

Self Insurers of South Australia

What the proposed model OHS laws
will mean to you

23 July 2009

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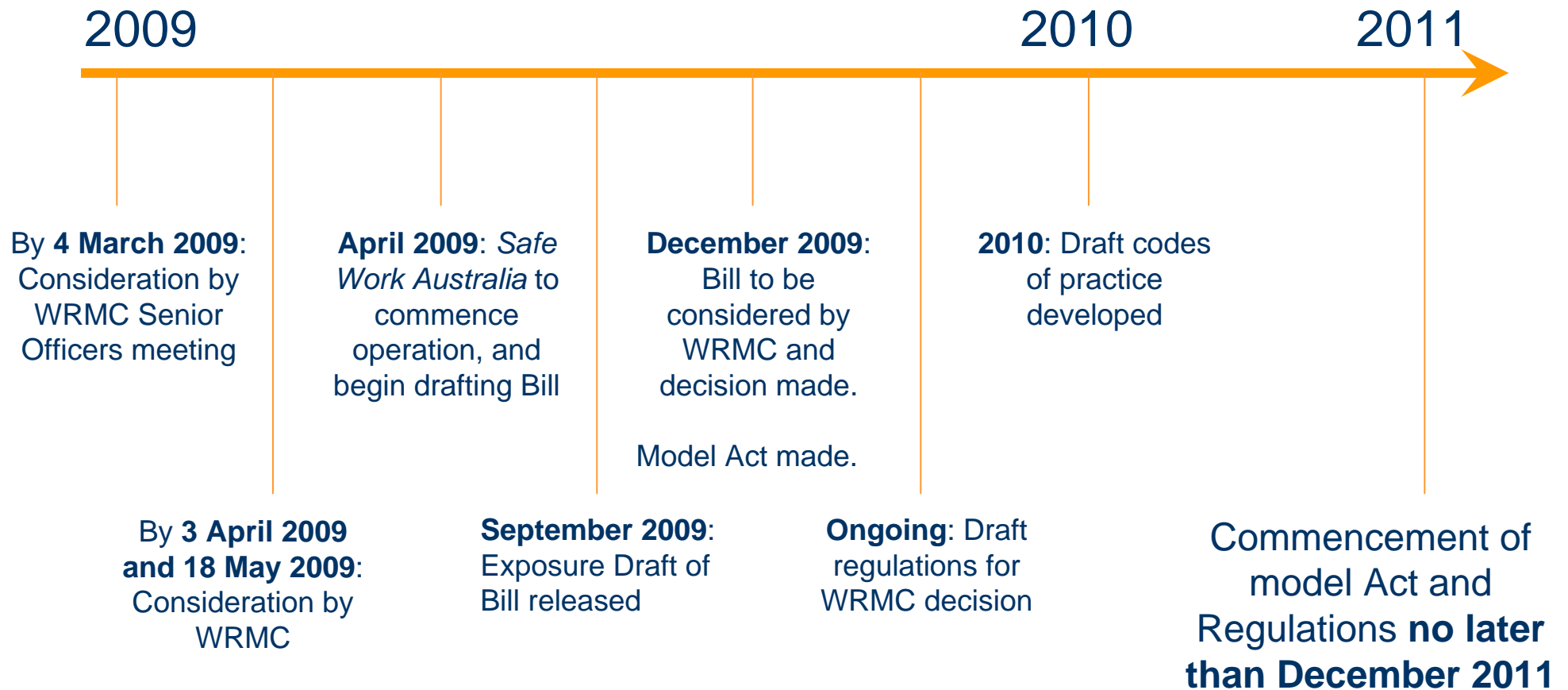
Freehills

Harmonisation: The year that was

The Review process

- Panel appointed in April 2008 to conduct the Review
- Issues Paper released 30 May 2008
- Submissions provided and consultation undertaken
- First report delivered 31 October 2008
- Second report delivered 30 January 2009 - all other areas
- WRMC met on 18 May 2009 and accepted over 90% of the recommendations

Harmonisation: Where to from here?



