
Victoria – Managing OHS, when other jurisdictions have adopted the WHS laws

Key provisions of the Model WHS Laws and Victorian OHS Laws: What you can adopt now and what you can't.

Introduction:

In 2008 all Australian governments committed to the development and adoption of Model WHS Laws (Act, Regulations and supporting Codes of Practice) with an effective date of 1 January 2012, subject to any transitional arrangements that are specified within the Act and Regulations. The Model WHS Act was endorsed by the Workplace Relations Ministers' Council (WRMC) in December 2009; the Model WHS Regulations were subsequently endorsed, in principle, in August 2011.

Laws introduced

The Commonwealth, Queensland, New South Wales, Northern Territory and ACT have passed their WHS Acts with an effective date of 1 January 2012. These jurisdictions are well progressed towards implementation. Tasmania has passed its WHS Act with an implementation date of 1 January 2013 (as the amendment to the effective date was made in the upper house at the last minute, the Bill needs to go back to the lower house in early 2012 for final acceptance of this amendment).

Laws delayed

During August/September, 2011 Victoria and Western Australia indicated that they will not be in a position to implement the laws on the agreed date, seeking a twelve month extension; Victoria has commenced a supplementary assessment process which will continue into 2012. Debate on the South Australian Bill was adjourned in late November and is expected to recommence in February 2012. Hence, there is still some uncertainty in these three states, both about the final content of the legislation and the effective date. The adoption of harmonised mining regulations will be delayed until at least 1 July 2011, as they are yet to be finalised and approved by Ministers; each jurisdiction that is adopting the harmonised laws on 1 January 2012 have put in place arrangements for their current mining laws to continue to operate.

This situation means that five jurisdictions will have harmonised laws in place (for all but mining) on 1 January 2012, whilst the remaining jurisdictions will have delays, possibly up to twelve months. For businesses operating in the “delayed” states there is some uncertainty about how to proceed working towards implementation of WHS laws, especially if they are part of a national organisation which is required to adopt the new laws from 1 January 2012.

To assist these organisations, Ai Group is developing a comparison between the key provisions of the Model WHS Act and WHS Regulations and the related OHS Act and Regulations in each of the delayed states. This comparison includes a series of “conclusions” designed to help organisation identify what can be adopted now and what needs to be delayed. As Victoria was the first state to announce a delay, this comparison has been completed first. The remaining comparisons will be available by January 2012.

This comparison has been designed as a guide to assist organisations to understand the similarities and differences between the Model WHS laws and the Victorian OHS laws. It should not be used as the only source of information on the requirement of either sets of laws. The individual circumstances of an organisation may require a different interpretation/emphasis. This document should not be used to determine an organisation’s compliance with the Act and Regulations.

