year to determine any ongoing need and the feasibility of the work being part of the role of the proposed permanent training officer.

Recommendation 26

The Regulator/Chief Executive Officer should adopt, with the assistance of the proposed change manager, a formal change management process.

4.3. Board monitoring and review (including Regulator reporting)

Discussion

The monitoring and review of performance of the regulator varies between jurisdictions, depending on the status of the regulator and the relevant legislation. In some jurisdictions the regulator is accountable to the Minister (through the Department). In others there is an overseeing Board. In some jurisdictions a separate body is given the monitoring and review function by legislation (as in Tasmania with the Board having that function under Part 2 of Schedule 2 of the WHS Act).

Reporting to the relevant monitoring body or person varies significantly between the jurisdictions, as does whether the reporting (or part of it) is made public. Reporting commonly includes statistical data on fatalities, injuries and claims. Some regulators report on their activities. In some jurisdictions the regulator provides details of the way in which their activities relate to relevant strategy and action plans.

Findings and Recommendations

We have been provided with Regulators Roundup reports that are regularly provided by the Regulator to the Board. These reports are very detailed and enable the Board to be aware of the key activities of the Regulator, strategic priorities, performance against a small number of indicators, injury and claims experience, and matters relevant to the management of WorkSafe Tasmania and the Inspectorate. The information reported to the Board is industry sector specific and by region.

The information provided to the Board is consistent in nature with the most detailed of that reported in other jurisdictions. Further information of a historical nature (due to time lag), providing a comparison between jurisdictions on a wide range of metrics, is available to the Board in the form of the Comparative Performance Monitoring Report that is collated and released by Safe Work Australia.

As noted below, the Strategic Plan for the period 2018-2023 is being completed and sets out 4 key strategies that deal with targeted harm reduction, building culture and capability, ensuring regulatory frameworks are contemporary and effective, and striving for excellence as a regulator. Throughout the Plan are statements of what will be done, but not how. We have recommended that operational and work plans be developed that support the Strategic Plan, indicating what action is being taken to achieve the intended outcomes in each area of the Strategic Plan.

In monitoring the performance of the Regulator, the Board should ensure that it is provided with information that relates specifically to each of the Strategies and the supporting operational plans. The Board should be concerned to assess the activity of the Regulator and the Inspectorate, but also whether that activity is supporting the Strategic Plan and providing measurable benefits. For example, the Board may be interested to have:

- data on injuries and claims in each of the target areas for harm reduction;
- detail of the activities of the Regulator and Inspectorate specific to the target areas; and
- whether, and how it is demonstrated that, the activities have contributed qualitatively and/or quantitatively to improvements in outcomes.

This will assist the Board to ensure the ongoing validity of the Strategic Plan and supporting plans, and whether activities and resources of the Regulator are being appropriately focussed.

While it is not the role of the Board to encroach on the authority of the Regulator or to direct specific action, the role of the Board in monitoring and reviewing the performance of the Regulator is similar to the traditional role of a board of a company.

The Board should of course carefully consider all reports provided by the Regulator, ask questions or seek further information as appropriate, and challenge any significant unsubstantiated comments or assertions.

This review is an example of how the Board may review the performance of the Regulator, in accordance with its function to do so. Quality, regular reporting by the Regulator to the Board should enable the Board to monitor the Regulator sufficiently that it will only require a formal review of this nature infrequently.

We anticipate the Regulator will provide updates to the Board in the Regulator's Roundup on the progress of initiatives taken in response to our recommendations. The Board should ensure that the updates are provided.

Recommendation 27

The Board should, following finalisation of the WorkSafe Tasmania Strategic Plan 2018-2023, obtain from the Regulator and consider operational plans that set out how the Strategies will be met and enable the Board to monitor performance against those plans.

The Board should require the Regulator to report regularly in the Regulator's Roundup on activities and how they relate to the Strategies.

Recommendation 28

The Board should require regular reporting by the Regulator on action taken towards adopting and implementing such of the recommendations in this report as are accepted.

4.4. Regulator strategy and plans

Discussion

Most of the WHS regulators have published documents (variously described as strategic plans or corporate plans) that identify the strategy of the regulator to respond to identified priority areas for action.

The strategic plans (however described) are generally consistent, in part as they are driven by relatively common datasets and are in pursuit of the objects set out in the Australian Work Health and Safety Strategy 2012-2022. The plans identify the WHS outcomes in the jurisdiction (fatalities, injuries and claims), identify key areas of concern and briefly state strategies for responding to those concerns. The main areas of focus are consistently based on a risk management approach of minimising risk in high risk industries and injury mechanisms, and from high consequence incidents. Many of the plans also identify strategies for enabling and building the capability of the regulator to achieve the targeted harm reduction.

Each regulator has subordinate or supporting (action or business) plans to provide greater detail of the desired outcomes from the strategic plan, including the operationalisation of strategy elements (e.g. targeted workplace visits, educational and promotional activities). Only some of the regulators have formalised action or business plans that are published (in whole or in part).

Findings and Recommendations

The draft Strategic Plan 2018-2023 is an improvement on previous plans and is consistent with Strategic Plans and Corporate Plans of other WHS regulators. The Strategic Plan identifies the areas to target for harm reduction, while also dealing with organisational issues and engagement with external stakeholders. The data confirms that the target areas for harm reduction are appropriate and we commend the focussing of resources and activities to those areas.

As with plans of this nature, the Strategic Plan is broad and comprises statements of intended behaviour and outcomes. It does not provide detail of the ways by which and means through which those intentions will be met.

The draft Strategic Plan refers to a number behaviours and activities that are identified in this report as areas requiring improvement. This demonstrates a clear understanding by the Regulator of what is needed to improve the contribution of the Regulator and Inspectorate to health and safety outcomes in Tasmania, and a clear intention to address the key areas. Our recommendations are intended to assist the Regulator to achieve the intended outcomes stated in the Strategic Plan.

While it may be a matter of presentation rather than substance, the draft Strategic Plan 2018-2023 does not identify critical success factors in that or similar terms. The Strategic Plan does not include performance measures. The plan, and measurement and reporting against it, may be improved by those matters being included.

There are various ways of presenting information in a strategic plan and supporting operational or business plans. Some examples include:

- The Business Plan for NT WorkSafe includes, in an Excel document, the elements of the strategy, specific division strategies, deliverables, performance measures and timelines. This provides a clear link between the strategic elements and activities.
- The summary of the current 5 year Strategic Plan of the Queensland Workplace Health and Safety Board includes a good summary of the strategic levers, 5 year key outcomes, performance measures and risk mitigation measures.
- WorkSafe Service Industries and Specialists in Western Australia has a Business Plan in a table format, with headings 'what are we working towards', 'how we will know this is achieved' (with references to specific projects), 'timeframe' and 'responsibility'.

We have reviewed the detailed Operational Plan 2014-2015 of WorkSafe Tasmania and consider this to represent a good approach and would be a useful precedent for the development of an operational plan to support the Strategic Plan. The document is annotated '*For internal use only: NOT FOR PUBLIC DISTRIBUTION*'. We consider that the publication on the website of WorkSafe Tasmania of an abbreviated operational plan would provide for transparency and assist duty holders and the public to understand what the Regulator is doing in pursuit of the Strategic Plan, and what duty holders can expect from inspectors.

The elements of the Strategic Plan should be supported by both proactive and reactive interventions. The operational plan and work plans should include details of the proactive activities, such as risk based planned workplace inspections and media campaigns.¹¹

A common concern raised in our discussions with stakeholders, regulators around Australia, and is consistent with our experience working with duty holders under the WHS Act, is a lack of understanding of the 'cascading' and concurrent nature of duties under the WHS Act (through the contracting chain, supply chain and duties of officers and workers) and of the duty in section 46 of the WHS Act for each duty holder to consult, cooperate and coordinate their activities with others having a duty under the WHS Act in relation to the same matter. A failure by duty holders to understand

¹¹ For a discussion of proactive interventions by regulators around Australia see *Supporting and enforcing compliance with Australia's harmonised WHS laws*; (2017) 30 Australian Journal of Labour Law p30 at 40-45.

these fundamental concepts in the WHS Act can result in significant health and safety risks being unknown or uncontrolled.

The intention of the duty in section 46 was in part, combined with the concurrent duties, to encourage large businesses to support smaller businesses. Many small businesses work with larger businesses, who have knowledge and systems that can assist the small businesses to understand and control health and safety risks. As we have identified in 2.2 above, industry in Tasmania is comprised of many micro and small businesses.

We recommend that the Regulator provide, either specifically in the Strategic Plan or as a key element of operational and work plans, for education of duty holders on the concurrent nature of the duties and the duty to consult etc in section 46 of the WHS Act. The relevant plan should also provide for compliance with section 46 to be a focus of enforcement activities.

Recommendation 29

The Regulator/Chief Executive Officer and the Department of Justice should consider the inclusion in the Strategic Plan of references to critical success factors and performance measures, and a summary graphic similar to that in the Strategic Plan of the Queensland Workplace Health and Safety Board.