Guide to approaching the reports

- start with the Terms of Reference;
- the summaries to each report;
- go to the list of recommendations;
- and then the body of the reports

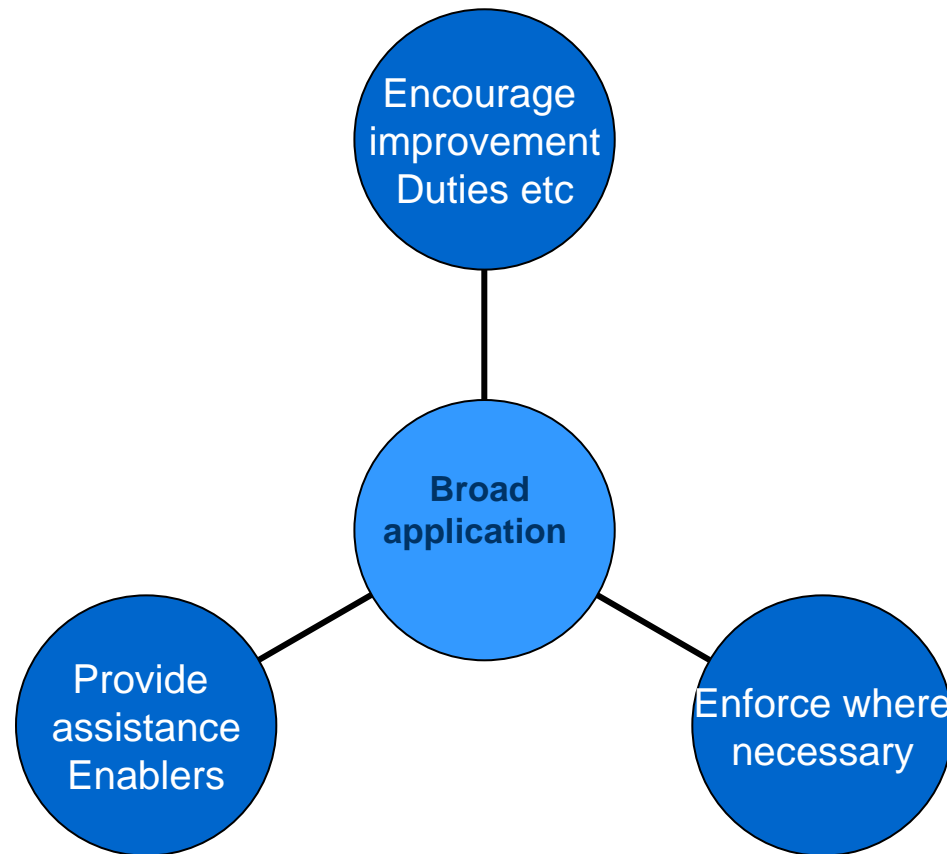
Treat the two reports as one and read the chapters and recommendations

- **Chapters 20 to 23; 1 to 9; 24 to 49; 10 to 19**

Then check the WRMC decisions on each recommendation

To avoid misinterpretation don't look at recommendations or issues in isolation – they are inter-related; don't miss the safeguards

