



Consultation Regulation Impact Statement

*Recommendations of the 2018 Review of the
Model Work Health and Safety Laws*

June 2019



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Contents

1.	About this Consultation Regulation Impact Statement	4
2.	How to provide feedback	5
3.	Background	6
4.	Impact assessment	8
5.	Psychosocial risks.....	11
6.	Work groups and HSRs in small businesses.....	15
7.	Workplace entry by HSR assistants	18
8.	Cancelling a Provisional Improvement Notice (PIN).....	21
9.	Choice of HSR training course	24
10.	Referral of disputes.....	26
11.	WHS entry permit holders – prior notice of entry.....	28
12.	Inspectors' powers	31
13.	The Category 1 offence and industrial manslaughter	33
14.	Prohibit insurance for WHS fines	40
15.	The risk management process	42
16.	Safe Work Method Statements	45
17.	Consultation Plan.....	48
	Appendix A – Recommendations likely to have nil or minor impacts	49

1. About this Consultation Regulation Impact Statement

In 2018, an independent review of the model work health and safety (WHS) laws (the 2018 Review) was undertaken to examine and report on their content and operation. The terms of reference called for the 2018 Review to be evidence-based and propose actions that Commonwealth, state and territory ministers with responsibility for WHS (WHS ministers) could take to improve the model WHS laws, or identify areas requiring further assessment and analysis.

The 2018 Review found that, for the most part, the model WHS laws are working as intended, but identified some areas where stakeholders are experiencing confusion or consider the laws are overly complex. The final report titled [Review of the model Work Health and Safety laws: Final report December 2018](#) (the Review Report) contains 34 recommendations to address the identified problems.

The purpose of this Consultation Regulation Impact Statement (Consultation RIS) is to canvas stakeholder views, supported with evidence where possible, on those recommendations and alternative options to address the problems identified by the 2018 Review. The questions in the Consultation RIS aim to clarify the extent of the identified problems, whether the proposed options address those problems and to collect information and data about the relative costs and benefits of each option. The Consultation RIS should be read in conjunction with the Review Report.

Safe Work Australia will use the information received from stakeholders to develop a Decision Regulation Impact Statement (Decision RIS) that will identify the options with the greatest net benefit, based on an analysis of the costs and benefits. The Decision RIS will be provided to WHS ministers to assist them to decide whether the 2018 Review's recommendations or an alternative option should be implemented, and if so, how. Your input on the anticipated costs and benefits is an important part of providing WHS ministers with an accurate and comprehensive Decision RIS to guide their decisions.

Safe Work Australia has prepared this Consultation RIS in accordance with the Council of Australian Governments' (COAG) document [Best practice regulation: A guide for ministerial councils and national standard setting bodies](#).

2. How to provide feedback

Safe Work Australia welcomes submissions from all interested stakeholders, including duty holders, regulators, government departments, unions, workers, legal professionals, members of the public and other parties who may be affected by implementation the recommendations of the 2018 Review.

We are particularly interested in your views on the 12 recommendations of the 2018 Review that are discussed in more detail in the following chapters of this Consultation RIS. At the end of each chapter, there are four standard questions to seek information on options related to those recommendations and their impacts on business, individuals and the community. Some chapters also have additional questions to gather more specific information on the options to assist in assessing impacts. You may answer some or all of the questions, or can raise a matter not specifically addressed in the Consultation RIS, as long as it is relevant to problems with the model WHS laws identified in the 2018 Review.

The remaining 2018 Review recommendations are expected to have no or minor impacts on business, individuals or the community. These recommendations and related questions are set out in [Appendix A](#). We welcome your comments on any of these recommendations, especially if you are of the view the recommendations would be difficult to implement, would not address a problem or will have more than a minor impact.

Please support your views with evidence or data where possible.

Making a submission

Submissions are requested by **11.59 pm (AEST) on 5 August 2019**. Submissions can be made using Safe Work Australia's [online Engage consultation platform](#).

Demographic data will be collected as part of this process through your registration with Engage and in the electronic submission form. Consultation questions are provided in a template available on the Engage platform to assist with drafting a response.