The Regulator/Chief Executive Officer should ensure supporting operational plans, work plans and strategic tracking and performance reporting tools, are prepared as soon as possible after the Strategic Plan 2018-2023 has been finalised. Those documents should set out how each of the Strategies will be met and enable monitoring of performance against those plans. This should include a formal plan for data retention and analysis, to enable reporting and review of work activities, work allocation and reporting against plans.

The Operational Plan 2014-15 provides a valid approach and a useful precedent.

An abbreviated version of the operational plan should be published on the website of WorkSafe Tasmania to provide for transparency, and assist duty holders and the public to understand what the Regulator is doing in pursuit of the Strategic Plan and what they can expect from inspectors.

Recommendation 30

The Regulator/Chief Executive Officer should include in the Strategic Plan 2018-2023, or operational plan, details of how the Regulator and Inspectorate will promote an understanding of, and compliance with, the duty in section 46 of the WHS Act for duty holders to consult, cooperate and coordinate activities.

4.5. Legislative functions, powers and tools

4.5.1. Functions

The functions of the Regulator and inspectors are set out in Appendices 4 and 6 respectively. We consider the functions to be clearly stated, consistent with the object of the WHS Act set out in section 3 and we do not make any recommendations in relation to the functions.

The functions in the WHS Act are being considered as part of the review of the WHS Act being undertaken through Safe Work Australia. We recommend that this issue be revisited following the release of the report from that review.

4.5.2. Powers

The powers of the inspectors are set out in Appendix 6 and the Regulator has such powers as are necessary or convenient to carry out the functions of the Regulator. We consider the powers to be clearly stated and enable the Regulator and inspectors to fulfil their functions under the WHS Act. The powers are consistent with and provide for support of the object of the WHS Act set out in section 3. We do not make any recommendations in relation to the functions.

The appropriateness of the powers in the WHS Act is a matter being considered as part of the review of the WHS Act being undertaken through Safe Work Australia. We recommend that this issue be revisited following the release of the report from that review.

4.5.3. Legislative tools

Subject to the following comments, the legislative tools available to the Regulator and Inspectorate are, in our view, adequate to enable proper and effective enforcement of the WHS Act.

The issue of the adequacy of legislative tools is being considered as part of the review of the WHS Act being undertaken through Safe Work Australia. We recommend that this issue be revisited following the release of the report from that review.

The enforcement regime in Tasmania includes infringement notices for a specified number of administrative offences. It was suggested to us by one person that the number and range of breaches for which an infringement notice may be issued should be increased, as these notices provide immediacy of response by duty holders. The use of infringement notices around the jurisdictions, and the breaches for which they may be issued, is inconsistent.

There are arguments both for and against the use of such notices and the scope of relevant breaches. Infringement notices should be used only for administrative or 'process' breaches, and should not be used for breaches that result in high risk or are systemic and may result in a range of uncontrolled risks.

The Regulator may wish to undertake a separate review of the use of infringement notices, but we do not make any recommendation in relation to that.

While we consider the legislative tools available to be adequate, we refer to our comments in 4.6.3 on the use of the available tools (particularly improvement notices and enforceable undertakings).

4.6. Regulator activities not involving Inspectorate activities

4.6.1. Advising the Minister

Findings

We have been informed that the Regulator routinely advises the Minister in writing and in meetings on a range of matters specifically as they relate to the operation and effectiveness of the Work Health and Safety Act 2012 which can include legislative amendment, codes of practice and the application of specific legislative provisions to constituent concerns. The Regulator has fortnightly meetings with the Minister and advisors for this purpose.

We have been provided with general detail of the subjects on which advice is provided, but it is not appropriate for such confidential matters to be disclosed in this report. The information provided to us does, however, enable us to find that the Regulator properly fulfils this function.

4.6.2. Strategic planning – promoting the object of the WHS Act

Findings and Recommendations

We refer to our discussion and recommendations in part 4.4 above. We have found the process of the Regulator for the formulation of the Strategic Plan to be sound, including internal and external stakeholder consultation. The provision of formal supporting operational and work plans would provide greater transparency and allow for validation of the activities of the Regulator and WorkSafe Tasmania towards meeting the strategic objectives.

4.6.3. Monitoring and enforcing compliance (including proceedings)

Discussion

In this section we consider the performance of the Regulator in relation to functions (b) and (h) in section 152 of the WHS Act.

The performance of the Regulator in relation to the Compliance and Enforcement Policy adopted by the Regulator is central to this discussion, and is specifically referred to in the scope for the review.

We note that effective enforcement of the WHS Act, including successful and well publicised prosecutions are a key element to promoting compliance and risk management by duty holders. This is both due to the general deterrence of breach from a prosecution and the education of duty holders on what may constitute compliance or breach. Each successful prosecution raises the profile of the Regulator, makes enforcement more visible and increases the perception that a duty holder may be held accountable for failing to comply with the law. Reporting details of the circumstances in which an incident occurred in relation to which a penalty has been imposed, helps duty holders to understand commonly encountered risks and the need for vigilance and diligence in risk management. Publicity for an unsuccessful prosecution may provide a sense that even if caught offending, a duty holder may in any event escape penalty.

The table on page 16 of part 2 of the 19th Comparative Performance Monitoring report (Safe Work Australia), sets out the numbers of prosecutions, success rates and penalties across the jurisdiction over the period of 5 years up to the end of the 2015-2016 financial years.

This shows the following comparison for Tasmania and other WHS Act jurisdictions that are relatively similar:

Activity	Financial year	Tasmania	South Australia	Northern Territory	Queensland
Legal proceedings finalised	2011/12	10	40	4	98
	2012/13	8	29	1	98
	2013/14	5	27	1	53
	2014/15	0	29	0	54
	2015/16	6	23	3	48

Conviction, order or agreement	2011/12	7	36	4	78
	2012/13	7	23	1	78
	2013/14	5	21	1	47
	2014/15	0	17	0	42
	2015/16	2	19	1	42
Fines (\$,000)	2011/12	\$175	\$1,825	\$336	\$3,161
	2012/13	\$60	\$1,386	\$120	\$2,470
	2013/14	\$33	\$956	\$5	\$1,910
	2014/15	\$0	\$737	\$0	\$1,800
	2015/16	\$75	\$778	\$152	\$1,104

The use of data for a jurisdictional comparison is rendered difficult by the many differences between the jurisdictions. The greater concentration of businesses in larger jurisdictions (meaning less travel) and the micro nature of businesses in Tasmania, mean that reference to raw numbers to compare Tasmania with other jurisdictions may not be a valid approach.

Prosecution outcomes are only part of the measure of performance, not reflecting the contribution made by the Regulator and the Inspectorate to improved WHS performance through aiding risk management.

It appears from the data in the above chart that the number of prosecutions is relatively consistent on a pro-rata basis after normalisation to current labour force data for each State (except for 2014/2015). The proportion of prosecutions that are successful and average fines imposed are significantly lower in Tasmania than in relatively comparable States.

We also note that the trend of fewer prosecutions each year appears to have been reversed in many of the States (for example, recent data from WorkSafe Victoria shows an increase in the number of prosecutions by approximately 20%).

Compliance and enforcement policy and supporting documents

The Regulator has adopted the National Compliance and Enforcement Policy (“**NCEP**”), as have the regulators in all other jurisdictions in Australia. The NCEP sets out the enforcement hierarchy to be applied and the general approach of the regulator in applying that hierarchy in particular circumstances.¹²

¹² For an interesting discussion on the NCEP and regulator models and approaches see *Project 3: Regulator Compliance Support, Inspection and Enforcement: Report to Safe Work Australia* (2015, Liz Bluff, Richard Johnstone and Neil Gunningham), kindly provided by Dr Bluff.

Some jurisdictions have supplementary and more detailed documents which provide greater detail on how the NCEP will be applied.

WorkSafe Victoria has produced a brief guide on its compliance and enforcement policy and the various WorkSafe documents supporting it, and is currently finalising a guide on each element of the NCEP as applied by it. WorkSafe Victoria is also developing “an OHS compliance and enforcement plan” for publication, which will identify the activities to be undertaken to support the strategic priorities of the organisation. This is aimed at ensuring a risk based approach to compliance and enforcement.¹³ WorkSafe Victoria has a number of documents relating to aspects of compliance and enforcement, including a series of guidelines under section 12 of the Victorian Occupational Health and Safety Act, described as ‘WorkSafe Positions’ and supplementary enforcement guideline documents.

Section 230(3)(a) of the WHS Act requires the regulator to publish on its website general guidelines in relation to the prosecution of offences and the acceptance of WHS undertakings. All WHS Act jurisdictions (including Tasmania) have such guidelines, but the content varies. NT WorkSafe includes information in its guideline about the stages of a prosecution through the different courts. The guideline of the Regulator that is on the WorkSafe Tasmania website adopts by reference the detailed information in the Prosecution Guidelines of the Director of Public Prosecutions (“DPP”), but that information is not found on the WorkSafe Tasmania website or linked to the guidelines on the website of the DPP.

Comcare has a regulatory guide on prosecutions on its website, which provides information on the prosecution process and decision-making.

SafeWork SA has a Principles of Operation document for inspectors that sets out briefly how they are to conduct themselves in their compliance and enforcement activities, including references to their activities at a workplace and during investigations. That document is publicly available on its website.