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Key provisions of the Act

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Section 13 to 16 – Principles that apply to duties</p> <ul style="list-style-type: none"> Duties not transferrable A person can have more than one duty More than one person can concurrently have the same duty; each duty holder must comply with that duty to the standard required by this Act even if another duty holder has the same duty. 	<p>No equivalent provisions</p>	<p>Conclusion: Whilst not stated in the Victorian laws, these principles would still apply</p>
<p>Section 17</p> <p>A duty to ensure health and safety requires the person to eliminate or minimise risks so far as is reasonably practicable.</p>	<p>Section 20(1)</p> <p>A duty to ensure health and safety requires the person to eliminate or minimise risks so far as is reasonably practicable.</p>	<p>Conclusion: Provisions are identical</p>
<p>Section 18</p> <p>Reasonably practicable is outlined as taking into account and weighing up all relevant matters:</p> <ul style="list-style-type: none"> Likelihood Degree of harm What is known about the hazard/risk and ways of eliminating or minimising it Availability and suitability of ways to eliminate or minimise the risk After assessing the above, the cost associated with eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risk 	<p>Section 20(2)</p> <p>Reasonably practicable is outlined as regard must be had to the following matters:</p> <ul style="list-style-type: none"> Likelihood Degree of harm What is known about the hazard/risk and ways of eliminating or minimising it Availability and suitability of ways to eliminate or minimise the risk The cost of eliminating the hazard or risk 	<p>Conclusion: No significant variation between Model WHS laws and Victorian laws</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Section 19</p> <p>Primary duty of care</p> <p>(1) A person conducting a business or undertaking (PCBU) must ensure, so far as is reasonably practicable, the health and safety of:</p> <p>(a) Workers engaged, or caused to be engaged by the person; and</p> <p>(b) Workers whose activities in carrying out work are influenced or directed by the person, while the workers are at work in the business or undertaking</p> <p>(2) A PCBU must ensure, so far as is reasonably practicable that the health and safety of other persons is not put at risk from work carried out as part of the business or undertaking.</p> <p>Note: a worker is defined in s.7 of the Act as:</p> <p>(a) An employee;</p> <p>(b) A contractor or subcontractor;</p> <p>(c) An employee of a contractor or sub-contractor;</p> <p>(d) An employee of a labour hire company who has been assigned to work in the person's business or undertaking;</p> <p>(e) An outworker;</p> <p>(f) An apprentice or trainee;</p> <p>(g) A student gaining work experience;</p> <p>(h) a volunteer;</p> <p>(i) A person of a prescribed class</p>	<p>Section 21</p> <p>Duties of employers to employees</p> <p>(1) An employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health.</p> <p>(3) (a) a reference to an employee includes a reference to an independent contractor engaged by an employer and any employees of the independent contractor; and</p> <p>(b) the duties of an employer extend to an independent contractor engaged by the employer, and any employees of the independent contractor, in relation to matters over which the employer has control or would have had control if not for any agreement purporting to limit or remove that control</p> <p>Section 23</p> <p>Duties of employers to other persons</p> <p>(1) An employer must ensure, so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health and safety arising from the conduct of the undertaking of the employer. continued ...</p>	<p>The combined obligations of employers and self-employed persons to employees and other persons encompasses all of the duties imposed by the obligations of a PCBU under the Model laws.</p> <p>Conclusion: No significant variation between Model WHS laws and Victorian laws</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
	<p>Section 24</p> <p>Duties of self-employed persons to other persons (1) A self-employed person must ensure, so far as is reasonably practicable, that persons are not exposed to risks to their health or safety arising from the conduct of the undertaking of the self-employed person.</p>	
<p>Section 20</p> <p>Duty of persons conducting a businesses or undertaking involving management or control of workplaces – that the workplace, the means of entering and exiting the workplace, and anything arising from the workplace, are so far as is reasonably practicable, without risk to the health and safety of any person</p>	<p>Section 26</p> <p>Duties of persons who manage or control workplaces – ensure so far as reasonably practicable, that the workplace and the means of entering and leaving it are safe and without risks to health.</p> <p>Note: these provisions are limited to the matters over which the person has management or control</p>	<p>The WHS laws have slightly broader coverage with the utilisation of the words “anything arising from the workplace”</p> <p>Conclusion: No significant variations; if anything national laws are broader and can be applied without fear of being in breach of Victorian laws.</p>
<p>Section 21</p> <p>Duty of persons conducting businesses or undertakings involving management or control of fixtures, fittings or plant at workplaces.</p>	<p>No specific provision in Victoria.</p>	<p>Conclusion: As this obligation is not clearly stated in Victoria, the WHS laws provide clarity. It is important to remember that more than one person can have a duty, so the existence of this explicit duty does not reduce the obligations of an employer.</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Duties of persons conducting businesses or undertakings that:</p> <ul style="list-style-type: none"> • design plant or structures (section 22) • manufacture plant, substances or structures (section 23) • import plant, substances or structures (section 24) • supply plant, substances or structures (section 25) • install, construct or commission plant or structures (section 26) 	<p>A person who:</p> <ul style="list-style-type: none"> • designs plant (section 27) • designs buildings or structures (section 28) • manufactures plant or substances (section 29) • supplies plant or substances (section 30) • installs, erects or commissions plant (section 31) 	<p>In the WHS laws, there is an obligation on designers of structures to consider the safety of those who construct the structure. This is not the case in the Victorian laws, where the focus is on the end user of the structure.</p> <p>Conclusion: Increased obligation for designers of structures in Victoria which can be adopted earlier.</p>
<p>Section 27</p> <p>Duty of officer</p> <p>An officer must exercise due diligence to ensure that the person conducting the business or undertaking complies with their duties under the Act.</p> <p>An officer has the same meaning as in the Corporations Act 2001, with some additional detail to clarify the application to governments, statutory bodies and partnerships</p> <p style="text-align: right;">continued...</p>	<p>Section 144 and 145</p> <p>Liability of officers</p> <p>If a body corporate contravenes a provision of this Act or the regulations and the contravention is attributable to an officer <i>failing to take reasonable care</i>, the officer is guilty of an offence ...</p> <p>Officer has the same meaning as the Corporations Act 2001, with some additional detail to clarify the application to governments, statutory bodies and partnerships</p> <p style="text-align: right;">continued...</p>	<p>The definition of officer is effectively the same in both pieces of legislation.</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Due diligence includes, taking reasonable steps:</p> <ul style="list-style-type: none"> to acquire and keep up-to-date knowledge of work health and safety matters to gain an understanding of the hazards and risks to ensure appropriate resources and processes to eliminate or minimise risk to ensure appropriate processes for receiving and considering information to ensure the PCBU has and implements processes for complying with duties to verify the provision and use of the resources and processes referred to above. 	<p>In determining whether an officer is guilty, regard must be had to</p> <ul style="list-style-type: none"> what the officer knew about the matter concerned; and the extent of the officer’s ability to make, or participate in the making of, decisions that affect the body corporate in relation to the matter concerned; and whether the contravention by the body corporate is also attributable to an act or omission of any other person; and any other relevant matter <p>An officer may be convicted or found guilty of an offence ... whether or not the body corporate has been convicted or found guilty of the offence committed by it.</p>	<p>An officer who applies the due diligence provisions of the WHS laws will be well-placed to mount a defence that they had been taking reasonable care.</p> <p>Conclusion: Officers in Victoria should utilise the due diligence provisions as a guide to assist them to demonstrate that they have taken reasonable care.</p>