You can decide how your submission is published on the Safe Work Australia website by choosing from the following options:

- submission published with your or your organisations name
- submission published anonymously, or
- submission not published.

For further information on the publication of submissions on Engage, please refer to the [Safe Work Australia Privacy Policy](#) and the [Engagement HQ privacy policy](#).

If you are unable to lodge your submission using Engage, please email 2018Review@swa.gov.au.

3. Background

Development and implementation of the model WHS laws

The model WHS laws were developed following the National Review into model Occupational Health and Safety Laws (the 2008 National Review). The 2008 National Review was carried out by a panel of three independent experts that undertook extensive public consultation with regulators, union and employer organisations, industry representatives, legal professionals, academics and health and safety professionals. You can read more about [development of the model WHS laws](#) on Safe Work Australia's website.

The main object of the model WHS laws is to provide a balanced and nationally consistent framework to secure the health and safety of workers and others at workplaces by establishing clear responsibilities and appropriate compliance and enforcement measures. The model WHS law framework provides for continuous improvement in protecting workers and others from harm, which results in safer workplaces for everyone. A harmonised national system provides greater certainty for businesses, particularly important for those operating across jurisdictional borders.

The model WHS laws were implemented in New South Wales, Queensland, the Australian Capital Territory, the Northern Territory and the Commonwealth in 2011. South Australia and Tasmania implemented the model WHS laws in 2012.

The Victorian Government has stated it will not implement the model WHS laws. The Western Australian Government is part way through a process of developing modern WHS laws, based on the model WHS laws.¹

The 2018 Review of the model WHS laws

When the model WHS laws were developed, WHS ministers agreed their content and operation should be reviewed every five years after commencement. In August 2017, WHS ministers asked Safe Work Australia to undertake the first full review of the model WHS laws, to be finalised by the end of 2018. Safe Work Australia appointed an independent reviewer, Ms Marie Boland, to conduct the review.

The 2018 Review process involved extensive consultations with a wide range of stakeholders. The Review Report was provided to WHS ministers on 18 December 2018, and published on 25 February 2019.

The 2018 Review's central finding is that the model WHS laws are largely operating as intended, but it proposes 34 recommendations for actions to improve clarity and consistency, including undertaking further review and analysis in certain areas.

The 2018 Review recommendations broadly seek to address problems in the following areas:

- **Legal framework** – duty holders have difficulty navigating the three aspects of the model WHS laws (Act, Regulations and Codes of Practice), understanding which requirements are relevant to them and how to comply with those requirements, particularly in relation managing psychological risks in the workplace.
- **Duties of care** – the principles-based approach of the model WHS laws provides flexibility, but many duty holders are confused about how the principles apply in practice.
- **Consultation, representation and participation** – while the model WHS Act clearly requires consultation, representation and participation, stakeholders reported confusion and difficulty understanding these requirements in practice, particularly in relation to the current right of entry regime, health and safety representative (HSR) arrangements and training, and the WHS issue resolution process.
- **Compliance and enforcement** – there is some confusion and potential for inconsistency in how the compliance and enforcement framework works, which impacts the effective operation of the model WHS laws. The National Compliance and Enforcement Policy (NCEP) has not achieved the intended level of consistency in approach across jurisdictions, and needs review to better support inspectors, educators and stakeholders.

¹ See *Western Australia State Budget 2019-20, Budget Paper no. 2 Budget Statements Volume 1* p 224.

- **Prosecutions and legal proceedings** – there is a perception that the offences and penalties in the model WHS laws are no longer a sufficient deterrent to non-compliance with the laws and justice is not being administered fairly or appropriately in some cases of non-compliance, especially where a fatality occurs. Contributing to this is that penalty levels have not increased since the model WHS laws were introduced and there is an apparent inconsistency in penalties and sentences being handed down across harmonised jurisdictions.
- **Model WHS Regulations** – there are a number of technical issues with the operation of the model WHS Regulations. There is confusion about how the hierarchy of controls applies to managing risks more generally, a misunderstanding of the requirements for a Safe Work Method Statement (SWMS) for high-risk construction work, and perceived gaps in the asbestos regulations, including the quality of the asbestos register and the meaning of ‘competent person’ for carrying out asbestos related work.

