

The Australian Industry Group

# Workplace Health and Safety

## Post pandemic policy

August 2020



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# About Ai Group

The Australian Industry Group (Ai Group®) is a peak employer organisation representing traditional, innovative and emerging industry sectors. We have been acting on behalf of businesses across Australia for nearly 150 years.

Ai Group is **genuinely representative** of Australian industry. Together with partner organisations we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our members are small and large businesses in sectors including manufacturing, construction, engineering, transport & logistics, labour hire, mining services, the defence industry, civil airlines and ICT.

Our vision is for ***thriving industries and a prosperous community***. We offer our membership strong advocacy and **an effective voice at all levels of government** underpinned by our respected position of policy leadership and political non-partisanship.

With more than 250 staff and networks of relationships that extend beyond borders (domestic and international) we have the **resources and the expertise** to meet the changing needs of our membership. We provide the **practical information, advice and assistance** you need to run your business. Our deep experience of industrial relations and workplace law positions Ai Group as **Australia's leading industrial advocate**. We **listen** and we **support** our members in facing their challenges by remaining at the cutting edge of policy debate and legislative change. We **provide solution-driven** advice to address business opportunities and risks.

## Australian Industry Group contact

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# Contents

- Executive Summary .....5
- 1. Overview .....6
- 2. What have we learnt from COVID-19? .....6
- 3. Permanent pandemic awareness .....8
- 4. Working from home .....8
- 5. Mental Health .....9

# Executive Summary



On any fair view, over the past decade Australia has had great success in our mission to reduce the toll of workplace harm. We are now among the foremost nations in terms of workplace safety outcomes. Australia's experience with COVID-19 thus far has shown that our WHS laws are fit for purpose to respond to a pandemic. They were designed for broad application in a range of circumstances and with changing structures of workplace relationships.

Progress is on track or better against all three targets for worker fatalities, serious claims and musculoskeletal disorders in Australia's Australian Work Health and Safety Strategy 2012-2022.

The legislative framework that supports this mission is rooted in the Robens model – outcomes based rather than prescriptive regulation and informed by risk management and worker consultation. More recent refinements have included wider conceptions of consultation with workers and between organisations with overlapping WHS duties.

Of course, ongoing vigilance is required and there is strong scope to move to complete and make more rigorous the harmonisation of WHS across the federation.

The move towards harmonisation has been positive although the process remains incomplete and more fragile than should be the case. The incompleteness undermines its effectiveness as a symbol of joint intent, as a practical vehicle for clear messaging and as a means of reducing complexity and costs.

Organisations should be encouraged to have a current pandemic plan that can be activated if a crisis of this magnitude occurs in the future. There will be a time when physical distancing will have to be relaxed in social activities. But it may be appropriate to encourage businesses to maintain any reorganisation of work that enables, or can quickly re-enable, physical distancing associated with work activities.

The COVID-19 crisis has shown that many people are able to work productively and effectively from home. Assessments of working at home environments has shown that many people have appropriate safe workspaces that could support ongoing working from home.

With respect to mental health, the pandemic has highlighted the complexity of trying to pull apart questions of causation in the context of the variety of sources of stress both in the workplace and more broadly. An overarching framework to help organisations deal with the holistic issue of worker mental health is needed, beyond the regulatory focus on mental health issues impacted by the workplace.

A handwritten signature in black ink that reads "Innes Willox". The signature is written in a cursive style and is positioned above a horizontal line.

Innes Willox

Chief Executive

Australian Industry Group

# 1. Overview

The Australian Work Health and Safety Strategy 2012-2022<sup>1</sup> sets a framework to focus the attention of Workplace Health and Safety (WHS) regulators, employers, workers and unions on the interventions that will make the most difference to the safety of the nation’s workplaces and their key sources of injury and illness.

To note progress, the Strategy tracks three key metrics:

- a reduction in the number of worker fatalities due to injury of at least 20 per cent;
- a reduction in the incidence rate of claims resulting in one or more weeks off work of at least 30 per cent; and
- a reduction in the incidence of claims for musculoskeletal disorders (MSD) resulting in one or more weeks off work of at least 30 per cent.

Progress against all three targets is on track or better. The reduction in worker fatalities to date has exceeded the reduction required to meet the target, and the reduction in serious injury and MSD claims are on track to meet the targets by 2022.

Fatality numbers have fallen from an average of 268 between 2007 and 2010, to 144 in 2017-18. Serious claims fell from an average of 12.4 per 1000 workers between 2009 and 2012, to 9 in 2017-18. Musculoskeletal claims fell from an average of 11.2 per 1000 workers between 2009 and 2012 to 8 in 2017-18.