<p>Section 34</p> <p>Volunteer officers cannot be convicted for failing to meet their due diligence obligations</p>	<p>144(5) and 1445(5)</p> <p>An officer ... who is a volunteer is not liable to be prosecuted under this section for anything done or not done by him or her as a volunteer.</p>	<p>Conclusion: No real difference for volunteers</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Section 28</p> <p>Duties of workers</p> <ul style="list-style-type: none"> • take reasonable care for own health and safety • take reasonable care that acts or omissions do not adversely affect the health and safety of and other persons • comply so far as reasonably able with any reasonable instruction related to health and safety • cooperate with any reasonably policy related to safety 	<p>Section 25</p> <p>Duty of employees</p> <ul style="list-style-type: none"> • take reasonable care of own health and safety • take reasonable care for the health and safety of others who have be affected by acts or omissions • co-operate with the employer in relation to health and safety • must not intentionally or recklessly interfere with or misuse things provided for safety <p>When considering whether a person failed to take reasonable care, consideration must be given to what the person knows about the relevant circumstances.</p>	<p>Each set of laws has difference ways to qualify the duties, but largely the same expectations exist.</p> <p>Conclusion: No significant variations.</p>
<p>Section 29</p> <p>Duties of other persons at the workplace</p> <ul style="list-style-type: none"> • take reasonable care for own health and safety • take reasonable care that acts or omissions do not adversely affect the health and safety of and other persons • comply so far as reasonably able with any reasonable instruction related to health and safety 	<p>No comparative provisions, but another person can be captured by the reckless endangerment provisions (s.32)</p>	<p>New obligations for Victoria. No significant impact on how an employer conducts their activities in relation to health and safety</p> <p>Conclusion: Would need to be cautious if attempting to utilise WHS laws to set a standard for “other persons”. However, other persons can be prosecuted for reckless endangerment in Victoria.</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Section 31</p> <p>Offence – Reckless conduct – Category 1</p> <p>Conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness and the person is reckless as to the risk.</p> <p>Penalties: Individual: \$300 000 / 5 years jail Officer: \$600 000 / 5 years jail Body corporate \$3 000 000</p>	<p>Section 32</p> <p>Duty not to recklessly endanger</p> <p>A person who, without lawful excuse, recklessly engages in conduct that places or may place another person who is at the workplace in danger of serious injury or illness is guilty of an indictable offence</p> <p>Penalties: Individual: 1800 penalty units / 5 years jail (\$219,852 at 1 July 2011) Body corporate: 9000 penalty units (\$1,099,260 at 1 July 2011)</p>	<p>Provided for information only; does not affect obligations</p>
<p>Section 32 and Section 33 offences</p> <p>Breach of safety duty – lower maximum penalty for offences that do not create a risk of serious injury or death</p> <p>Individual: \$150 000 Officer: \$300 000 Body Corporate: \$1 500 000</p>	<p>Section 21</p> <p>Breach of safety duty, without reckless endangerment</p> <p>Individual: 1800 penalty units (\$219,852 at 1 July 2011) Body corporate: 9000 penalty units (\$1,099,260 at 1 July 2011)</p>	<p>Provided for information only; does not affect obligations</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Part 3 and Regulation 699</p> <p>Incident Notification</p> <p>Obligation rests with a PCBU who becomes aware of the notifiable incident arising out of the conduct of the business or undertaking – to notify the regulator and preserve the incident site</p>	<p>Part 5</p> <p>Duties related to incidents</p> <p>Obligations rest with the employer or self-employed person who has management or control of the workplace – to notify the regulator and preserve the incident site</p>	<p>WHS laws are based on the Victorian notification requirements. However, there are some variations between the Victorian and WHS requirements. A broader range of duty holders have the obligation.</p> <p>Conclusion: As notification is an important legal obligation, it is essential that the Victorian provisions are referred to, rather than the National requirements.</p>
<p>Part 4</p> <p>Authorisations</p> <p>General provisions outlining that it is an offence to direct or allow work to be undertaken if the relevant authorisations are not held.</p>	<p>Part 6</p> <p>Licences, registration, permits and other requirements</p> <p>General provisions outlining that it is an offence to direct or allow work to be undertaken if the relevant licences, registrations, permits or other requirements are not held.</p>	<p>Conclusion: As a general provision they are consistent; details for obtaining such authorisations are covered in the regulations.</p>
<p>Section 46</p> <p>Duty to consult, cooperate and coordinate with other duty holders who have a duty in relation to the same matter.</p>	<p>No similar prescribed duty. However, legal proceedings have demonstrated that a failure to have proper processes in place equivalent to these requirements are detrimental; even under current laws, having the paperwork is often not seen as sufficient.</p>	<p>Conclusions: Victorian employers would be well advised to adopt an approach to dealing with other duty holders that is consistent with the obligation to consult, cooperate and coordinate.</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Sections 47 to 49</p> <p>Creates an obligation to consult with workers (47); outlines the nature of consultation (48); and determines when consultation must occur (49). Specifies that, if there is an HSR, they must be involved in the consultation.</p> <p>Nature of consultation:</p> <ul style="list-style-type: none"> • provide relevant information; and • give a reasonable opportunity to: <ul style="list-style-type: none"> ○ express views and raise WHS issues in relation to the matter; and ○ contribute to the decision-making process relating to the matter; and • take views into account; and • advise of outcome of consultation in a timely manner 	<p>Sections 35 to 36 and Regulation 2.1.5</p> <p>Creates an obligation to consult with employees (35); outlines when consultation must occur (35); and outlines how employees are to be consulted (36). Specifies that, if there is an HSR, they must be involved in the consultation.</p> <p>How to consult:</p> <ul style="list-style-type: none"> • provide relevant information; and • give a reasonable opportunity to express views; and • take views into account <p>Regulation 2.1.5 outlines how an employer must involve the health and safety representative in consultation</p>	<p>The major variation between these provisions is that the Victorian Act only requires consultation with employees, not the broader concept of workers. The matters on which consultation is required in both Acts can broadly be summarised as whenever making a decision or taking an action that may impact on health and safety. “Nature of consultation” and “how to consult” have a couple of additions in the WHS laws that can easily be incorporated into consultation in Victoria.</p> <p>Conclusion: Unless trying to debate whether there is or isn’t a need to consult on a particular issue, by referring to the detailed list of “when” to consult, the WHS laws can be adopted. Victorian employers who have HSRs need to pay close attention to regulation 2.1.5 of the Victorian regulations.</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Sections 50 to 74 and Regulations 16 to 21</p> <p>Health and Safety Representatives</p> <p>These sections and related regulations establish the manner in which HSRs are established; their powers and functions; and access to training. There is provision for HSRs to issue Provisional Improvement Notices (PINs) and direct a cessation of work. The Act allows for an inspector to be called in to determine PINs and work cessations.</p> <p>The PCBU must ensure that a list of HSRs is prepared, kept up-to-date and displayed in an appropriate location in the business. This list must also be provided to the regulator as soon as practicable after it is prepared (s.74).</p> <p>Note: HSRs are only required if requested by a worker</p>	<p>Sections 43 to 71</p> <p>Health and Safety Representatives</p> <p>These sections establish the manner in which HSRs are established; their powers and functions; and access to training. There is provision for HSRs to issue Provisional Improvement Notices (PINs) and direct a cessation of work. The Act allows for an inspector to be called in to determine PINs and work cessations.</p> <p>The employer must ensure that a list of HSRs is prepared, kept up-to-date and displayed in an appropriate location in the business. There is no requirement to provide a copy of the list to the regulator.