The power to issue notices under section 155 of the WHS Act

It is common among the WHS jurisdictions for the regulator to delegate to inspectors the power in section 155 to issue a notice seeking information. The Regulator has not issued such a delegation other than to the Director of Industry Safety and the Chief Inspector of Mines (but not to individual inspectors) and otherwise exclusively exercises that power in Tasmania.

The use of WHS (enforceable) undertakings

The acceptance by the Regulator of WHS undertakings under Part 11 of the WHS Act (otherwise known as enforceable undertakings) is a measure that sits in the enforcement hierarchy above notices and below court sanctions.

Simply stated, the undertaking has the effect that a prosecution will not proceed in relation to matters covered by the undertaking so long as the terms of the undertaking (actions promised) are met.

While a WHS undertaking can be accepted by the Regulator before a prosecution is commenced, the almost universal practice around Australia is for consideration of a WHS undertaking not to occur prior to the commencement of a prosecution. The consideration of an undertaking commences with an application by the alleged offender and regulators do not encourage or invite an application, other

¹³ Some of these measures are in response to recommendations in the report of the Independent Review of Occupational Health and Safety Compliance and Enforcement in Victoria.

than by informing an alleged offender of the WHS undertaking process when, or shortly after, serving the prosecution proceedings.

WHS undertakings provide an opportunity to improve WHS performance in the business, or by an individual (worker or officer). The use of notices or the giving of directions is limited to specific issues and not to underlying enablers of performance. An undertaking can be broader and provide for systems or skills enhancement that will underpin improvement in health and safety performance by enabling better management of a range of risks. WHS undertakings must be complied with, and in this way they are effectively a directly coercive tool unlike the giving of advice by the regulator.

The jurisdictions each have their own policy positions and processes relating to the enforceable undertakings, with some differences in detail made available to duty holders.

While all WHS Act jurisdictions and Victoria have provision for enforceable undertakings, the use of them varies significantly between jurisdictions and from time to time within jurisdictions. Many of the WHS jurisdictions have not had an accepted WHS undertaking during the time in which the WHS Act has been in operation.

Findings and Recommendations

Compliance and enforcement policy and supporting documents

The NCEP sets out the tools, approach and considerations in decision compliance and enforcement but does not set out how this will be actioned.

We recommend, for the assistance of inspectors and the public, that the Regulator develop and publish supporting and more detailed documents, similar to those in place and being developed by WorkSafe Victoria and including prosecution process information similar to that in the NT WorkSafe guide. That documentation should include, or provide a link, to the DPP prosecution guidelines that are followed by the Regulator.

Recommendation 31

The Regulator should develop and publish more detailed documents to support the Compliance and Enforcement Policy, providing information for inspectors and the public on how the Policy will be applied and specific powers exercised. Documents currently published and being developed by WorkSafe Victoria may provide useful guides as to the nature and content of such documents.

The Compliance and Enforcement Policy, or supporting documents, should include or provide a link to the detail contained in the DPP Prosecution Guidelines that are followed by the Regulator.

Providing advice on the issuing of notices and voluntary compliance

The first compliance tool mentioned in the NCEP is the 'giving of advice on compliance and seeking voluntary compliance'. Further down the list (or up the hierarchy of enforcement measures) is the issuing of an improvement notice.

Inspectors, industry and unions have all noted that until the last year or so, voluntary compliance was almost always sought, with very few improvement notices issued. The reverse is now said to apply, with inspectors being required to issue notices unless voluntary compliance is achieved while they are at the workplace.

The question whether voluntary compliance should be permitted or a notice issued is one of controversy and ongoing debate throughout Australia.

We note this issue raises squarely the question of the approach of an excellent regulator in choosing the appropriate intervention strategy. We refer to the discussion on this in Appendix 7 and particularly to the paper of Professor Neil Gunningham referred to in that discussion¹⁴. The view of Professor Gunningham is that a regulator should invoke different strategies to engage effectively with different circumstances, which may include advice and persuasion through the provision of information and negotiating outcomes. That is, whether to permit voluntary compliance or impose coercive measures (notices) may depend on the circumstances.

Seeking voluntary compliance is said to assist the relationship between the inspector and the duty holder, be more reasonable in many circumstances, and is consistent with time being provided in improvement notices for a breach to be remedied. Immediate and serious risks can be the subject of a prohibition notice. Industry representatives assert that the issuing of a notice has significant negative effects on relationships with workers, clients (particularly in tendering) and public reputation. Courts have recognised the negative effects of a notice on a duty holder and have stated that a notice is a 'blunt tool' that should only be used after giving the duty holder a reasonable opportunity to comply – subject of course to urgency and seriousness of risk requiring a notice to instead be issued immediately.

The arguments for the issuing of improvement notices are based on prudent risk minimisation and on ensuring that the Regulator and inspectors are not subject to criticism for failing to act properly on an identified risk and potential breach.¹⁵ Simply stated, the interests of safety and the perception of the Regulator and inspectors as being strong on compliance outweigh the interests of the duty holder.

We are concerned that both approaches miss the need to ensure that an appropriate enforcement approach is adopted that is specific to the circumstances and for each duty holder. A history of timely voluntary compliance by a duty holder may support an inspector allowing that to occur in a particular case. A history of repeated non-compliance or delayed compliance should shift the balance towards issuing a notice rather than permitting time for voluntary compliance. A notice may be justified instead of permitting voluntary compliance where a duty holder is found to be non-compliant notwithstanding a public information campaign on the relevant safety hazard or risk.

Bluff et al¹⁶ identified that WorkCover NSW applied two broad approaches for an inspection, being a cooperative or accommodative approach, where the inspector provides advice and uses persuasion to obtain compliance and an enforcement approach with notices and fines used to obtain compliance. WorkCover NSW considered the two approaches were not exclusive and could be used together, with the aim being to support businesses with high behaviour and capability while working to improve the capability and/or behaviour of businesses in the low range.

¹⁴ *Compliance, Enforcement and Regulatory Excellence*, (2015, Neil Gunningham, Australian National University); Paper prepared for the Penn Program on Regulation's Best-in-Class Regulator Initiative; online at law.upenn.edu/live/files/4747-gunningham-ppr-bicregulatordiscussionpaper-06

¹⁵ The Supreme Court in *Kent v Gunns Limited* [2009] TASSC 30 (12 May 2009) found that a failure by an inspector to require action to address an issue could be a relevant factor in a prosecution – in that case supporting an acquittal.

¹⁶ *Project 3: Regulator Compliance Support, Inspection and Enforcement: Report to Safe Work Australia* (2015, Liz Bluff, Richard Johnstone and Neil Gunningham), at p55.

The concern about making clear to the duty holder what is required, both to ensure proper and timely steps for compliance and to avoid the negative consequences of not issuing a notice, can be met in appropriate circumstances by the inspector providing an inspection record to the duty holder.

The record could state:

- that the inspector had a reasonable belief of breach;
- what the duty holder undertook to do to remedy a breach or risk;
- the time within which that would occur;
- what the consequences may be of a failure by the duty holder to take the identified steps;
- the time for compliance that would have been included in an improvement notice (e.g. 2 months for improvement in systems or training);
- that the inspector would return within that period to assess the status of improvement measures (say after one month); and
- that the inspector may at that time, if not satisfied, issue an improvement notice with compliance required by the original compliance date.

The effect of the inspection record in considering subsequent breaches would be equivalent to that of an improvement notice, as it would record the alleged breach and measures required to be taken.

The benefit of use of an inspection report was demonstrated in the following comment relating to inspection performance at a particular workplace:

Not following procedures creates a risk of the exercise of compliance powers being overturned by the courts. In this instance, the procedures suggest that the inspector should leave a written inspection report with the PCBU following the inspection. While there is some documentation in relation to this matter, there are gaps in the written record where issues that have been raised are not formally addressed. There is no reliable record for either the PCBU or WorkSafe to provide certainty or clarity on the outcomes of an inspection or the next steps to take. As a result, perceptions of work being 'passed' can be formed which is not an accurate reflection of the Inspector's recollection of the language used or the advice given on site.

The use of an inspection record occurs in a number of jurisdictions (in Victoria these are referred to as Entry Reports and by Comcare and SafeWork SA as Inspector Reports).

Information available to inspectors and duty holders does not provide clarity on the process for deciding when voluntary compliance may be permitted or a notice instead be issued. An inspection record document has been provided by the Regulator for use by inspectors, but is not widely used.

The Regulator should permit an inspector to seek or allow voluntary compliance where appropriate, but should direct inspectors to ensure that if compliance has not been achieved while the inspector is at the workplace, the inspector should monitor voluntary compliance sufficiently to ensure the opportunity is available to issue a timely notice in the event of a failure to comply as agreed.

Recommendation 32

The Regulator should develop and publish more detailed explanation of the matters to be considered by an inspector in determining how to exercise their discretion to seek or permit voluntary compliance or issue an improvement notice and the process of consultation by the inspector with the duty holder and any relevant health and safety representative in reaching a decision.

This document should include a note that an improvement notice is a precautionary risk tool to provide for health and safety improvement, is not punitive, and while based on a reasonable belief that a breach has occurred does not mean that a breach has in fact occurred.