The key theme: Focus on ensuring health and safety



A role for all - powers, responsibilities, accountabilities, safeguards

Structure of the model Act

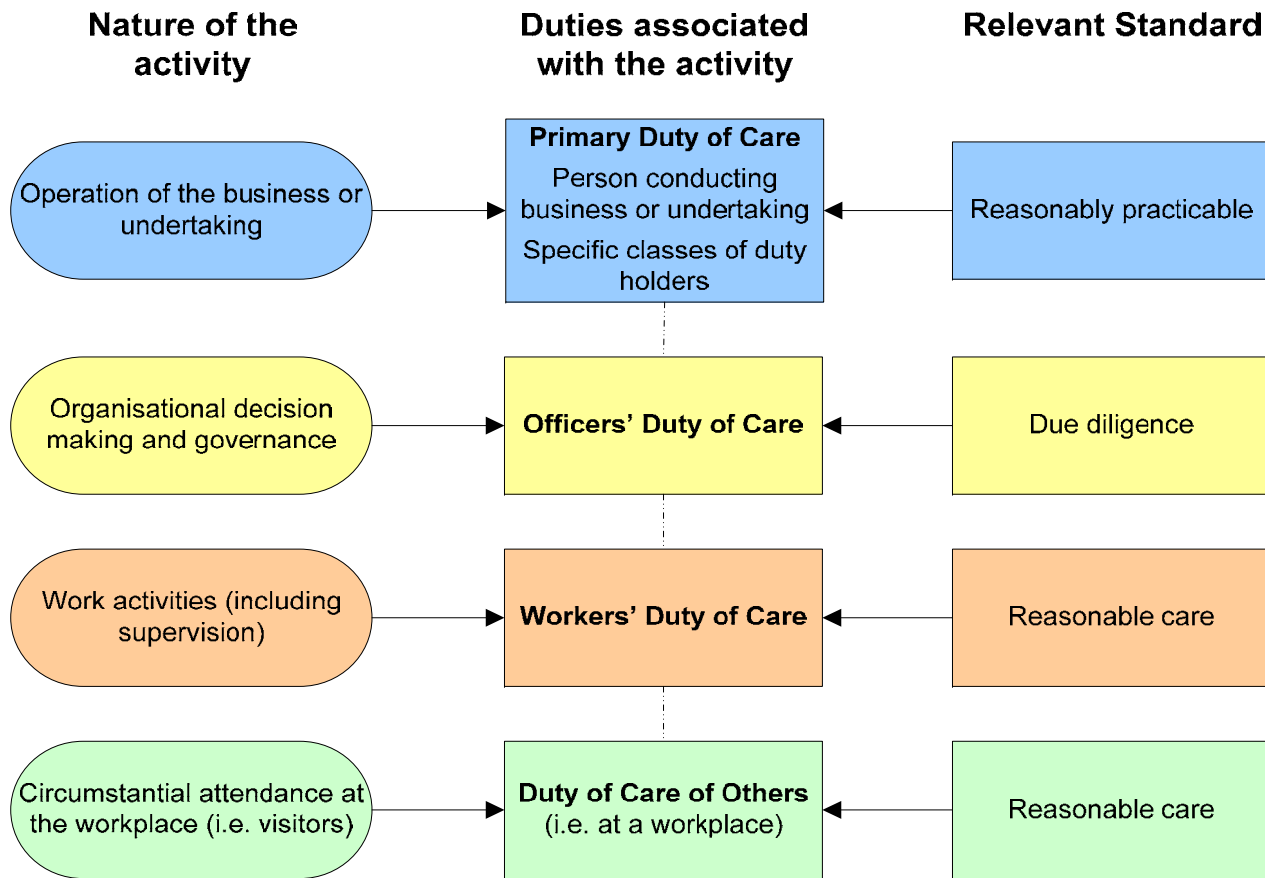


Scope, objects and principles

- Apply to all industries unless other legislation justified
- Continue to apply OHS to public safety consequences of work
- Maintain connection to work as key to application of the Act
- All who are involved in the conduct of work, or contributing things for it to occur, have a duty of care and should be involved in OHS risk elimination or minimisation
- All duties are non-delegable