</p> <p>Note: HSRs are only required if requested by an employee</p>	<p>The provisions in the WHS Act are based on current Victorian arrangements. One significant change is the requirement for HSRs to attend training before they can issue a PIN or direct a cessation of work. This is not the case in Victoria. Training for Victorian HSRs will need to continue to be the Victorian approved training. One of the most controversial issues around HSRs is their ability under the WHS laws to “seek the assistance of any person”; this is already in place in Victoria, but the process for “refusing” access is different.</p> <p>Conclusion: No significant variations between Victorian and WHS laws. However, if HSRs are currently in place, best to stay with the status quo until the new laws are in place. If there is a need to renegotiate workgroups and/or have elections, will need to apply Victorian provisions.</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Sections 75 to 79 Health and Safety Committees</p> <p>Must establish within 2 months of a request from: a HSR; or 5 or more workers</p> <p>If there is a HSR, and they consent, he or she will be a member of the committee; if 2 or more HSRs, those HSRs may chose 1 or more of their number to be on the committee</p> <p>At least half of the members must be workers who are not nominated by the PCBU</p>	<p>Section 72 Health and safety committees</p> <p>Must establish within 3 months of a request by a HSR</p> <p>At least half the members must be employees and, so far as is practicable HSRs or deputy HSRs</p>	<p>Similar provisions in both laws; a bit more prescription in WHS laws. Key variation is between the involvement of employees vs workers. If workers other than employees (e.g. labour hire workers) were to be on the committee in Victoria it would not be a problem, as long as other members of the committee were not concerned. The intention of half being employees is the same as half being workers – it is to ensure that the committee is not “top heavy” with managers representing the employer/PCBU</p> <p>Conclusion: Subject to agreement of employees, a committee in Victoria that included workers who were not employees is unlikely to be seen as a breach of the law.</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Sections 80 to 82 and Regulations 22 to 23</p> <p>Issue Resolution</p> <p>The Act establishes a requirement to have an agreed procedure to deal with WHS issues or to apply the default procedure outlined in the regulations.</p> <p>The Regulations provide both a default procedure and minimum requirements for an agreed procedure. It is stated that an agreed procedure must include all of the requirements in the default procedure.</p>	<p>Section 73 to 75 and Regulations 2.2.1 to 2.2.4</p> <p>Issue Resolution</p> <p>The Act establishes a requirement to have an agreed procedure to deal with OHS issues or to apply the default procedure outlined in the regulations.</p> <p>The Regulations provide a default procedure. The Act and regulations are silent on whether the agreed procedure must include the requirements of the default procedure; the strong union view is that they must and it is generally accepted in WorkSafe Victoria that this is appropriate.</p>	<p>The default procedures are different.</p> <p>Conclusion: A Victorian employer who wants to adopt the default procedure will need to use the one in the Victorian. If developing an agreed procedure they could use the WHS laws as a base and check any final procedure to make sure it is largely consistent with the Victorian default procedures.</p>
<p>Sections 84, 86, 87, 88 and 89</p> <p>A worker may cease, or refuse to carry out, work if the worker has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker's health or safety, emanating from an immediate or imminent exposure to a hazard</p> <p>A worker must notify the PCBU they have ceased work and remain available for alternative work; continuity of engagement is specified; an inspector may be called to assist.</p>	<p>No specific provision in Victoria, but assumed through the application of "common law" rights.</p>	<p>Conclusion: If a worker was to cease work for this reason in Victoria, the employer should deal with the matter as an important issue and seek advice about how to progress if the matter is not resolved.</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Sections 85 to 89 Powers of HSRs – Work cessation</p> <p>Once an HSR has attended the approved training (or as otherwise determined through transitional arrangements), a HSR may direct a worker to cease work if the HSR has a reasonable concern that to carry out the work would expose the worker to a serious risk to the worker’s health or safety, emanating from an immediate or imminent exposure to a hazard.</p> <p>Must first consult and attempt to resolve the matter using the issue resolution process, unless the risk is so serious and immediate or imminent that it is not reasonable to consult.</p> <p>The HSR must advise the PCBU of the cessation; workers must remain available to undertake alternative work; continuity of engagement is specified;</p> <p>An inspector may be called to assist.</p>	<p>Section 74 to 75 Powers of HSRs – Work cessation</p> <p>HSR can direct a worker to cease work if there is an immediate threat to health and safety of any person, if it is not appropriate to utilise the issue resolution procedures.</p> <p>A HSR must consult with the employer before directing the cessation.</p> <p>During the cessation, the employer may assign workers to suitable alternative work</p> <p>An inspector may be called to enquire into the issue and can exercise any of their powers that are reasonably necessary in the circumstances.</p>	<p>Conclusion: If a work cessation is called, the Victorian laws will apply.</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Section 90 to 102</p> <p>Provisional Improvement Notices (PINs) – issued by HSRs</p> <p>Can only be issued after HSR has attended the approved training (or as otherwise determined through transitional arrangements). Can be issued if there is a contravention; must consult with PCBU first; and must give a required date for remedy that is at least 8 days after the notice</p> <p>An HSR can make minor modifications and can cancel a PIN</p> <p>PIN must be displayed in the workplace</p> <p>PCBU must comply or seek review by inspector</p>	<p>Sections 60 to 66</p> <p>Provisional Improvement Notices (PINs) – issued by HSRs</p> <p>Can be issued whether or not the HSR has attended training. Can be issued if there is a contravention; must consult with employer first; and must give a required date for remedy that is at least 8 days after the notice</p> <p>Act is silent on ability of HSR to make modifications, but would occur in practice.</p> <p>PIN must be displayed in the workplace.</p> <p>Employer must comply or seek review by an inspector, within 7 days.</p>	<p>Conclusion: As a legal process, Victorian employers and HSRs will need to deal with this issue in line with Victorian OHS Act</p>
<p>Part 6</p> <p>Prohibition on discriminatory, coercive and misleading conduct due to their activities in relation to health and safety</p>	<p>Regulations 76 to 78</p> <p>Prohibition against discrimination against employees or prospective employees due to their activities in relation to health and safety</p>	<p>Conclusion: Employers under both sets of laws need to ensure that they do not adversely affect a persons “standing” due to them raising health and safety issues. If prosecution is being pursued it will be done under current Victorian laws.</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Part 7</p> <p>Workplace entry by WHS entry permit holders</p> <p>Entry for the purposes of</p> <ul style="list-style-type: none"> • inquiring into a suspected contravention • consulting and advising workers in relation to work health and safety 	<p>Part 8</p> <p>Authorised representatives of registered employee organisations</p> <p>Entry for the purpose of:</p> <ul style="list-style-type: none"> • inquiring into a suspected contravention <p>Note also: right of HSR to request the assistance of any person – used to involve union in consulting and advising</p>	<p>Conclusion: As a power under the Act, the Victorian provisions must be applied.</p>
<p>Part 8 – The Regulator</p> <p>Part 9 – Securing Compliance</p> <p>Part 10 – Enforcement Measures</p> <p>Part 11 – Enforceable Undertakings</p> <p>Part 12 – Review of Decisions</p> <p>Part 13 – Legal Proceedings</p> <p>Part 14 – General</p> <ul style="list-style-type: none"> • offence to give false or misleading information • Act does not affect legal professional privilege • Immunity from liability (inspectors) • Confidentiality of information • No contracting out • Person not to levy workers • Codes of Practice • Regulation making powers 	<p>Part 9 – Inspectors and enforcement</p> <p>Part 10 – Review of Decisions</p> <p>Part 11 – Legal Proceedings</p> <p>Part 12 – Compliance Codes</p> <p>Part 13 – Other matters</p> <ul style="list-style-type: none"> • Effect of compliance with regulations or compliance codes • Offence to give false or misleading information • Protection against self-incrimination • Legal professional privilege • Delegation by the Minister • Responsibility for activities carried out under the Petroleum (Submerged Lands) Act • Regulations 	<p>Conclusion: As legal constructs, the Victorian provisions will be applied.</p>