Recommendation 33

The Regulator should issue and enforce a direction requiring inspectors to complete and provide to the duty holder and any relevant health and safety representative an inspection record or like document, prior to or as soon as reasonably practicable after leaving the workplace.

The power to issue notices under section 155 of the WHS Act

The Regulator has delegated the power in section 155 to the Director of Industry Safety and the Chief Inspector of Mines (but not to individual inspectors) and otherwise exclusively exercises that power in Tasmania. We consider the decision of the Regulator as to the extent to which the Regulator has delegated the power to be proper in the circumstances.

We have found that the exercise of the power to issue section 155 notices by inspectors in other jurisdictions has often been inappropriate and the notices poorly drafted. Section 155 notices are, as the section makes clear, intended to be used only after all other reasonable attempts have been made to obtain the information sought. They are, however, often used by inspectors early in an investigation as an alternative to identifying and interviewing potential witnesses. The notices are accordingly often lengthy, vague, fishing and address questions to the wrong person.

The delegation of the power to issue section 155 notices may be appropriate where the inspectors are sufficiently trained and skilled to exercise proper judgement in their use and to draft them well (perhaps with the assistance of legal advice).

The recommended further investigations training of the Inspectorate in Tasmania may provide the Regulator with confidence to delegate the power to them.

Documents supporting inspectors undertaking investigations

The Regulator has developed a number of documents to assist inspectors in undertaking investigations, many of which have been released for use by them. This is a means through which the Regulator is performing the functions of seeing to the effective enforcement of the WHS Act and supporting prosecutions under the WHS Act.

The Regulator has prepared a draft 'Points of proof' evidentiary guide for use by inspectors during an investigation. The document is comprehensive and on a preliminary reading appears to be of good quality and will be most useful. We recommend that the document be finalised, with a legal review undertaken, and then provided for inspectors as soon as possible. Further investigation training should refer to this document. We do not recommend that this be a public document.

Comments and recommendations are made in other parts of this report in relation to training and implementation of processes and supporting documents.

Expert evidence and advice

The current and recommended processes of the Regulator and inspectors in undertaking investigations and making decisions in relation to enforcement action (including prosecutions) involve the obtaining of advice from technical experts and the Director of Public Prosecutions.

As we have recommended earlier in this report, we consider that there should be a dedicated budget allocation for the engagement of experts and clear guidelines on their engagement and use. This may include legal advice being obtained in relation to the engagement and use of the expert¹⁷, and reference to the Points of Proof document.

¹⁷ Significant issues arose in relation to the engagement and use of an expert in the matter of *Copper Mines of Tasmania Pty Ltd v Cooper* [2018] TASSC 25 (25 May 2018).

We also recommend that the Regulator and the DPP put in place guidelines to ensure that the protection of legal professional privilege applies to advice provided by the DPP during an investigation, prosecution decision making and other proceedings.¹⁸

Recommendation 34

The Regulator should develop with legal advice, and distribute to inspectors, guidelines to ensure that the protection of legal professional privilege applies to advice provided by the DPP during an investigation, prosecution decision making and other proceedings.

The use of WHS (enforceable) undertakings

The WorkSafe Tasmania website includes a detailed set of information documents on the use of WHS undertakings, including very detailed 'Guidelines for proposing a WHS Undertaking'. The Regulator has developed for use a comprehensive set of documents to manage the process of considering and making a decision on an application for a WHS undertaking. We consider this material to collectively provide sufficient information for duty holders and an appropriate process for considering applications.

There have not been any WHS undertakings accepted by the Regulator since the commencement of operation of the WHS Act in Tasmania.

In our view, there are health and safety benefits to be derived from WHS undertakings being accepted, with those benefits enhanced the earlier an undertaking is accepted. We consider the promotion of undertakings by the Regulator, generally and in particular cases, to be consistent with the functions of the Regulator and the object of the WHS Act.

Consideration of and advising on the various policy and process considerations surrounding the use of WHS undertakings is outside the scope of this review. While the Regulator may wish to undertake or commission a review of the lack of use of WHS undertakings, in the absence of applications for WHS undertakings, this is a low order priority.

Decision-making on investigation responses

Decisions on whether to initiate a prosecution for alleged breaches of the WHS Act are made by the Regulator after considering the investigation report and other matters in a meeting of the Investigation Review Committee ("IRC"). The IRC is informed by investigation plans and associated report outcomes. An evidence matrix is to be used by all inspectors undertaking an investigation.

Investigation Briefing Reports are to be reviewed by the Team Leader in consultation with the investigation team, signed off and then presented to the Regulator within the context of the IRC. The investigator may be invited to present their report.

We have viewed the internal policy document that sets out in detail the role, composition and operation of the IRC, including the matters considered by it when reviewing an investigation. We are satisfied that the proper operation of the IRC should provide a proper means of supporting decision making by the Regulator.

The Regulator has developed a detailed Points of Proof for adoption after review and legal advice. That document will greatly assist the Regulator and IRC in reviewing the adequacy of investigations and considering whether a prosecution is appropriate; in addition to assisting inspectors in undertaking investigations and review by their Team Leaders.

¹⁸ The Supreme Court found in *Roadside Products Pty Ltd v Cocker* [2018] TASSC 6 (13 February 2018) that legal professional privilege in a report was waived by voluntarily providing it to the Coroner.

The Regulator has undertaken a review of workplace fatality investigations. This has enabled him to identify opportunities for improvements in the investigation and decision making processes, some of which are reflected in recent changes and others are the subject of changes underway or proposed. We commend the Regulator for this initiative and action taken in response.

The conduct of prosecutions

The conduct of prosecutions is undertaken by the Regulator through the DPP. The enhanced working relationship between the Regulator and the DPP, together with the arrangements made between them, and the implementation of our recommendations relating to investigations by inspectors (including training) should improve the likelihood of success of prosecutions, taken in a timely manner.

4.6.4. External provision of advice, information and statistics

Discussion

The approach of WHS regulators to the dissemination (to stakeholders) and the publication of statistics and similar information is inconsistent. Some jurisdictions regularly provide detailed data and analysis to stakeholders (e.g. WorkSafe Victoria through the information made available quarterly to the Stakeholder Reference Group), while some regulators do not provide or publish data other than by contributions to annual reports and the Comparative Performance Monitoring Reporting.

The amount and quality of advice and other information on regulator websites also varies considerably. The navigability of regulator websites and the ability of a duty holder or other stakeholder to identify the existence and location of information, also varies significantly.

Collectively, the regulators and Safe Work Australia have an enormous amount of information for duty holders and the community to understand the WHS Act and regulations, supporting codes of practice, guidance information and references to technical detail including Australian Standards. Not all of the information can be found on the website or in publications of any individual regulator; and it is often difficult for a duty holder to identify how the law applies to them and what guidance is available.

Findings and Recommendations

The Regulator regularly collects and analyses information relating to health and safety performance and outcomes. The Regulator provides regular information to the Board by way of the Regulator's Roundup. The Regulator has not historically provided similar information to stakeholder organisations or the community.

Some statistics are provided to the public by the Regulator in the Strategic Plan, and as part of presentations at conferences and other events. Some statistical information is provided to stakeholder organisations during meetings by way of updates or as relevant to the matters under discussion.

The Regulator contributes to annual reports of the Board and the Department of Justice, but does not separately publish statistics. The Regulator provides data for inclusion in the Comparative Performance Monitoring Report administered by Safe Work Australia.

The nature and extent of information published by regulators, and the frequency with which publication occurs, varies greatly between regulators. Our experience has demonstrated that a regulator can gain significant benefits from regular reporting of data and sharing information with stakeholder organisations, including:

- improved perceptions of regulator transparency;
- encouragement of timely input by stakeholders into current and planned initiatives; and
- enabling stakeholders to understand and support regulator initiatives.

WorkSafe Victoria provides a large amount of information to stakeholder representatives on the Stakeholder Reference Group (“SRG”) on a quarterly basis, and engages with the stakeholders in meetings of the SRG.

A significant amount of the information provided to the Board in the Regulator’s Roundup would, in our view, be useful for stakeholder organisations if it was provided to them on a quarterly basis, a short time after it has been considered by the Board. The information so provided could include the status of current initiatives. The information may also be condensed into a summary form for regular publishing on the website of WorkSafe Tasmania.

We note our recommendations that the reporting by the Regulator to the Board should include the status of the operational plan, and linking activities to outcomes and performance against the Strategic Plan and operational plan. That information could usefully be provided to stakeholder organisations and published on the website.

Recommendation 35

The Regulator should regularly (e.g. quarterly) provide to stakeholder organisations statistical information and information about the initiatives of the Regulator and WorkSafe Tasmania. The information may comprise information from the Regulator’s Roundup provided quarterly to the Board. The Regulator should also regularly publish condensed versions of that information on the WorkSafe Tasmania website.

We have considered the information provided to duty holders and the community in part 4.2.4 above and refer to our recommendations in that part.

4.6.5. *Fostering cooperation and consultation between duty holders and workers and their representatives*

Discussion

We refer to the discussion and our findings and recommendations in Part 4.2.4, identifying benefits to the Regulator from obtaining the support of stakeholders through effective engagement with them.

