

Agreed response to the Review of the Model Work Health and Safety Laws

On 20 May 2021, Ministers responsible for work health and safety (WHS) from the Commonwealth and each state and territory met to finalise the response to the independent Review of the Model WHS Laws (the Model Law Review) undertaken by Marie Boland and to discuss a range of other important WHS issues.

A Decision Regulation Impact Statement (DRIS) was prepared by Safe Work Australia (SWA) on the Model Law Review and recommended alternative proposals to the review's recommendations in some cases. The DRIS reflects an assessment of the feedback and evidence considered during the Consultation Regulation Impact Statement process and was considered by WHS Ministers in finalising their response to the Model Law Review.

Decisions required support of at least a two-thirds majority of Ministers and the following table outlines the agreed response to each recommendation of the Model Law Review.

A copy of the final report of the Model Law Review and the DRIS is available on the [SWA website](#).

Model Law Review Recommendation		Agreed outcome
1	Review the model WHS Regulations and model Codes Review the model WHS Regulations and model Codes against agreed criteria on the purpose and content of the second and third tiers of the model WHS laws as they relate to the seven priority industries in the Australian Work Health and Safety Strategy 2012-2022.	DRIS Recommendation – Safe Work Australia develop a tool to assist duty holders in priority industries to identify the regulations that may apply to their business or undertaking.
2	Make regulations dealing with psychological health Amend the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.	Implement the Model Law Review recommendation.
3	Continuously assess new industries, hazards and working arrangements Safe Work Australia develop criteria to continuously assess new and emerging business models, industries and hazards to identify if there is a need for legislative change, new model WHS Regulations or model Codes.	Implement the Model Law Review recommendation. SWA has already begun preliminary work on this recommendation as agreed by WHS Ministers.
4	Clarify that a person can be both a worker and a PCBU Amend s 5(4) of the model WHS Act to make clear that a person can be both a worker and a PCBU, depending on the circumstances.	DRIS Recommendation – Safe Work Australia update existing guidance material to clarify the operation of the model WHS Act in a contractual chain.
5	Develop a new model Code on the principles that apply to duties Develop a model Code to provide practical guidance on how PCBUs can meet the obligations associated with the principles contained in ss 13–17 (the Principles), including examples of: <ul style="list-style-type: none"> • the application of the Principles to labour hire, outsourcing, franchising, gig economy and other modern working arrangements, and • processes for PCBUs to work co-operatively and cohesively to discharge their duties (in the context of the duty to consult, co-operate and co-ordinate with other duty holders—s 46 of the model WHS Act). 	DRIS Recommendation – Develop a model Code or other practical guidance on how PCBUs can meet the obligations associated with the principles contained in ss 13-17 (the Principles), including examples of: <ul style="list-style-type: none"> - The application of the Principles to labour hire, outsourcing, franchising, gig economy and other modern working arrangements, and - Processes for PCBUs to work cooperatively and cohesively to discharge their duties (in the context of the duty to consult, cooperate and coordinate with other duty holders – s46 of the model WHS Act).
6	Provide practical examples of how to consult with workers Update the model Code: <i>Work health and safety consultation, cooperation and co-ordination</i> to include practical examples of how meaningful consultation with workers can occur in a range of traditional and non-traditional settings.	Implement the Model Law Review recommendation.