The Regulations

The Act establishes a “general duty” to eliminate or minimise risks, so far as is reasonably practicable. Specific detail is then provided in the Regulations in relation to risks and/or industries that it has been agreed could benefit from more detail about how to manage these risks.

If a risk is not covered in the regulations, it does not mean that an employer does not need to manage the issue, just that they can apply their own approach to the management of that risk.

Risk Management Requirements

The WHS laws establish a specific focus on risk management generally, whilst the Victorian OHS laws, tend to include the risk management requirements within the specific risk/industry areas of the regulations and compliance codes. A comparison of the approach to risk management (incorporating the Act, Regulations and Code of Practice) is shown in the following table.

Model WHS Laws	Victorian OHS Laws	Comment/Action
The Act establishes the obligation to eliminate or minimise risk so far as is reasonably practicable.	The Act establishes the obligation to eliminate or minimise risk so far as is reasonably practicable	Conclusion: Same provisions
Regulation 34 creates a specific obligation to identify all reasonably foreseeable hazards that relate to the risks or industries covered by the regulations	There is no specific overarching reference to the requirement to identify hazards, but it is covered in individual regulations.	Conclusion: Similar provisions

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Regulations 35 & 36 establish specific requirements to eliminate the risk so far as is reasonably practicable; if it is not reasonably practicable to eliminate the risks, then to minimise those risks so far as is reasonably practicable</p> <p>In minimising risks a duty holder must implement risk control measures in accordance with this regulation</p> <ul style="list-style-type: none"> - Must apply one or more of the following: <ul style="list-style-type: none"> o Substituting (wholly or partly) the hazard giving risk to the risk with something that gives rise to less risk; o Isolation the hazard from any person exposed to it; o Implementing engineering controls - If a risk still remains, the duty holder must minimise the remaining risk, so far as is reasonably practicable, by implementing administrative controls - If a risk still remains, the duty holder must minimise the remaining risk, so far as is reasonably practicable, by ensuring the provision and use of suitable personal protective equipment <p>In addition to this general hierarchy, specific control measures are detailed in some of the individual regulations.</p>	<p>There is no specific overarching reference to a general hierarchy in the regulations. However, where applicable it is utilised in the individual regulations. Other specific controls and hierarchies are also outlined in specific regulations</p>	<p>Conclusion: Adoption of the general approach to risk management, with reference to specific regulations as required would be an appropriate way to deal with hazards and risks in Victoria</p>

Model WHS Laws	Victorian OHS Laws	Comment/Action
<p>Regulation 37 requires that control measures are maintained so that they remain effective</p> <p>Regulation 38 establishes a range of “triggers” that will initiate a review of control measures.</p> <p>In addition to these general requirements, some individual regulations establish more triggers for review</p>	<p>There is no specific overarching reference to the obligation to maintain and/or review risk controls. However, where applicable it is specified in the individual regulations.</p>	<p>Conclusion: Adoption of the general approach to risk management, with reference to specific regulations as required would be an appropriate way to deal with hazards and risks in Victoria</p>
<p>The Code of Practice <i>How to Manage Work Health and Safety Risks</i> provides guidance on how to manage all hazards and risks (not just those addressed in the regulations). The Code recommends adoption of a risk management process which involves: identifying hazards; assessing risks (if necessary); applying the hierarchy of controls; and monitoring and reviewing risk controls.</p>	<p>The Victorian laws do not have a general risk management code. Many of the codes that support the regulations propose similar approaches to managing risks.</p> <p>Further, in order to meet the overarching obligation to eliminate or minimise risks, it is accepted practice that the hierarchy of controls would be applied.</p>	<p>Conclusion: Adoption of the general approach to risk management, with reference to specific regulations as required would be an appropriate way to deal with hazards and risks in Victoria</p>

Additional requirements of the regulations

Other than the risk management requirements, when comparing the WHS laws to those currently in place in Victoria, the regulations can be allocated to two broad categories:

- topics which are currently not specifically covered by Victorian Regulations; and
- topics where there are existing detailed regulations in Victoria that may have some variations when compared with the National WHS laws.

Topics which are currently not covered by Victorian Regulations, but do have specific regulations under WHS laws.

The topics listed below are specifically regulated in the WHS laws but the Victorian Regulations are silent on these issues. Victorian employers do still need to address these issues although the way in which to manage them is not prescribed.

In working towards harmonisation and/or working within an organisation that is required to meet these obligations in other states, it is more than appropriate for that organisation to manage health and safety in line with the WHS Regulations and Codes of Practice.