The duties of care – cause and effect

Relationship between recommended duties of care



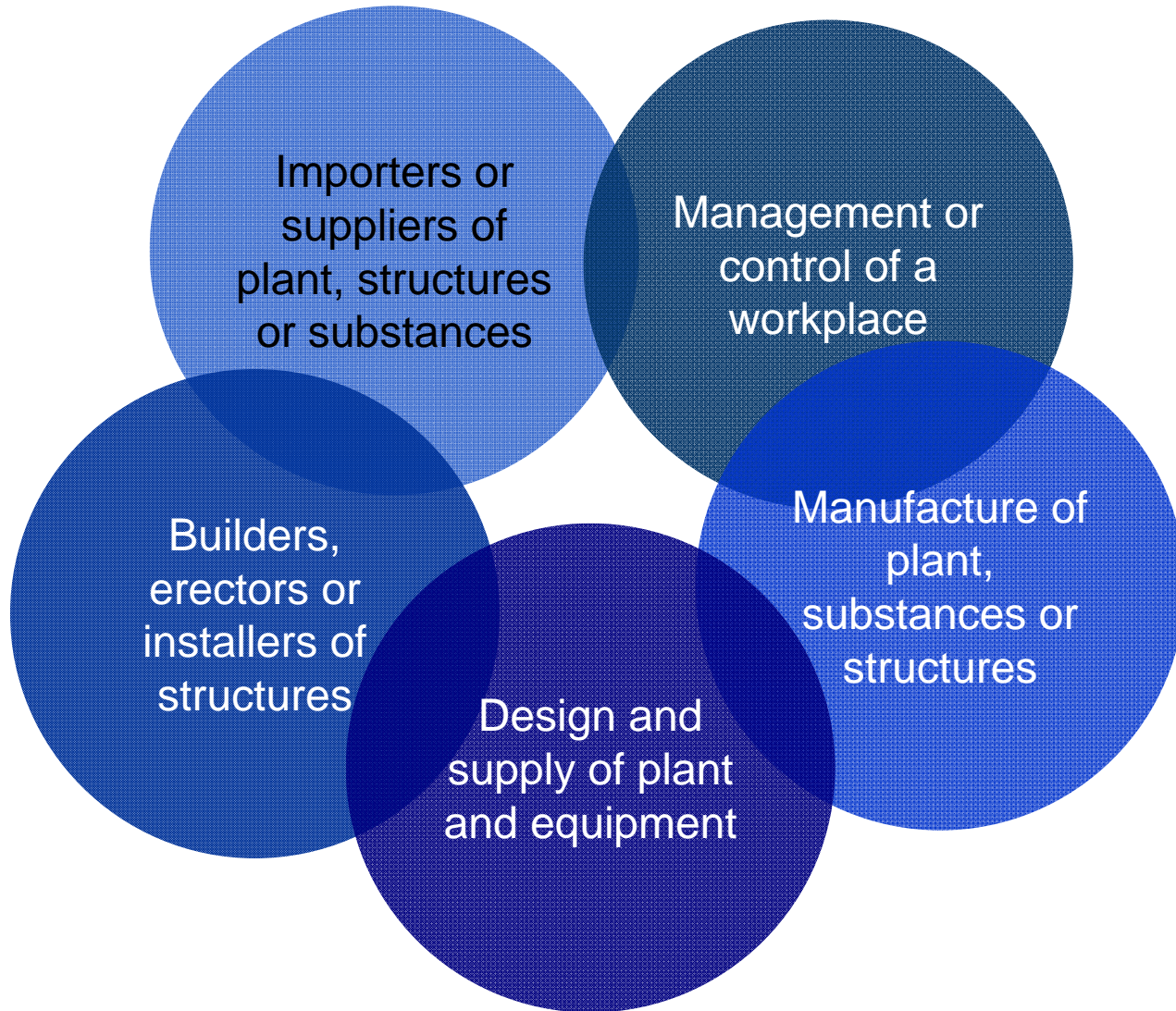
Duty of person conducting business or undertaking

- To replace current duties of
 - employer (to employees)
 - employer conducting business or undertaking (to others)
 - self-employed person (to others)
- Cause and effect approach
- Practical relationships, not legal, will determine who owes a duty to whom
- Effectively everyone contributing to work will have a duty of care
- Focus will be on what you must do