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7	<p>7a: New arrangements for Health and Safety Representatives (HSRs) and work groups in small businesses</p> <p>Amend the model WHS Act to provide that, where the operations of a business or undertaking ordinarily involves 15 workers or fewer and an HSR is requested as per the requirements of the model WHS laws, the PCBU will only be required to form one work group for all workers represented by one HSR and a deputy HSR unless otherwise agreed between the workers and the PCBU.</p>	DRIS Recommendation – Provide practical examples of work group and HSR arrangements in small businesses in the existing model Code: <i>Work health and safety consultation, cooperation and coordination</i> with the aim of clarifying how the laws can be applied, and reducing perceived complexity.
	<p>7b: Work group is negotiated with proposed workers</p> <p>Amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group.</p>	Implement the Model Law Review recommendation.
8	<p>Workplace entry of union officials when providing assistance to an HSR</p> <p>Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the Fair Work Act or another industrial law, taking into account the interaction between Commonwealth, state and territory laws.</p>	This recommendation was out of scope for WHS Ministers and was not considered.
9	<p>Inspectors to deal with safety issue when cancelling a Provisional Improvement Notice (PIN)</p> <p>Amend the model WHS Act to provide that, if an inspector cancels a PIN for technical reasons under s 102 of the model WHS Act, the safety issue which led to the issuing of the PIN must be dealt with by the inspector under s 82 of the model WHS Act.</p>	DRIS Recommendation – Safe Work Australia to review and amend the <i>Worker Representation and Participation Guide</i> to clarify how WHS issues should be dealt with when an inspector is reviewing a PIN.
10	<p>HSR choice of training provider</p> <p>Amend the model WHS Act to make it clear that for the purposes of s 72:</p> <ul style="list-style-type: none"> • the HSR is entitled to choose the course of training, and • if the PCBU and HSR cannot reach agreement on time off for attendance or the reasonable costs of the training course that has been chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter. 	Implement the Model Law Review recommendation.
11	<p>Provide examples of HSC constitutions, agendas and minutes</p> <p>Update the model Codes and guidance with examples of HSC constitutions, agendas and minutes.</p>	DRIS Recommendation – Update the model Code: <i>Work health and safety consultation, cooperation and coordination</i> and the <i>Worker representation and participation guide</i> with examples of HSC constitutions, agendas and minutes.
12	<p>Update guidance on issue resolution process and participants</p> <p>Update the <i>Worker Representation and Participation Guide</i> to include:</p> <ul style="list-style-type: none"> • practical examples of how the issue resolution process works, and • a list of the various representatives entitled to be parties in relation to the issues under s 80 of the model WHS Act as well as ways of selecting a representative and informing the other parties of their involvement. 	Implement the Model Law Review recommendation.

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13	<p>Resolving outstanding disputes after 48 hours Amend the model WHS Act to provide for:</p> <p>a. disputes under ss 82 and 89 of the model WHS Act to be referred to the relevant court or tribunal in a jurisdiction if the dispute remains unresolved 48 hours after an inspector is requested to assist with resolving disputes under the default or agreed procedures and with cease work disputes</p> <p>b. a PCBU, a worker, an HSR affected by the dispute or any party to the dispute to notify the court or tribunal of the unresolved issue they wish to be heard</p> <p>c. the ability for a court or tribunal to exercise any of its powers (including arbitration, conciliation or dismissing a matter) to settle the dispute, and</p> <p>d. appeal rights from decisions of the court or tribunal to apply in the normal way.</p>	DRIS Recommendation – Safe Work Australia to further scope the problem identified in Recommendation 13 of the Model Law Review.
14	<p>Clarify court powers for cases of discriminatory or coercive conduct Amend the model WHS Act to make it clear that courts have the power to issue declaratory orders in proceedings for discriminatory or coercive conduct.</p>	DRIS Recommendation – Maintain the status quo.
15	<p>Remove 24-hour notice period for entry permit holders Amend the model WHS Act to retain previous wording in s 117 of the model WHS Act.</p>	Implement the Model Law Review recommendation.
16	<p>Align the process for the issuing and service of notices under the model WHS Act to provide clarity and consistency Amend the model WHS Act to align the service of notices provisions under s 155 and s 171 with those in s 209 of the model WHS Act dealing with improvement, compliance and non-disturbance notices.</p>	Implement the Model Law Review recommendation.
17	<p>Provide the ability for inspectors to require production of documents and answers to questions for 30 days after the day they or another inspector enter a workplace Amend the model WHS Act to provide that, instead of being limited to the inspector who enters (or has entered) a workplace, the powers to require production of documents and answers to questions can be exercised by any inspector within 30 days following an inspector’s entry to that workplace.</p>	Implement the Model Law Review recommendation.
18	<p>Clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the model WHS laws outside of their jurisdiction Amend the model WHS Act to clarify that the regulator’s power to obtain information under s 155 has extraterritorial application.</p>	Implement the Model Law Review recommendation.
19	<p>Enable cross-border information sharing between regulators Amend the model WHS Act to include a specific power enabling regulators to share information between jurisdictions in situations where it would aid them in performing their functions in accordance with the model WHS laws.</p>	Implement the Model Law Review recommendation.