- Regulations Part 3.2 and Code of Practice: General workplace management (whilst also referencing the Victorian Compliance Code to identify conflicts)
- Regulation 42 and Code of Practice: First aid (whilst also referencing the Victorian Compliance Code to identify conflicts)
- Regulation 43: Emergency Plans:
- Regulations 44 to 47: Personal Protective Equipment
- Regulation 48 and Code of Practice Remote or Isolated Work
- Regulations 54 to 55: Falling objects which are reasonably likely to cause injury
- Regulations Part 4.4: Falls from one level to another that are reasonably likely to cause injury to the person or another person:
[Note: for detail on Victorian requirements in relation to falls from 2 metres or above see section below]
- Regulations Part 4.7: General Electrical Safety in Workplaces and energised electrical equipment
- Regulations Part 4.8: Diving work
- Regulations 304 to 306: Excavation (managing risks) :

Note: there is also a regulation on demolition work, but it relates only to notification requirements. Victorian employers do not currently have requirements under WHS laws to notify of demolition work. Any local requirements under current laws will continue to exist.

Topics which are covered in detail in the Victorian Regulations and the WHS regulations.

The following topics are covered in detail in both the Victorian and WHS regulations: noise, hazardous manual tasks / manual handling; confined spaces; falls; plant; high risk work (licensing); hazardous chemicals (including lead and dangerous goods); major hazard facilities and mines.

[note: the mines regulations are yet to be finalised] . There are many similarities between current Victorian laws and the Model WHS laws, but also a number of differences that may impact on an organisation's ability to comply with local requirements if the provisions of the harmonised WHS laws were adopted in advance. The following sections do not give a detailed outline of the WHS Regulations; they are designed to highlight the key areas of difference that need to be considered if an organisation wants to implement all or part of the Model WHS laws in advance of Victoria adopting them.

Noise	Model WHS Laws – Part 4.1 and Code of Practice; Victorian OHS Laws – Part 3.2
<p>In addition to the requirements of the WHS laws, Victorian regulations specify:</p> <ul style="list-style-type: none"> - Requirement for a written record if it is not reasonably practicable to implement control measures within 6 months - Signage is required if hearing protection is to be worn - There are specific obligations on an employer when acquiring plant, to consider the sound power level, in addition to the duties of upstream duty holders. - Requirements for audiometric testing are triggered by the fact that hearing protection is required to be provided to control noise (WHS laws link the audiometric testing to frequent use) - There is a requirement to provide for the employee to undergo an audiological examination as soon as reasonably practicable, if there are adverse results of 2 consecutive audiometric tests <p>Conclusion: Victorian employers need to continue to comply with the above requirements of the Victorian OHS regulations for noise; either in addition to the requirements of the WHS laws or, in the case of audiometric testing, instead of the WHS laws.</p>	
Hazardous manual tasks (manual handling)	Model WHS Laws – Part 4.2 and Code of Practice; Victorian OHS Laws – Part 3.1
<p>The provisions in both sets of laws are effectively the same.</p> <p>Conclusion: Victorian employers can refer to the new regulations and Code of Practice, along with appropriate guidance material, to address the risks of hazardous manual tasks.</p>	

Confined spaces	Model WHS Laws – Part 4.3 and Code of Practice; Victorian OHS Laws Part 3.4 and Compliance Code
<p>The definition of a confined space has changed in the WHS laws; this may lead to an increase in the number of confined spaces that may be in a workplace. The provisions for managing entry into a confined space are very detailed in both the Model WHS laws and the Victorian laws.</p>	
<p>Conclusion: It would be appropriate to utilise the new definition to determine if there are any additional confined spaces that need to be managed. However, it will be important that organisations ensure compliance with the Victorian regulations which are very detailed in relation to control measures for confined spaces.</p>	
<p>Falls Victoria – 2 metres or above WHS laws – cover the risk of all falls</p>	<p>Model WHS Laws – Part 4.4 and Code of Practice ; Victorian OHS Laws – Part 3.3 and Code of Practice (Housing Const'n)</p>
<p>In relation to falls from 2 metres or above, the key additional requirements in Victoria are:</p> <ul style="list-style-type: none"> - Specific requirements if using a ladder or plant as a control measure - A requirement to document the use of administrative controls 	
<p>Conclusion: Victorian employers need to ensure ongoing compliance with these specific requirements for the risk of falls from 2 metres or more.</p>	
High risk work (licensing)	Model WHS Laws – Part 4.5; Victorian OHS Laws – Part 3.6 and Part 8
<p>The Model WHS laws adopt the current uniform licensing arrangements that have been in place in Victorian regulations for a number of years. In addition to the general exceptions to licensing requirements for trainees under direct supervision, the Model WHS laws contains an exception, in regulation 82 (see below), to the requirement for licensing, that is not currently in the Victorian regulations. This exception does not apply in the Victorian laws, and cannot be applied under current laws.</p>	
<p>(2)(a) If the work is carried out at a workplace solely for the purpose of the manufacture, testing, trialling, installation, commissioning, maintenance, servicing, repair, alternation, demolition or disposal of the plant at that workplace or moving the plant within the workplace; and (2)(b)The plant is operated or used without a load except when standard weight loads with predetermined fixing points are used for calibration of the plant. (3) For the purposes of subregulation (2)(a), moving does not include loading plant onto, or unloading plant from, the vehicle or equipment used to move the plant. (4) Exclusions for those setting up or dismantling a crane if they have a licence in relation to rigging.</p>	

The Model WHS laws also create a new license category related to reach stackers (used to handle shipping containers). There will be a transitional arrangement put in place to enable the necessary licenses to be obtained.

Conclusion: Victorian employers will continue to operate under the current high risk licensing scheme. It is not appropriate to apply the general exception outlined above to licensing requirements. Where reach stackers are utilised, work should commence on preparing for the new licensing class.

**Plant and Structures
(including requirements for registration of designs and items)**

Model WHS Laws – Chapter 5 and Code of Practice (draft) ; Victorian OHS Laws – Part 3.5

General requirements

Both the WHS laws and the Victorian OHS laws restrict the scope of the regulations for plant and structures by applying an exclusion for certain types of plant.