In 2019, preliminary figures for fatalities had risen to 174, although that was still the second lowest annual number recorded.

The legislative framework that supports this mission is rooted strongly in the Robens model – outcomes based rather than prescriptive regulation based on risk management and worker consultation, to which has been added the more recent notions of a wider definition of worker and broader consultation requirements between organisations with overlapping WHS duties.

**“An overwhelming view was that the model WHS laws are working and are settling. Support for harmonisation remains strong with many calling for Western Australia and Victoria to adopt the model. There is concern about some jurisdictions making variations to the model..”<sup>2</sup>**

While the harmonisation of WHS laws has been successful, it remains incomplete and subject to erosion as different jurisdictions have gone about making individual changes over time. This undermines its effectiveness as regulation, as an important symbol of joint intent and as a vehicle for clear national messaging on WHS. The disjointed approach to industrial manslaughter, with no less than five different versions and as well as jurisdictions who oppose it, further erodes confidence in the national commitment to harmonisation despite its success.

Revitalising the harmonisation of WHS and putting in place governance arrangements to prevent or at least minimise the erosion of a harmonised approach has the potential to improve its effectiveness and substantially reduce compliance burdens.

On any fair view, Australia is on a successful mission to reduce the toll of workplace harm and in the past decade have placed ourselves among the foremost nations in terms of workplace safety outcomes. But WHS requires continued vigilance, especially as rapid shifts in economic activity expose workers less to new risks than to old risks in new industries.

# 2. What have we learnt from COVID-19?

Australia’s experience with COVID-19 thus far has shown that our WHS laws are fit for purpose to respond to a pandemic.

<sup>1</sup> See <https://www.safeworkaustralia.gov.au/about-us/australian-work-health-and-safety-strategy-2012-2022>.

<sup>2</sup> 2018 Boland Review of Harmonisation - Public Consultation Summary p1

They were designed for broad application in a range of circumstances and with changing structures of workplace relationships. The general duties require employers to systematically identify risks and implement controls that are reasonably practicable, in line with the current state of knowledge and in consultation with workers. The duties of employers are agnostic with respect to the employment relationship they have with workers engaged in their enterprise.

The rate of change in knowledge under pandemic conditions has been a challenge for workplaces and regulators alike, but the framework of responsibilities has proven robust in that environment.

For the regime to work, particularly with a new risk such as COVID-19, it requires good information to be circulated quickly about the general nature of the risk, and for guidance to then be developed that facilitates the application of that knowledge to thousands of different workplace and commercial environments across all sectors.

In the case of COVID-19, that meant sharing the emerging knowledge of how it is transmitted, who in the population were at greater risk and general infection control strategies. Armed with this information, Ai Group and other industry groups were able to provide detailed guidance to organisations in different subsectors that gave practical advice on how to comply with the public health orders requiring social distancing, and the adoption of increased hygiene and cleaning protocols, within the framework provided by standing legislation and regulation. Regulators also provided this guidance but at a more general level at first as they lacked the specific industry context in which it needed to be applied. In some cases, they adopted or modified the industry generated material. This co-design model should be used more.

Suggestions were made that WHS regulations needed to be modified or made to specifically cover the pandemic. A permanent rigid regulation would remove the ability to respond appropriately if advice on control measures changes or is different in any future pandemic situation.

Not every new risk requires its own regulation. COVID-19 has shown that most workplaces responded effectively to COVID-19 requirements within the current WHS laws. However, simple information about the nature of new risks is often required to feed into existing risk management systems.

Consultation with workers proved critically important in dealing with a new manifestation of risk in the workplace, both as a source of practical and effective risk management activities and to support understanding and implementation with unusual and challenging new workplace expectations.

The responsibility of workers to comply with reasonable and necessary WHS requirements, particularly social distancing and hygiene protocols, is a key element of infection control. Unusually, but not uniquely, in this case both behaviour at work and away from the workplace were important, though only the former is contemplated directly by WHS regulation. Public health orders dealt with private behaviour.

There is an opportunity to utilise this experience to further promote the important roles within the WHS laws of consultation, of workers' modest but nevertheless important duties, and to highlight the importance of officers exercising due diligence.

Apart from completing harmonisation and making it more robust, the COVID-19 experience suggests that there is no need for fundamental regulatory change in WHS.

The pandemic has also highlighted the importance of a sense of common cause in changing behaviour. Debate over WHS can lapse into zero-sum bargaining over the form and scope of regulation, but with no common objective this can be very hollow and unproductive. We need to restate and focus on the goals of WHS in Australia with as much enthusiasm, if not more, than we give to arguments over its regulation. Similar logic suggests there is no strong case for insurance or indemnities that limit liability for legitimate and balanced WHS penalties.