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20	<p>Review incident notification provisions</p> <p>Review incident notification provisions in the model WHS Act to ensure they meet the intention outlined in the 2008 National Review, that they provide for a notification trigger for psychological injuries and that they capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements.</p>	<p>DRIS Recommendation – Review the incident notification provision in the model WHS Act with the objective of ensuring that:</p> <ul style="list-style-type: none"> - the incident notification provisions meet the intention outlined in the 2008 national review, - the incident notification provisions capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements; and - WHS regulators have appropriate visibility of work-related psychological injuries and illnesses. <p>SWA has already begun preliminary work on this recommendation as agreed by WHS Ministers.</p>
21	<p>Review the National Compliance and Enforcement Policy (NCEP)</p> <p>Review the NCEP to include supporting decision-making frameworks relevant to the key functions and powers of the WHS regulator to promote a nationally consistent approach to compliance and enforcement.</p>	<p>Implement Model Law Review recommendation. SWA has already begun preliminary work on this recommendation as agreed by WHS Ministers.</p>
22	<p>Increase penalty levels</p> <ul style="list-style-type: none"> • Amend the penalty levels in the model WHS Act to reflect increases in consumer price index and in the value of penalty units in participating jurisdictions since 2011, and • Review the increased penalty levels as part of future reviews of the model WHS Act and model WHS Regulations to ensure they remain effective and appropriate. 	<p>DRIS Recommendation – Increase the penalty levels in the model WHS Act and review penalty levels as part of future reviews of the model WHS Act.</p> <p>Ministers also agreed to further consider significant increases to penalties under the model WHS laws in relation to Category 1 offences.</p>
23	<p>23a: Enhance Category 1 offence</p> <p>Amend s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is grossly negligent in exposing an individual to a risk of serious harm or death.</p> <p>23b: Industrial manslaughter</p> <p>Amend the model WHS Act to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and include the following:</p> <ul style="list-style-type: none"> • The offence can be committed by a PCBU and an officer as defined under s 4 of the model WHS Act. • The conduct engaged in on behalf of a body corporate is taken to be conduct engaged in by the body corporate. • A body corporate’s conduct includes the conduct of the body corporate when viewed as a whole by aggregating the conduct of its employees, agents or officers. • The offence covers the death of an individual to whom a duty is owed. <p>Safe Work Australia should work with legal experts to draft the offence and include consideration of recommendations to increase penalty levels Recommendation 22) and develop sentencing guidelines (Recommendation 25).</p>	<p>DRIS Recommendation – Implement Model Law Review Recommendation 23a only – include gross negligence as a fault element in the Category 1 offence.</p>
24	<p>Improve WHS regulator accountability for investigation progress</p> <p>Amend the model WHS Act to remove the 12-month deadline for a request under s 231 that the regulator bring a prosecution in response to a Category 1 or Category 2 offence and to ensure ongoing accountability to the person who made the request until a decision is made on whether a prosecution will be brought.</p>	<p>DRIS Recommendation – Amend the model WHS Act to:</p> <ul style="list-style-type: none"> - extend the 12-month deadline for a person to request that a WHS regulator bring a prosecution in response to a Category 1 or Category 2 offence under s 231, for a period to be determined in consultation with jurisdictions, and - require a WHS regulator to provide updates to the person who made the request until a decision is made on whether a prosecution will be brought