Proposed primary duty



Specific classes of duty holders

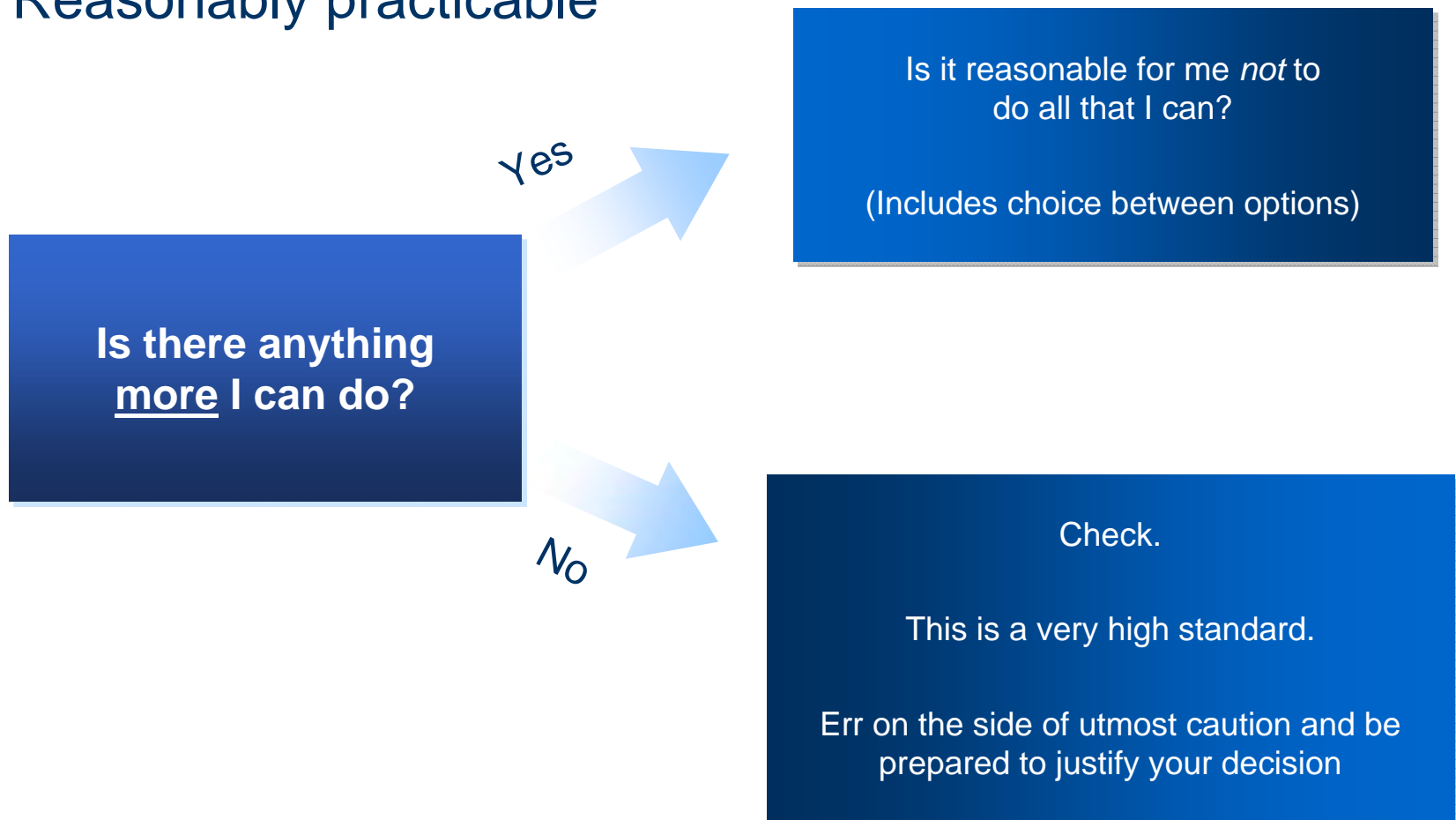


Reasonably practicable

- ‘Reasonably practicable’ to qualify most duties of care (other than for officers, workers and others at the workplace)
- It will be defined in the Model OHS Act
- Follow but enhance Vic definition
 - refers to what can reasonably be done
 - refers to ‘weighing up’ relevant matters
 - clearer reference to hazard, potential harm and risk
 - relevance of cost to be clearer
- Note the issue of control – inherent, not specific