Victorian laws exclude: plant that is hand held **OR** manually operated.

The WHS laws exclude: plant that is hand held **AND** manually operated.

Hence, the plant regulations will apply to more types of plant under the WHS laws than the Victorian laws.

Other than the varied scope, the requirements under the Victorian OHS Regulations are almost identical to those in the WHS laws. Variations are:

- Manufacturer obligations to keep records (Vic 3.5.14) are additional to requirements in the WHS laws
- Prescriptive requirements relating to obligations of those who install, construct or commission are different – see Vic laws Reg 3.5.29 and WHS laws Reg 202
- Specific obligations for suppliers to ensure hazard identification and risk measures have been carried out (Vic 3.5.16) are not in WHS laws
- Specific obligations on supplier who hires or leases plant (Vic 3.5.19 and 3.5.20) do not appear in the WHS laws

- Specific requirements are listed for many types of plant, as listed below. Those indicated with an * are covered in the WHS regulations but are not specifically covered by Victorian laws:
 - Powered mobile plant
 - Roll-over protection on tractors
 - Protective structures on earthmoving machinery*
 - Industrial lift trucks
 - Plant that lifts or suspends
 - Plant used in connection with tree lopping*
 - Industrial robots*
 - Lasers*
 - Pressure equipment*
 - Scaffolds
 - Plant with pressure sensing safeguarding systems*
 - Registered mobile cranes and tower cranes*
 - Lifts
 - Amusement devices*
- Scaffolding provisions are worded differently

Conclusion: As most provisions are the same, general compliance issues will be unchanged. Employers in Victoria may wish to adopt the requirements for specific types of plant outlined in the WHS laws early.

Registration of designs and items.

Both the Victorian OHS regulations and the Model WHS regulations establish requirements for registrations related to the items listed in schedules 2 and 5 respectively.

Conclusion: As registration is an important legal obligation, it is essential that the Victorian provisions are referred to, rather than the Model WHS laws.

Construction work

Model WHS Laws – Chapter 6 and Code of Practice (draft); Victorian OHS Laws – Part 5.1

Definition of construction

There are some variations to the definition of construction work, which may change the application of these regulations in circumstances where work is being undertaken on fixed plant (R289 of the WHS laws).

Conclusion: Victorian employers must continue to apply the Victorian definition of construction.

Construction induction

The requirement for *construction induction* continues to apply under the Model WHS laws. There are some variations to the detail about who requires a card (in relation to peripheral activities). The processes for having construction induction recognised are different under the current Victorian laws. Victoria also has a specific requirement for site specific training which does not exist in the Model WHS laws.

Conclusion: Victorian processes for registration of construction induction training will continue to operate until harmonisation. It should be noted that there will continue to be recognition of induction training between jurisdictions.

High risk construction work

The Model WHS Laws establish 13 types of work that are defined as *high risk construction work*; most of these are the same as currently in place in Victoria. There is a variation in specific descriptions of high risk work, in relation to work that involves: demolition; asbestos; and being near roads, railways etc.

Safe work method statements (SWMS) are required when high risk work is being undertaken. The detail of what is required in SWMS varies between the Victorian and Model Regulations. WHS laws have some specific requirements that SWMS must be set out and expressed in a way that is readily accessible and understandable to persons who use it. This may ultimately lead to a different approach to the level of complexity expected to be in SWMS.

Conclusion: Victorian employers will need to continue to utilise SWMS as outlined in the Victorian regulations and current expectations of the regulator.

Excavation work

The Model WHS Regulations have a specific obligation to manage the risks of *excavation work*. There is no equivalent in the Victorian regulations.

Conclusion: Victorian laws are silent on this issue, but an employer would be expected to manage with issue as part of their “general duty”. The principles outlined in the WHS Regulations and Code would be equally appropriate and relevant to Victoria.

Victoria has specific requirements to *notify excavation work*. There is no equivalent in the WHS Regulations.

Conclusion: As notification is an important legal obligation, it is essential that the Victorian provisions are referred to, rather than the national requirements.

Construction Projects and Principal Contractors

Both the Victorian regulations and the model WHS laws define a *construction project* as construction work valued at \$250 000 or more; this provides a trigger for the requirement to appoint a *principal contractor*, with specific obligations for signage and development of a safety management plan. The WHS laws also establish specific obligations for providing amenities and controlling a range of specified risks.

Conclusion: Whilst there are some minor variations in relation to signage and management plants, it would be relatively straightforward to develop an approach that complies with the Victorian regulations and adopts the requirements of the Model WHS laws. The Victorian laws are silent on the specific obligations in relation to amenities and risks; however, in Victoria a principle contractor would most likely be expected to manage these issues as part of their “general duty”.

Hazardous Chemicals – general

Model WHS Laws – Part 7.1 and Codes of Practice (2 x final; 1 x draft); Victorian OHS Laws – Part 4.1

A major change in the approach to hazardous chemicals is that the WHS regulations will cover both hazardous substances and dangerous goods. When the laws are adopted in Victoria, the Dangerous Goods Act and Regulations will be revoked. In the meantime both sets of laws will apply. The WHS laws also introduce the GHS (globally harmonised system) of classifying and labelling hazardous chemicals which will be particularly relevant to manufacturers and/or importers of chemicals.

The Model WHS laws adopt a similar approach to the management of hazardous chemicals in the workplace, and notification requirements, as currently contained in the Victorian OHS and Dangerous Goods Regulations. Key requirements include:

- Correct labelling of containers
- Maintenance of a hazardous chemicals register, which includes copies of current safety data sheets
- Applying the hierarchy of controls
- Undertaking health monitoring as appropriate
- Placarding of dangerous goods storage once a threshold quantity is reached
- Developing a manifest of dangerous goods and providing a copy of that manifest to the regulator once a threshold quantity is reached.