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25	<p>Consistent approach to sentencing Safe Work Australia work with relevant experts to develop sentencing guidelines to achieve the policy intention of Recommendation 68 of the 2008 National Review. As part of this process, any unintended consequences due to the interaction of local jurisdictional criminal procedure and sentencing legislation should also be considered.</p>	DRIS Recommendation – Safe Work Australia, working with relevant experts, will undertake a review into the feasibility of developing national WHS sentencing guidelines.
26	<p>Prohibit insurance for WHS fines Amend the model WHS Act to make it an offence to:</p> <ul style="list-style-type: none"> • enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the model WHS Act • provide insurance or a grant of indemnity for liability for a monetary penalty under the model WHS Act, and • take the benefit of such insurance or such an indemnity. 	Implement the Model Law Review recommendation.
27	<p>Clarify the risk management process in the model WHS Act Amend the model WHS Act to clarify the risk management process by including a hierarchy of controls (consistent with regulation 36) and making any corresponding amendments necessary to the model WHS Regulations.</p>	DRIS Recommendation – Safe Work Australia to further scope this issue to inform the development of guidance, particularly for small business, on the risk management process and the application of the hierarchy of controls.
28	<p>Improved recording of amusement device infringements and operator training Amend Regulation 242 of the model WHS Regulations to ensure that details of statutory notices issued by any WHS regulator and evidence of operator training and instruction are included in the device’s log book.</p>	Implement the Model Law Review recommendation.
29	<p>29a: Add a Safe Work Method Statement (SWMS) template to the WHS Regulations Amend the model WHS Regulations to prescribe a SWMS template.</p> <p>29b: Develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMSs Safe Work Australia develop an intuitive, interactive tool to assist in the effective and efficient completion of fit-for-purpose SWMSs.</p>	DRIS Recommendation – Implement the Model Law Review recommendation 29b – develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMSs.
30	<p>Photographic ID on White Cards Amend the model WHS Regulations to require photographic ID on White Cards consistent with high-risk work licences.</p>	DRIS Recommendation – Additional work to be undertaken to gain a greater understanding of the nature and scope of the problems identified in the Model Law Review and determine whether the recommendation is the most appropriate mechanism to treat them.
31	<p>31a: Consider removing references to Standards in model WHS Regulations Review the references to Standards in the model WHS laws with a view to their removal and replacement with the relevant obligations prescribed within the model WHS Regulations.</p> <p>31b: Compliance with Standards not mandatory unless specified Amend regulation 15 of the model WHS Regulations ('Reference to Standards') to make it clear that compliance with Standards is not mandatory under the model WHS laws unless this is specifically stated.</p>	DRIS Recommendation – Implement both recommendation 31a and recommendation 31b of the Model Law Review.
32	<p>Review MHF Regulations Review the model WHS Regulations dealing with MHF, with a focus on administrative or technical amendments to ensure they meet the intended policy objective.</p>	Implement the Model Law Review recommendation. SWA has already begun preliminary work on this recommendation as agreed by WHS Ministers.

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33	<p>Review crane licence classes Review the high-risk work licence classes for cranes to ensure they remain relevant to contemporary work practices and equipment.</p>	<p>Implement the Model Law Review recommendation. SWA has already begun preliminary work on this recommendation as agreed by WHS Ministers.</p>
34	<p>34a: Improving the quality of asbestos registers Amend the model WHS Regulations to require that asbestos registers are created by a competent person and update the model Codes to provide more information on the development of asbestos registers.</p> <p>34b: Competent persons in relation to asbestos Review existing requirements for competent persons, including consideration of amendments to the model WHS Regulations to provide specific competencies for asbestos-related tasks or requirements for further guidance on the skills and experience required for all asbestos-related tasks.</p>	<p>DRIS Recommendation – SWA to publish additional guidance to improve the quality of asbestos registers and implement Model Law Review recommendation 34b.</p>