Legal standard

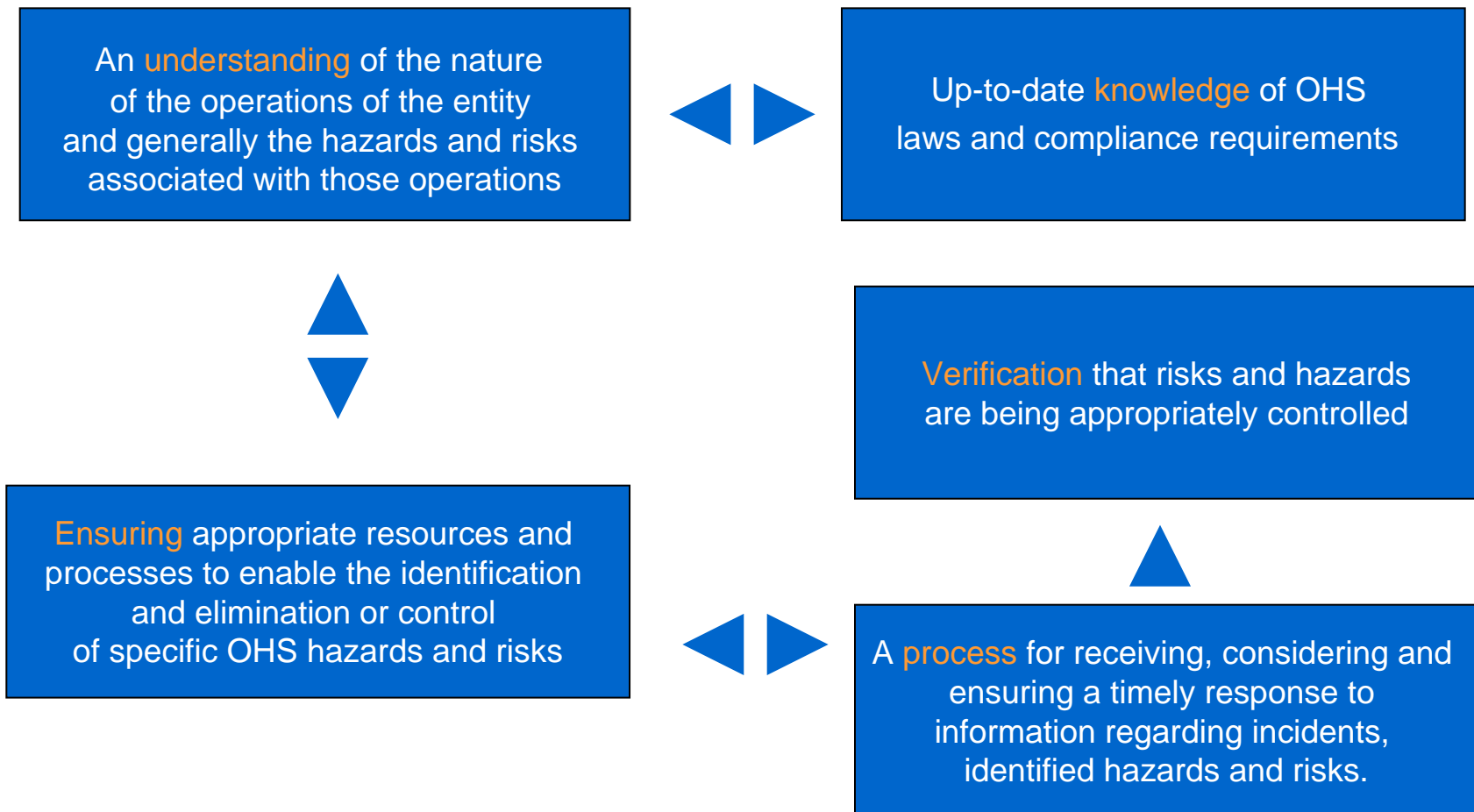
- Reasonably practicable



Officers

- Positive duty of care – a new way of drafting, but consistent with current law
- Volunteers not to be liable to prosecution
- ‘Due diligence’ standard – WRMC decision not to have a definition in the model Act, leaving it to the courts to interpret
- Report recommendation based on the law, but intended to be informative for those who need to comply
- Continue to be proactive toward organisational compliance
- Key differences
 - no attributed liability
 - not reliant on guilt of organisation (or incident)

Due diligence: What should officers do?