Conclusion: Specific requirements for labelling and safety data sheets set out in Victorian laws must be complied with. If the Victorian delays are extensive, organisations who are in the business of supplying or manufacturing chemicals will need to consider long term impacts of the non-harmonisation of laws. However, this should not be a consideration unless the delay continues beyond 1 January 2013. Due to the nature of control measures and the specific requirements for placarding and manifests, Victorian employers would be best advised to continue to manage hazardous chemicals in line with Victorian laws.

Hazardous Chemicals – lead

Model WHS Laws – Part 7.2; Victorian OHS Laws – Part 4.4

The lead regulations apply if work involves a *lead process*. Additional requirements, including biological monitoring, are specified if the work is defined as *lead risk work*. The definitions of a lead process and lead risk work in Victorian laws and the Model WHS laws are the same. The requirements for the management of risks and the provision of information and health monitoring are similar. There are some variations to the requirements to make notifications to the regulator.

Conclusions: Whilst the provisions are very similar, Victorian employers would be best advised to continue to manage lead in line with current Victorian regulations.

Asbestos	Model WHS Laws – Chapter 8 and Codes of Practice; Victorian OHS Laws – Part 4.3 and Compliance Codes
<p><i>Management of asbestos</i></p> <p>Both sets of regulations require the management of insitu asbestos, including the establishment of an <i>asbestos register</i> (in the WHS laws, this is required for all workplaces built up until 31 December 2003; if there is no asbestos present, this will be a “nil” register) . The WHS laws also require the establishment and maintenance of an <i>asbestos management plan</i>.</p> <p>Conclusion: As the specific obligations relating to asbestos registers and asbestos management plans are broader under the WHS laws than that required under the Victorian laws, an employer could adopt the approach in the WHS laws in advance of them being passed in Victoria.</p> <p><i>Asbestos removal</i></p> <p><i>Asbestos removal</i> is a highly regulated industry involving licensing of removalists and requirements to notify the regulator. There are also detailed requirements outlining how the work is to be undertaken. For this reason the requirements have not been summarised here.</p> <p>Conclusion: As a regulated industry asbestos removalists will need to apply current approaches as required by the regulator. It is expected that, when the new WHS laws are passed, there will be a very structured transition from one set of the laws to the other – managed in conjunction with the regulator.</p>	
Major Hazard Facilities	Model WHS Laws – Chapter 9; Victorian OHS Laws – Part 5.2
<p>The approach to major hazard facilities is highly regulated involving notifications, safety cases, safety management systems and licensing. For this reason a detailed comparison of the two sets of laws is not appropriate for this document.</p> <p>Conclusion: As a regulated industry Major Hazard Facilities will need to apply current approaches as required by the regulator. It is expected that, when the new WHS laws are passed, there will be a very structured transition from one set of the laws to the other – managed in conjunction with the regulator.</p>	
Mines	Model WHS Laws – Chapter 10; Victorian OHS Laws – Part 5.3
<p>The Mining chapter of the WHS Model Laws is still to be finalised. These regulations and supporting codes are expected to be adopted on or after 1 July 2012.</p>	

Compliance Codes and Codes of Practice

The Act and Regulations are supported by Codes of Practice (under the Model WHS Laws) or Compliance Codes (under the Victorian OHS Laws).

There are three Compliance Codes in Victoria for which there is no comparative Model WHS Code. Victorian employers should continue to reference these Victorian Compliance Codes:

- Communicating occupational health and safety across languages
- Prevention of falls in general construction
- Foundries

In addition to the Codes of Practice listed in the preceding sections of this document, the following Codes of Practice under the Model WHS Laws have been developed to deal with issues that are not covered by Regulations under the Model WHS Laws or the Victorian OHS Laws. Victorian employers will be able to utilise these Codes to assist in the management of important hazards/risks that are expected to be dealt with under the general obligation eliminate or minimise risk so far as is reasonably practicable.

- Work health and safety consultation, cooperation and coordination (finalised)
- How to manage work health and safety risks (finalised)
- Managing electrical hazards at work (draft at December 2011)
- Safe design of buildings and structures (draft at December 2011)
- Excavation work (draft at December 2011)
- Demolition work (draft at December 2011)
- Spray painting and powder coating (draft at December 2011)
- Abrasive blasting (draft at December 2011)
- Welding and allied processes (draft at December 2011)
- Safe access in tree trimming and arboriculture (draft at December 2011)
- Preventing and managing fatigue in the workplace (draft at December 2011)
- Preventing and responding to bullying in the workplace (draft at December 2011)

Ai Group Resources to assist you with Work Health and Safety

BIZassistInfoline	1300 78 38 44												
BIZassistManual	Available in hard copy or online http://www.aigroup.com.au/bizassist												
BIZassistBriefingWebinar	November briefings with an overview of the WHS laws, highlighting issues for delayed states available on line soon http://www.aigroup.com.au/portal/site/aig/bizassistbriefings/webinar												
Ai Group TV	Short videos, with new additions due in December 2011 http://www.aigroup.com.au/tv												
Officer Due Diligence Webinar	Available in December 2011 http://www.aigroup.com.au/tv												
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Tailored onsite services	Designed to meet your organisation's specific needs, for further information contact:												
	<table> <tr> <td>Melbourne:</td> <td>Mario Machado</td> <td>0408 662 240</td> </tr> <tr> <td>Sydney:</td> <td>Dean MacKenzie</td> <td>0418 747 555</td> </tr> <tr> <td>Brisbane:</td> <td>Vannessa Patterson</td> <td>0408 926 061</td> </tr> <tr> <td>Adelaide:</td> <td>Caroline Lange</td> <td>0419 109 668</td> </tr> </table>	Melbourne:	Mario Machado	0408 662 240	Sydney:	Dean MacKenzie	0418 747 555	Brisbane:	Vannessa Patterson	0408 926 061	Adelaide:	Caroline Lange	0419 109 668
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General information about harmonised WHS laws	<table> <tr> <td>Tracey Browne</td> <td>0419 300 054</td> </tr> <tr> <td>Carol Bullivant</td> <td>0419 319 394</td> </tr> </table> whsinfo@aiigroup.asn.au	Tracey Browne	0419 300 054	Carol Bullivant	0419 319 394								
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