The function (e) of the Regulator in Section 152 is focussed on achieving compliance and effective risk management through workplace specific relationships and processes.

The WHS Act contains a structured approach to supporting duty holders to achieve compliance and effective risk management, through workplace representation (through elected health and safety representatives), contribution to informed risk management decision-making (through consultation and the use of health and safety committees and health and safety representatives and persons assisting them) and the resolution of issues that remain after appropriate consultation has occurred (through issue resolution and rights of entry to the workplace by WHS entry permit holders).

This supplements (and is intended to minimise the need for) advice, compliance and enforcement activities of an inspector at the workplace. Given the limited ability of an inspector to attend a specific workplace, either planned or reacting to concerns raised, and particularly in view of this being a significant concern in Tasmania, the effectiveness of these workplace cooperation and consultation mechanisms is critical to minimise risk.

For the approach provided for by the WHS Act and referred to above to be actioned and effective:

- the provisions must be known and understood by the intended workplace participants (PCBUs and workers and their representatives);

- the respective workplace participants must know and understand the processes for support and enforcement to be provided by an inspector (e.g. enforcing requirements for representation, consultation, rights of workplace entry, and assisting in issue resolution); and
- there must be an expectation of the workplace participants that the Regulator and Inspectorate will in fact provide the support and assistance through advice and enforcement, including responding to and investigating as appropriate allegations of unlawful discrimination under Part 6 of the WHS Act.

Carrying out the function of the Regulator of fostering a co-operative and consultative relationship between duty holders and those to whom they owe duties and their representatives, should include external advice and support (e.g. on the website) and ensuring inspectors are provided with processes, training and directions to fulfil their role.

Information is available on workplace consultation, representation, issue resolution and the anti-discrimination provisions on various websites including Safe Work Australia and many of the regulators. We note our comments above on the variance in the information available on the websites of individual regulators and the ease (or lack of ease) of identifying and finding it.

The persons consulted by us almost unanimously identify failings by inspectors in supporting workers and health and safety representatives in compliance and risk management activities. Inspectors, unions and PCBUs have all commented that it is at best unusual for an inspector to seek out an elected health and safety representative when at the workplace, and to consult with them or workers on particular safety issues raised.

Findings and Recommendations

The WorkSafe Tasmania website includes information about consultation, issue resolution and about HSRs, including their functions and powers. The information is not prominent, being found through searching the website, which necessarily relies on knowing what to search for.

We recommend that as part of the review of the website, the Regulator/Chief Executive Officer provide more prominent information for PCBUs and workers. Examples of prominent home page or ease of navigation to information are the websites of NT WorkSafe, Comcare and WorkSafe Victoria.

Recommendation 36

The Regulator/Chief Executive Officer should as part of a review of the WorkSafe Tasmania website provide more prominently for information for PCBUs and workers about consultation, issue resolution and HSRs, including their functions and powers and protection against unlawful discrimination.

Unions have consistently told us that workers and HSRs are reluctant to raise health and safety issues with PCBUs or with inspectors for fear of 'retribution' from the PCBU. They have complained that concerns raised about discrimination that is prohibited by Part 6 of the WHS Act are not treated seriously by inspectors. Unions and individual PCBUs consulted by us have stated that it is uncommon for an inspector to seek out a HSR or engage with a HSR when attending a workplace; and inspectors attending workplaces do not engage with workers on health and safety issues, engaging only with representatives of the PCBU.

It is important that workers and their representatives are aware of their rights and encouraged to engage with PCBUs and inspectors in identifying risk management solutions, in the resolution of health and safety concerns, and in issue resolution (where concerns remain unsatisfied). It is also important to ensure that workers and their representatives feel supported and protected from unlawful discrimination, to encourage their participation in risk management.

We recommend that, for clarity and certainty, the Regulator issue a direction to inspectors under section 162 of the WHS Act requiring them when attending workplaces to seek out HSRs elected to represent relevant workers and to engage with workers and HSRs when monitoring compliance and considering health and safety concerns. The requirement to seek out and engage with HSRs is clearly stated in section 164(2)(c) of the WHS Act, and the requirement to seek out and engage with relevant workers is necessary to enable an inspector to properly carry out their functions and make informed decisions on whether and how to exercise their powers.

Recommendation 37

The Regulator should, for clarity and certainty, issue and enforce a direction to inspectors under section 162 of the WHS Act requiring them when attending workplaces to seek out HSRs elected to represent relevant workers and to engage with HSRs and relevant workers when monitoring compliance and considering health and safety concerns, as required by section 164(2). The direction should include a requirement that this be recorded on an inspection report relating of the workplace visit.

4.6.6. Promotion and support of education and training

We refer to the discussion and recommendations in part 4.2.4 of this report.

4.7. Activities of the Inspectorate

The activities of the Inspectorate are considered throughout the earlier parts of this report when considering the performance of the Regulator. To avoid repetition, we refer to the earlier discussion and recommendations and in this part of our report provide a brief summary of our findings.

4.7.1. Providing information and advice about compliance

The performance of inspectors in providing information and advice about compliance has been found to be variable. Concerns have been raised about inspectors':

- skills and experience; and
- opportunities to provide proactive advice.

This is discussed at length and recommendations made above to address these concerns.

4.7.2. Engaging with and supporting workers and their representatives

We refer to our comments and recommendations at part 4.6.5.

4.7.3. Review of disputed provisional improvement notices

This has not been raised with us as a concern by any person we have consulted.

4.7.4. Requiring compliance

We refer to our comments and recommendations in part 4.6.3, particularly in relation to voluntary compliance and the issuing of notices. We also note our comments on the use of inspection reports to confirm compliance requirements and expectations.

4.7.5. Investigating contraventions and assisting in prosecution of offences

We refer to our comments and recommendations in parts 4.2.5, 4.2.6 and 4.6.3.

4.8. Specific areas

4.8.1. Licensing and Accreditation (ADG Unit)

Discussion

Part 4 of the WHS Act, supported by specific provisions in the regulations, places requirements on PCBUs and specified workers for authorisation (licensing, registration and accreditation) of workplaces, plant or substances, or individuals. The enforcement of these requirements is supported by detailed provisions in the regulations.

The requirements for authorisation relate to things (workplaces, plant or substances) that have associated with them high risk of harm to workers and others, and to people who use or operate or exposed to them. The processes for authorisation are aimed at ensuring appropriate scrutiny of the thing has occurred before use, or that the individual using the thing has sufficient training and skill to be able to safely use it. Special processes and expertise are required to enable the Regulator to administer and enforce the authorisation provisions.

WHS regulators consistently provide for specific authorisation processes and documentation, administered through dedicated resources. In the case of the Regulator this is done through the Accreditation and Dangerous Goods Unit.

There is consistency in the processes and documentation used by WHS regulators to administer the regime for authorisation. This provides opportunities for streamlining processes, development of IT support, and sharing of processes and training between jurisdictions. This is occurring.

Findings and Recommendations

All relevant stakeholders consulted by us stated that the ADG Unit and its processes are in need of significant reform, with key issues being:

- poor ('antiquated') processes and documents for use in the process, including duplication;
- inadequate information technology – both as to usefulness and stability;
- senior inspectors with experience in the workplace are limited to activities with licensing, and are predominantly office-based (with the exception of field auditing of accredited assessors);
- an inadequate number of Client Service Officers ('CSOs');
- technical knowledge and skills of CSOs require enhancement to enable them to better administer the licensing process and lessen their need to seek advice from the inspectors;
- the need for inspectors to undertake work outside their area of expertise and experience, leading to inefficiencies from the need for time-consuming research;
- a lack of leadership, guidance and advice for CSOs, particularly on technical matters;
- a disconnect between the activities of the ADG Unit inspectors and general inspectors, other than through general inspectors seeking advice by telephone; and
- a failure (inability) to utilise the skills and experience of the ADG Unit Senior Inspectors to provide advice in the workplace, undertake workplace audits and to provide technical advice to assist inspectors undertaking investigations.

We note that a number of recommendations made in this report address many of these concerns. We also note that the IT platform and system have been considered and significant changes are proposed to be made to assist the licensing process.

Recommendation 38

The Regulator/Chief Executive Officer should with assistance from the Manager, Accreditation and Licensing, effect the following changes within the ADG Unit:

- remove inspectors from involvement in licensing and accreditation processes not requiring their experience and expertise (continuing as an expert resource for CSOs and to conduct field audits of accredited assessors);
- improve efficiency of the ADG inspectors by streaming work to meet their expertise;
- following a reduction in the licensing role of inspectors identify and direct them to proactive field activities - including workplace compliance auditing in their fields of expertise, providing advice to duty holders, assisting the general inspectorate in workplaces, assisting inspectors with technical advice during investigations, and pursuing specific risk-based initiatives;
- consider the feasibility of specific training of an inspector in the North and North-Western regions to provide local support to the ADG inspectors and other inspectors in the region;
- provide for an additional inspector in the ADG Unit, with experience in high risk work;
- undertake a training needs analysis for the CSOs and provide recommended training;
- increase the number of CSOs by at least one permanent role (initially) and one temporary administrative support, and determine after embedding IT and process changes whether any further increase is needed; and
- appoint a senior person with relevant training and skills to the role of Team Leader of the CSOs, to assist in the management of the licensing process and provide technical support, which will free up the inspectors.