Workers and others

- Workers
 - broad definition of worker – anyone performing work in a business or undertaking
 - duty to take reasonable care for themselves and others (not tied to workplace)
 - duty to co-operate with the person conducting the business or undertaking regarding OHS
- Other persons at the workplace (new)
 - similar to workers
 - visitors, public and those authorised to enter the workplace

Other obligations

- WRMC did not accept the recommendation requiring employment/engagement of a qualified person to advise
 - also not accept that if usually have more than 30 workers, must have Workplace Health and Safety Officer (Qld model)
- monitoring workplace and health of workers
- notification of incidents by person conducting the business or undertaking from which the incident arose
 - associated obligations for non-disturbance of site
- permits and licensing requirements – mutual recognition

Workplace consultation, participation and representation

- Obligations for consultation relating to the work
 - between persons conducting relevant businesses or undertakings
 - with workers
- Health and Safety Representatives for work groups
 - may cross more than one workplace or business
 - powers and entitlements similar to Victorian provisions, including direction of work cessation and issuing of provisional improvement notices
 - review and disqualification provisions – WRMC modified this
- Health and Safety Committees
 - may cross more than one workplace or business

Workplace consultation, participation and representation

- Issue resolution procedures
 - procedures determined by workplace participants or default procedure
 - triggered by ‘issue’ – unresolved concern or dispute after consultation; but not to exclude HSR before it is an ‘issue’
 - issues subject to review by inspector, then court or tribunal
- Protection through strengthened provisions against discrimination, victimisation or coercion
 - criminal offence – ‘dominant reason’ test
 - civil proceedings – ‘operative reason’ test
 - defendant has onus of proof re reason for conduct
 - reasonable precautions defence not accepted by WRMC

Unions

- Authorised representatives to have right of entry
 - immediate for investigating suspected breach
 - 24 hours notice for advice or consultation
 - 24 hours notice for request for documents
 - subject to permit and member eligibility requirements, protections and accountability
- No power to prosecute
 - could, as others can, seek review of a decision of regulator not to prosecute

The regulator and inspectors

- Role in providing information and advice
- Regulator able to accept enforceable undertakings as an alternative to prosecution
- Act to provide for cross-jurisdictional co-operation
- Inspectors to have all current powers, protections and accountability
- Act to provide for cross-jurisdictional appointment or authority and admissibility of evidence
- Inspectors to provide advice and assist in issue resolution
- Review of decisions of regulator and inspectors

Prosecutions

- Prosecution to be brought within 2 years or one year after an inquest, whichever is the later
- Only a public official may prosecute, but a decision not to do so may be reviewed by the DPP
- Prosecution to bear the onus of proving all elements of an offence for breach of a duty of care by any duty holder
- Clear appeal rights – avenue to the High Court – agreed in principle by WRMC (subject to jurisdictional issues)
- WRMC rejected proposed reasonable precautions defence for corporation to whom conduct or state of mind has been imputed

Penalties

Categories based on degree of 'culpability' and risk/degree of harm



Other sentencing issues

- Various sentencing options as alternatives to fines
- No additional penalty for repeat offenders
- Double jeopardy rule accepted but not to be stated in the model OHS Act
- Allow multiple breaches in one charge (overcoming duplicity issue)
- Victim impact statements supported but outside the Act
- National sentencing guidelines

What should you be doing now?

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Preparing for any **future** changes may also allow you to assess your **current** level of compliance.

- Understand impact of primary duty of care
- Consider requirements of officers' positive duty and review current corporate governance arrangements
- Understand how consultation, issue resolution, HSR provisions may impact your business
- Consider how right of entry provisions may affect you
- Review or develop policies to provide for effective and efficient compliance – provide a basis for the reasonable precautions defence
- Review or develop procedures for incident response, including ensuring privileges are available and exercised

Start now !

- Model OHS laws are no longer just a possibility
- While the detail is to be refined the key principles and key changes have been clearly stated and agreed
- Development and effective implementation ('take up') takes 18 months to 2 years for significant change
- Detailed requirements in regulations will also happen at the same time – get the strategic, structural and consultation issues resolved ahead of this

Start at the top

- The executive must first be aware to lead and support the changes – train them first in what is needed to be done
- The executive will be directly involved in strategic and structural issues – critical to due diligence and their duty of care as officers
- Then the middle management and subject matter experts need to be trained in the detailed requirements and what they will mean
- Development and implementation, training and review should then take place

For further information

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