The pandemic also drew attention to the costs of unnecessary regulation, for example, notification requirements that nobody acts upon.

COVID-19 shows us the vital importance of concentrating on proactively managing risks and not waiting to hammer on outcomes. There is a strong case for enhanced enforcement of due diligence duties, which do not even require an incident, in preference to reliance on post-incident remedies such as industrial manslaughter.

### 3. Permanent pandemic awareness

Organisations should be encouraged to have a current pandemic plan that can be activated if a crisis of this magnitude occurs in the future.

At the start of the COVID-19 crisis, it seemed to be condescending to teach people how to wash their hands properly. As we move out of the crisis of the pandemic, we need to continue to emphasise the importance of good hygiene practices, in the workplace and generally.

There will be a time when physical distancing will have to be relaxed in social activities. But it may be appropriate to encourage businesses to maintain any reorganisation of work that enables, or can quickly re-enable, physical distancing whilst undertaking work activities.

Organisations are expected to have processes in place to enable contact tracing should there be a confirmed COVID-19 case that may impact workers in their businesses. Once these systems are established, there is no reason for them to be abandoned and they should be maintained as good practice.

The COVIDSafe app should be deactivated at an appropriate time in the future. However, there is value in the app being maintained and enhanced following the passing of this crisis, so that it can be reactivated if necessary and with informed consent by users.

There will be an increased expectation across the community that people will stay at home if they are unwell. In the short term, at least, it will be socially unacceptable to be in public whilst coughing, sneezing or constantly blowing your nose.

Employers, and colleagues, will be encouraging people to stay at home if they have cold- or flu-like symptoms. Compliance is important both to decrease the risk of a COVID-19 case in the workplace and to ensure that we don't create anxiety or friction within workplaces.

For those that have successfully worked at home during the lockdown we could expect that they might be able to work, at least some hours, during such precautionary absences. We need to promote this as an option, with the expectation that people cannot work from home if they are too unwell to work.

This increased awareness and lack of tolerance for symptomatic people to be in public may result in an overall reduction in illness across future cold and flu seasons.

However, employers will still need to be able to deal with unacceptable levels of absenteeism. There will be some people who take advantage of this increased expectation that people will remove themselves from the workplace if they have symptoms.

A key question will be what right an employer has to send a worker home if they are showing symptoms, especially if they have no sick leave balance.

### 4. Working from home

The COVID-19 crisis has shown that many people are able to work productively and effectively from home. Assessments of working at home environments have shown that many people have appropriate safe workspaces that could support ongoing working from home beyond the pandemic.

Organisations that have been reluctant to allow large numbers of workers to work from home may find that they are under pressure to maintain some level of flexibility into the future. Employees who have enjoyed working at home will most likely argue that they made it work during particularly difficult times and can therefore make it work into the future.

Employers will need to make assessments of the ability to effectively manage teams, workload and communications to determine if and how flexibility can be maintained into the future. Having some people in the workplace and others working from home will create a different dynamic to one where everyone is working from home.

If working from home becomes a more significant part of work, consideration will need to be given to how workers' compensation schemes can best respond to the potential increased exposure to claims that might arise from injuries that occur "in the course of employment", especially those that involve exposure to normal household risks such as falling down stairs or tripping over the cat. The no fault nature of workers compensation was founded on the notion that the employer controlled the place where work was conducted. Working from home challenges this, in a similar manner to journey injuries.

The application of WHS laws will also need to acknowledge a different level of obligation in relation to office setup, dependant on whether the working from home arrangement is required (as has been the case during COVID-19) or the arrangement is at the request of the worker. In both cases, the employer needs to be confident that the physical setup is appropriate. However, the responsibility for the cost of that setup should be determined by who initiates the work from home arrangement. If the employer requires a person to work at home, they should be responsible for the cost of all necessary additional equipment. If the worker requests the flexibility to work from home, whilst also having part time presence in the workplace, it is reasonable that the worker covers the cost of any necessary equipment.

## 5. Mental Health

The pandemic has highlighted the complexity of trying to pull apart questions of causation when you have universal, or even merely broad, community sources of stress.

WHS regulation, by definition, can only really deal with mental health injury caused or exacerbated by work. However emerging research and the experience of employers themselves suggests that mental health *in the workplace* is best improved with a framework that examines at least three fields – work as cause itself, work that is welcoming to those with mental health challenges and supports their recovery, and work in which people can thrive.

To use workplaces as a broader asset in this way, it is better to have an overarching framework to help organisations deal with the holistic issue of worker mental health that does not too finely distinguish between possible causes. A regulatory focus on mental health as a workplace issue remains appropriate, but this should not be over-relied on as a primary driver of change.