Recommendation 39

The Regulator/Chief Executive Officer should implement as soon as this can reasonably be done, a 'state of the art' system and supporting information technology platform for the processing of licences (which may be by adopting and adapting processes used in other jurisdictions). The systems and IT platform should be aimed at improving efficiency and removing duplication.

4.8.2. Mines' Inspectorate

Discussion

The *Mines Work Health and Safety (Supplementary Requirements) Act 2012* supplements the WHS Act by adding specific roles and process requirements associated with mining operations. This includes the designation by the Regulator of a Chief Inspector of Mines, who is (subject to the direction of the Regulator) responsible for the oversight of inspectors assigned primarily to mines.

This recognises that mining operations have particular hazards and risks not generally encountered in other industries, requiring more detailed and specific risk management approaches. This also recognises that particular expertise is required to enable inspectors to effectively undertake compliance and enforcement activities – that expertise relating to the requirements in the legislation and regulations, and technical matters relating to mining operations and associated risks and risk controls.

Mining operations also have associated hazards and risks that are commonly encountered in other industries, particularly open cut and quarrying operations, and mines inspectors accordingly need to have knowledge in relation to those.

It is common around Australia for regulators to attend to WHS compliance and enforcement in mining operations through a dedicated mines inspectorate. This is in part due to the considerations noted above, and the history of dedicated mines inspectors operating under separate mines health and safety legislation.

A detailed review of the mines inspectorate was undertaken in 2017 which resulted in the Rowan report¹⁹. Many of the issues raised and recommendations made in that report are consistent with issues raised in other jurisdictions from time to time – most common being assertions of ‘regulatory capture’ by the industry. The Rowan report identified some opportunities for improvement in the activities of the mines inspectorate in Tasmania through adopting measures introduced in other jurisdictions.

Findings and Recommendations

We have considered the Rowan report and each of the recommendations and sought the views of relevant stakeholders. While our enquiries relating to the mines inspectorate were less extensive than those of the Rowan review, we have obtained the views of several people within WorkSafe Tasmania on the recommendations in the Rowan report, and have had the advantage of considering mines inspectorate issues as part of a broader review of WorkSafe Tasmania. We understand that some recommendations have not been supported, and the work towards meeting other recommendations is underway but incomplete. The recommendations in the Rowan report that are most relevant to our review of the Regulator are 1, 2, 4, 7, 9, 10 and 11. Our findings in relation to those recommendations are:

Recommendation 1 – the proposal for a levy on the industry has not been adopted by government and for the reasons set out above at part 4.2.2, we do not support such a levy. We refer to our recommendations in relation to funding which are relevant to, and will assist to provide additional funding for, the mines inspectorate.

Recommendation 2 – this recommendation is consistent with our views expressed in part 4.4. Work on supporting operational plans should be undertaken as soon as possible after the Strategic Plan 2018-2023 has been finalised.

Recommendation 4 – the question of sufficiency of administrative support for the mines inspectorate was not pressed with us. Our recommendations throughout this report to improve the support and effectiveness of inspectors are relevant to the work undertaken within the mines inspectorate and may remove or reduce any need for increased staff numbers. We recommend that further consideration of any need for additional resources within the mines inspectorate be deferred until our recommendations have been adopted.

Recommendation 7 – our recommendations relating to operational plans, process and document improvements and the undertaking of investigations are relevant to this recommendation. Recommendations specific to the mines inspectorate are made by us below.

Recommendation 9 – see our recommendations in part 4.2.5 dealing with inspector competencies and duty statements.

Recommendation 10 - see our recommendation in part 4.2.5 dealing with training of inspectors.

¹⁹ 2016-2017 Audit of the Office of Chief Inspector of Mines: Tasmania – Report to the Chief Executive Officer: WorkSafe Tasmania by Rowan & Associates Pty Ltd, 13 March 2017.

Recommendation 11 – see our comments and recommendations in part 4.6.3 on the development of documents supporting the Compliance and Enforcement Policy and the Investigation Process Manual.

The legislation applicable to the mines inspectorate contemplates that inspectors will be “assigned primarily to mines”, who are to be subject to the oversight and direction of the CIM.²⁰ Specialist skills and experience are required to properly and effectively enforce compliance with the specific requirements of the mines legislation and regulations. Inspectors should accordingly continue to be specifically appointed for and allocated to compliance in the mining sector.

There are very specific risks and requirements in mining (particularly underground mining), but many of the risks associated with mining are also common to other activities and sectors. We were told that some mines inspectors lack experience in those more generally encountered risks. We do not recommend a move of the mines inspectorate into, and be absorbed within, the general inspectorate. We do, however, consider there to be benefits from a closer working relationship and sharing of resources between the mines inspectorate and the Inspectorate more broadly. These include:

- increased ability to manage workflow fluctuations through the mines inspectors being able to be deployed from time to time assisting the general inspectors, and the general inspectors assisting the mines inspectors;
- enhancing the knowledge and experience of mines inspectors in a broader range of risks, that are encountered in mining but also exist elsewhere;
- increased flexibility in the availability of administrative and other support services; and
- providing assistance to mines inspectors in the investigation of incidents, through the technical and practical knowledge of the general inspectors and through the enhanced investigation skills of inspectors dedicated to investigations.

Care should be taken in implementing change to ensure there is no compromise of the ability of the mines inspectors to undertake their core activities under the legislation, or to dilute the amount of proactive field work currently being undertaken by the mines inspectors.

We refer to our comments above in part 4.2.3 in relation to regulatory ‘capture’ and the recommendation for rotation of inspectors to minimise the risk or perception of this occurring. This recommendation should be applied to the mines inspectorate to the extent that this is feasible. We also note the Rowan report recommendation for less predictable workplace visits, which would also lessen any perception of ‘weak’ enforcement by the mines inspectors.

We have been provided with draft reports on activities within the mines inspectorate. These represent a backward look at what has been done, across various types or categories of activity. These documents could usefully provide the basis for forward looking operational planning.

The reports and our discussions have confirmed that a good deal of proactive work is undertaken by mines inspectors, that is work that is not in response to notification of incidents or complaints, but is part of a program of assessment of compliance and risk management by duty holders.

The number of mines inspectors appears to be adequate for them to undertake their work, both proactive and responsive. The potential for the mines inspectors to be assisted by general inspectors, and the potential efficiency improvements through the implementation of new processes and training, will further enable the mines inspectors to meet the requirements of their role. Accordingly, no additional inspector resources are recommended at present.

We note that, for historical reasons unrelated to the requirements of the mines legislation, the mines inspectorate has been responsible for monitoring health and safety compliance in smelters. This does not appear logical, as the health and safety risks in smelters are those commonly found in large

²⁰ Section 8 of the Mines Work Health and Safety (Supplementary Requirements) Act 2012.

industrial and manufacturing complexes. This, and the location of the smelters (in the Southern region and Northern region) makes it more appropriate for this responsibility to be moved from the mines inspectorate to the general inspectorate.

Recommendation 40

The Regulator/Chief Executive Officer with the Chief Inspector of Mines should ensure supporting operational plans and work plans specific to the activities of the mines inspectorate are prepared as soon as possible after the Strategic Plan 2018-2023 has been finalised. This should include a formal plan for data retention and analysis, to enable reporting and review of work activities, work allocation and reporting against plans. Draft activity reports sighted by us would be useful starting points.

Recommendation 41

No increase is currently required in the number of inspectors and support staff in the mines area. Further consideration of any need for additional resources should be deferred until our various recommendations have been adopted.

Recommendation 42

The Regulator and Chief Inspector of Mines should develop and implement documented procedures to support the activities of the mines inspectorate, applying those used broadly within WST supplemented only by further documents necessary for and relating to specific activities of the mines inspectorate.

Recommendation 43

The Regulator and Chief Inspector of Mines should provide for rotation of mines inspectors around workplaces, with processes for handover and ongoing communication between inspectors in respect of specific workplaces, to minimise the risk of actual or perceived 'regulator capture'. This may also be assisted by processes for the review of inspection reports.

Recommendation 44

The Regulator and Chief Inspector of Mines should provide for the mines inspectors to be able to be deployed from time to time assisting the general inspectors, and the general inspectors assisting the mines inspectors.

Recommendation 45

The Regulator should move responsibility for monitoring compliance in smelters from the mines inspectorate to the general inspectorate.

Recommendation 46

The Regulator and Chief Inspector of Mines should provide for the mines inspectors to be assisted by general inspectors in undertaking investigations.

Appendix 1 – Persons consulted

1. Bailey, Michael	Tasmanian Chamber of Commerce and Industry
2. Baker-Goldsmith, Heather	Consultant to Police Association of Tasmania
3. Boland, Marie	Consultant (undertaking WHS Act review for Safe Work Australia)
4. Bradshaw, Angela	Community and Public Sector Union
5. Brakey, Andrew	Dir, Strategy & Operations, Aust Nursing & Midwifery Federation
6. Buchanan, Julieanne	Workers' Comp Manager, Wesfarmers; WorkCover Board member
7. Campbell, Martyn	Executive Director, Safework SA
8. Cashion, Gavin	Police Association of Tasmania
9. Coates, Daryl SC	Director of Public Prosecutions
10. Cocker, Mark	The Regulator and Chief Executive, WorkSafe Tasmania
11. Connor, Ross	Compliance and Enforcement Project Manager, WorkSafe Victoria
12. Coxhell, Peter	Quality, Safety, Health & Environment Manager, Vos Construction
13. Crawford, Cameron	Safety Principal, Nyrstar (ex State WHS Manager, Inghams Group)
14. Creedon, Greg	Safety Health and Wellbeing Manager, Simplot Australia
15. Davis, Peter	Manager, Accreditation and Licensing, WorkSafe Tasmania
16. Gauld, Trevor	(formerly) Communications, Electrical and Plumbing Union Tas
17. Goodsell, Mark	Australian Industry Group, NSW
18. Gradomski, Paul	CEO, Cripps Nubake Pty Ltd
19. Griffin, Paul	State Secretary, Shop Distributive Allied Employees Association
20. Gunson, Chris QC	Represented defendants
21. Harkins, Kevin	CFMEU
22. Hassett, Richie	CFMEU
23. Jacobson, Tim	Health and Community Services Union
24. Kadziolka, Mark	Police Association of Tasmania
25. Kennedy, Chris	Health and Community Services Union
26. Lohrey, Rick	WHS management consultant
27. Lynch, Tom	Community and Public Sector Union
28. Lyons, Tim	Reveille, Reviewer of NT WorkSafe and formerly Qld review
29. McLean, Scott	State Secretary, Forestry Division, CFMEU
30. Milne, Todd	Safety, Health, Environment & Quality Manager, Nyrstar
31. Morgan-Wicks, Kathrine	Chair, WorkCover Tasmania Board
32. Munday, Jessica	Secretary, Unions Tas and Member, WorkCover Tasmania Board
33. Napier, Justin	General Manager, Regulatory Operations, Comcare
34. Noone, Claire	Principal, Nous Group (undertaking WorkSafe ACT review)
35. Parker, Brad	Assistant Director, Industry Safety, WorkSafe Tasmania
36. Pearce, Robyn	Director, Industry Safety, WorkSafe Tasmania
37. Polis, Mary	Centre for Innovative Justice, RMIT University
38. Proud, Julian	Construction Manager, Hansen & Yuncken
39. Sassin, Rick	Housing Industry Association
40. Sears, Fred	Chief Inspector Of Mines, WorkSafe Tasmania
41. Shepherd, Emily	State Secretary, Australian Nursing and Midwifery Federation

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| 42. Short, John | Amalgamated Manufacturing Workers Union |
| 43. Sutton, Glenn | Quality & HSE Manager, Hansen Yuncken |
| 44. Tabor, Vicki | Director, Compensation and Support Services, WorkSafe Tasmania |
| 45. Taylor, Jennifer | Chief Executive Officer, Comcare |
| 46. Thorp, Garry | Site Risk Manager, McCain Foods (Aust) Pty Ltd |
| 47. Triffitt, Shane | HSE Manager, Inghams Group |
| 48. Tunstall, Andrew | Principal Inspector, Mines Inspectorate, WorkSafe Tasmania |
| 49. Wilkins, Matthew | Page Seager Lawyers |
| 50. Winford, Stan | Centre for Innovative Justice, RMIT University |
| 51. Wood, Graham | Member, WorkCover Tasmania Board |
| 52. Eight individual members of the Inspectorate | |

Appendix 2 - Object of the WHS Act (Section 3(1))

Object

(1) The main object of this Act is to provide for a balanced and nationally consistent framework to secure the health and safety of workers and workplaces by –

(a) protecting workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work or from specified types of substances or plant; and

(b) providing for fair and effective workplace representation, consultation, cooperation and issue resolution in relation to work health and safety; and

(c) encouraging unions and employer organisations to take a constructive role in promoting improvements in work health and safety practices, and assisting persons conducting businesses or undertakings and workers to achieve a healthier and safer working environment; and

(d) promoting the provision of advice, information, education and training in relation to work health and safety; and

(e) securing compliance with this Act through effective and appropriate compliance and enforcement measures; and

(f) ensuring appropriate scrutiny and review of actions taken by persons exercising powers and performing functions under this Act; and

(g) providing a framework for continuous improvement and progressively higher standards of work health and safety; and

(h) maintaining and strengthening the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in this jurisdiction.

(2) In furthering [subsection \(1\)\(a\)](#), regard must be had to the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work or from specified types of substances or plant as is reasonably practicable.

Appendix 3 – Functions of the Regulator (Section 152)

Functions of regulator

The regulator has the following functions:

(a) to advise and make recommendations to the Minister and report on the operation and effectiveness of this Act;

[Supports all parts of section 3]

(ab) to develop, implement and review strategies and plans for improving work health and safety;

[Supports all parts of section 3]

(b) to monitor and enforce compliance with this Act;

[Supports section 3 (1)(e)]

(c) to provide advice and information on work health and safety to duty holders under this Act and to the community;

[Supports section 3(1)(d)]

(d) to collect, analyse and publish statistics relating to work health and safety;

[Supports section 3(1)(d)(f)(g)(h)]

(e) to foster a cooperative, consultative relationship between duty holders and the persons to whom they owe duties and their representatives in relation to work health and safety matters;

[Supports section 3(1)(c)]

(f) to promote and support education and training on matters relating to work health and safety;

[Supports section 3(1)(d)]

(g) to engage in, promote and coordinate the sharing of information to achieve the object of this Act, including the sharing of information with a corresponding regulator;

[Supports section 3(1)(g)(h)]

(h) to conduct and defend proceedings under this Act before a court or tribunal;

[Supports section 3(1)(e)]

(i) any other function conferred on the regulator by this Act.

Appendix 4 – WHS functions of the Board (Part 2 of Schedule 2)

Functions

In addition to any functions imposed on it under any other Act, the Board has the following functions:

- (a) to inquire into and report to the Minister on any matter relating to this Act referred to it by the Minister;
- (b) to monitor and report to the Minister on the operation and effectiveness of this Act and on the performance of the systems to which this Act relates;
- (c) to make recommendations to the Minister with respect to such matters as it considers necessary for the purposes of this Act;
- (d) to promote understanding of this Act through education and any other appropriate means;
- (e) to promote –
 - (i) the prevention of injuries and disease in workplaces; and
 - (ii) the development of healthy and safe workplaces;
- (f) to develop and review strategies and plans for improving work health and safety;
- (g) to monitor and review the regulator in connection with the exercise of powers and the performance of functions under this Act;
- (h) to collect, analyse and publish statistics relating to work health and safety;
- (i) such other functions as may be prescribed.

Appendix 5 – Inspectors’ functions and powers of (Section 160)

Functions and powers of inspectors

An inspector has the following functions and powers under this Act:

(a) to provide information and advice about compliance with this Act;

[Supports section 3(1)(d)]

(b) to assist in the resolution of –

(i) work health and safety issues at workplaces;

[Supports section 3(1)(b)(c)(d)(e)(f)] and

(ii) issues related to access to a workplace by an assistant to a health and safety representative;

[Supports section 3(1)(b)(c)(d)] and

(iii) issues related to the exercise or purported exercise of a right of entry under [Part 7](#) ;
[Supports section 3(1)(b)(c)]

(c) to review disputed provisional improvement notices;

[Supports section 3(1)(a)(b)(f)]

(d) to require compliance with this Act through the issuing of notices;

[Supports section 3(1)(e)]

(e) to investigate contraventions of this Act and assist in the prosecution of offences;

[Supports section 3(1)(e)]

(f) *this paragraph has been left blank so as to preserve uniformity with other jurisdictions with regard to the numbering of the Act.*

Appendix 6 – A contemporary benchmark of a good regulator

The following is a brief discussion identifying what may be described as a contemporary benchmark of a good regulator. This is by way of summary only, in the interests of brevity. Further information and discussion is contained in the various papers and documents referred to below.

A recent study on regulator excellence (“the Coglianese study”) identified three attributes of an excellent regulator, being utmost integrity, empathetic engagement and ‘stellar competence’.²¹ Each of these need to be evident in the traits of the regulator, its actions and outcomes. In recognising that “*regulator excellence is ultimately people excellence*”, the report from the study recommended that a regulator should build human capital that maintains each of these attributes.²²

The key tenets for stellar competence were identified in the report as:

- i. analytic capability – seeking out reliable data and conducting analysis with the aim of synthesising the best available evidence to support decisions, seeking to reduce and manage risks smartly;
- ii. instrumental capacity – a sufficiently-funded and highly trained staff working in a supportive organizational culture, using the best available tools to solve problems and earnestly seeking continuous improvement through regular performance measurement and evaluation; and
- iii. high performance – consistently delivering significant positive public value (not necessarily making everyone happy).²³

Coglianese provides a checklist of excellence for regulators²⁴ with 24 elements across 4 areas being:

1. internal management (e.g. mission clarity, resources, autonomy, human capital, culture);
2. priority-setting/decision-making (e.g. scientific and economic analysis and how it informs decisions);
3. problem-solving (e.g. regulatory instrument design, inspection and enforcement strategies); and
4. external engagement (e.g. transparency, external engagement).

In a paper²⁵ provided for the purposes of the Coglianese study, Professor Neil Gunningham of the Australian National University considered how an excellent regulator should intervene in the activities of regulated entities to ensure compliance and facilitate enforcement. He accepted the convention that the principal criteria for choosing an intervention strategy should be effectiveness and efficiency. His paper considers the strengths and weaknesses of seven intervention strategies being:

1. advice and persuasion (provision of information and negotiating);
2. deterrence (through detecting violation and penalizing);
3. responsive regulation (inspectors adapt to responses of those regulated, using a range of responses and escalating up and de-escalating down a pyramid of sanctions as needed);
4. risk-based regulation (targeting resources based on risk to the regulator’s objectives);
5. smart regulation (flexible and imaginative and harnessing third parties as surrogate regulators);

²¹ *Listening-Learning-Leading: A Framework for Regulatory Excellence*, (2015, Cary Coglianese, University of Pennsylvania Law School) at page ii.

²² *Ibid* page ix

²³ *Ibid* page iii

²⁴ *Ibid* page x to xii.

²⁵ *Compliance, Enforcement and Regulatory Excellence*, (2015, Neil Gunningham, Australian National University); Paper prepared for the Penn Program on Regulation’s Best-in-Class Regulator Initiative; online at law.upenn.edu/live/files/4747-gunningham-ppr-bicregulatordiscussionpaper-06 .

6. meta-regulation (requiring enterprises to put in place systems of internal control and management, the regulator's main intervention role being to oversee and audit them); and
7. criteria strategies (decision making according to criteria).

Gunningham concluded that an excellent regulator should:

1. invoke different strategies to engage effectively with different circumstances;
2. take into account the drivers of regulated enterprises;
3. apply combinations of compliance and enforcement strategies;
4. encourage regulated entities to go beyond compliance;
5. harness third parties to influence regulated groups and act as surrogate regulators;
6. develop adaptive learning and resilience; and
7. maintain legitimacy with those regulated and the community through understood and justifiable intervention strategies.

In a research project undertaken for Safe Work Australia, Dr Liz Bluff and Professors Richard Johnstone and Neil Gunningham undertook a review of the compliance and enforcement activities of seven regulators in the WHS Act jurisdictions.²⁶ The report was aimed at identifying opportunities to improve regulator performance²⁷, but in doing so considered a range of proactive and reactive interventions, including those referred to above by Gunningham.

Some governments in Australia have formalised elements of the requirements of regulators, that are consistent with the academic research and the views of academics referred to above.

The New South Wales government has a *Framework for outcomes-based reporting and risk-based compliance and enforcement* which is comprised of:

- defining outcomes;
- understanding risks and regulated entities;
- gathering and validating evidence to design regulatory initiatives;
- allocating resources;
- interacting with regulated entities; and
- monitoring, reporting and continual improvement, with a diagnostic report for the level of implementation and prioritising areas for improvement.

Commonwealth regulators that administer, monitor or enforce regulation are required to implement the *Australian Government Regulator Performance Framework ("RPF")*.²⁸ The RPF comprises outcomes-based key performance indicators being that:

- the regulators do not unnecessarily impede the efficient operation of regulated entities;
- communication with regulated entities is clear, targeted and effective;
- actions undertaken by regulators are proportionate to the risk being managed;
- compliance and monitoring approaches are streamlined and coordinated;
- regulators are open and transparent with regulated entities; and
- regulators actively contribute to the continuous improvement of regulatory frameworks.

²⁶ *Project 3: Regulator Compliance Support, Inspection and Enforcement: Report to Safe Work Australia* (2015, Liz Bluff, Richard Johnstone and Neil Gunningham), kindly provided by Dr Bluff. This research was further discussed in a subsequent paper by Dr Bluff and Professor Johnstone: *Supporting and enforcing compliance with Australia's harmonised WHS laws*; (2017) 30 *Australian Journal of Labour Law* p30.

²⁷ With recommendations identifying the need to share information and initiatives between jurisdictions and particularly with smaller and less well-resourced jurisdictions, particularly for proactive and strategic interventions.

²⁸ Which can be found at <https://docs.jobs.gov.au/documents/regulator-performance-framework>.

The RFP documents include measures of good regulatory performance and examples of outputs or activity-based evidence for each of the key performance indicators. Specific regulatory action should include things such as:

- the publication of compliance and enforcement strategies, that are consistent with risk management policies;
- a documented enforcement strategy which allows for the compliance records of regulated entities to be considered in determining regulatory actions;
- a documented enforcement strategy and monitoring and enforcement strategies that include options for a range of graduated regulatory actions;
- regulators' decisions and advice are provided in a timely manner, clearly articulating expectations and the underlying reasons for decisions;
- demonstrated engagement with regulated entities to inform them of the regulators' expectations;
- demonstrated transparency of inspection and monitoring arrangements; and
- advice and guidance is widely available to stakeholders, with feedback mechanisms in place to support and inform continuous improvement.

WHS regulators around Australia have identified the characteristics that they aim to display as a regulator. While these are expressed in different ways and in different places, they consistently include being:

- honest, open, transparent, trusted and respected;
- professional excellence;
- committed and courageous;
- engaging, listening and responsive;
- collaborative;
- consistent;
- constructive;
- proportionate;
- accountable; and
- continuously improving.

Taking all of the above into account, foundation questions were formulated for the conduct of this Review as noted at page 5.

Appendix 7 – Documents and references

The following documents and references were considered by us during the course of this review. The specific documents were too numerous to individually note and are accordingly grouped into categories.

Documents

We were provided by the Regulator with what we understand comprise key policy and procedure documents, forms and precedent letters currently in use by the Regulator, the Inspectorate and others within Worksafe Tasmania. The Regulator also provided drafts of documents currently under development and consideration, to indicate intended changes and enhancements.

Reports in relation to reviews of specific matters undertaken for the Regulator in recent years, many of which were confidential, were provided to us and considered by us.

We accessed and considered various documents publicly available on the websites of each health and safety regulator around Australia (including on the ICAC website in South Australia) and other confidential documents, not publicly available, provided to us by regulators. Annual reports of government bodies in some jurisdictions that included matters relevant to the regulator were accessed and considered. Documents on the website of Safe Work Australia were also accessed and considered, including the Comparative Performance Monitoring Report, edition 19.

Relevant documents on other government websites were identified and considered, including the Commonwealth *Regulator Performance Framework* documents, the *Australian Government Investigations Standards 2011*, and the New South Wales *Guidance for regulators to implement outcomes and risk-based regulation* and New South Wales *Internal diagnostic tool for outcomes based and risk based regulation*.

Regulator reviews were being undertaken during the course of this review in South Australia, Western Australia, Northern Territory and Australian Capital Territory. We considered the terms of reference (or similar) and discussion papers for each review, discussed issues and were provided with documents by those undertaking some of the reviews.

Documents relating to enforcement models of other regulators (e.g. EPA) were accessed and considered.

Some of the people consulted provided us with documents relating to specific issues, including media reports. One stakeholder provided a written submission. One stakeholder provided the results of a survey of inspectors and written comment on issues relating to inspectors.

Various decisions of the Supreme Court of Tasmania and Magistrates Court of Tasmania relevant to matters discussed in this report were identified and considered by us.

In addition to considering the WHS Act and regulations in Tasmania, we considered the WHS legislation in other jurisdictions, to identify and determine the significance of any differences.

References

Best Practice Review of Workplace Health and Safety Queensland, Final Report, 3 July 2017.

Compliance, Enforcement and Regulatory Excellence, (2015, Gunningham, Australian National University)

Effectiveness of OHS Regulation: Survey of the Quantitative Literature; Tompa et al, summary slide pack 7 September 2017.

How to tell your team that organisational change is coming; (2018, Kislik, Harvard Business Review)

Independent Review of Occupational Health and Safety Compliance and Enforcement in Victoria, Report November 2016; and government response.

Listening-Learning-Leading: A Framework for Regulatory Excellence, (2015, Coglianese, University of Pennsylvania Law School).

Modernising work health and safety laws in Western Australia: Proposals for amendments to the model Work Health and Safety Bill for adoption in Western Australia; Ministerial Advisory Panel, 16 April 2018.

Project 3: Regulator Compliance Support, Inspection and Enforcement: Report to Safe Work Australia (2015, Bluff, Johnstone and Gunningham).

Public Hearing – Evaluation of SafeWork SA: Closing submissions of Counsel assisting; 31 August 2018

Review into the investigation and prosecution arrangements within SafeWork SA, Recommendations.

Supporting and enforcing compliance with Australia's harmonised WHS laws; Bluff and Johnstone (2017) 30 Australian Journal of Labour Law p30.

The use of restorative justice for environmental crime; 22 March 2011, Preston CJ.

Victorian Government Submission to the Parliament of Australia, Senate Standing Committees on Education and Employment: Framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia; 2018