4. Impact assessment

Safe Work Australia has worked with the Commonwealth Office of Best Practice Regulation (OBPR) to make an initial assessment of the likely impacts of each recommendation in the Review Report. The initial assessment was carried out using available information and applying COAG's Best Practice Regulation guidelines, including consideration of the costs and benefits associated with implementation and compliance (including education and training), certainty balanced against regulatory burden, and proportionality of enforcement measures and penalties.

This initial assessment indicated 12 of the 2018 Review recommendations, or their parts, have one or more of the following features:

- an impact which is anticipated to be more than minor
- complex implementation
- a prominent issue for stakeholders requiring a policy change, or
- an alternative option requires further consideration and consultation.

The Consultation RIS focusses on these 12 recommendations (some with multiple parts), which are outlined below:

- Recommendation 2: Make regulations dealing with psychological health
- Recommendation 7a: New arrangements for HSRs and work groups in small businesses
- Recommendation 8: Workplace entry of union officials providing assistance to an HSR
- Recommendation 9: Inspectors to deal with safety issue when cancelling a PIN
- Recommendation 10: HSR choice of training course
- Recommendation 13: Resolving outstanding disputes after 48 hours
- Recommendation 15: Remove 24 hour notice period for entry permit holders
- Recommendation 17: Production of documents and answers to questions
- Recommendation 23a: Enhance Category 1 offence
- Recommendation 23b: Create an industrial manslaughter offence
- Recommendation 26: Prohibit insurance for WHS fines
- Recommendation 27: Clarify the risks management process in the model WHS Act
- Recommendation 29a: Add a SWMS template to the WHS Regulations
- Recommendation 29b: Develop an interactive tool to support SWMS

Each of these recommendations and the proposed alternative options are discussed in more detail in the following chapters, and questions are asked in order to collect further information to fully assess their impacts.

Recommendations initially assessed as having minor or no impacts, or which recommend further review and cannot be assessed at this time, are outlined in [Appendix A](#). This initial assessment does not reflect the importance of these recommendations or the issues they raise, but rather the impact the proposed changes are expected to have. There are two standard questions asked in Appendix A that apply to all of these recommendations. Safe Work Australia welcomes information and evidence on the impacts of recommendations in this category, particularly if you think there are costs and benefits or disadvantages that may be more than minor.

Table 1 below provides a full list of the 2018 Review's recommendations, and a summary of Safe Work Australia's initial assessment. It also sets out where to find discussion of the recommendations in this Consultation RIS.

Table 1: Initial assessment of 2018 Review recommendations and anticipated impacts

2018 Review Recommendation	Section	Initial assessment for Consultation RIS
1: Review the model WHS Regulations and model Codes of Practice	Appendix A	Review required before impact can be assessed
2: Make regulations dealing with psychological health	Chapter 5	Prominent issue, may have significant compliance impact
3: Continuously assess new industries, hazards and working arrangements	Appendix A	Further work required before impact can be assessed
4: Clarify that a person can be both a worker and a person conducting a business or undertaking (PCBU)	Appendix A	Amendment with no or minor compliance impact
5: Develop a new model Code on the principles that apply to duties	Appendix A	Further guidance with no or minor compliance impact
6: Provide practical examples of how to consult with workers	Appendix A	Further guidance with no or minor compliance impact
7a: New arrangements for HSRs and work groups in small businesses	Chapter 6	Additional option proposed
7b: Work group is negotiated with proposed workers	Appendix A	Amendment with no or minor compliance impact
8: Workplace entry of union officials when providing assistance to an HSR	Chapter 7	Prominent issues with complex implementation
9: Inspectors to deal with safety issue when cancelling a provisional improvement notice (PIN)	Chapter 8	Complex implementation
10: HSR choice of training provider	Chapter 9	Prominent issue with complex implementation
11: Provide examples of health and safety committee (HSC) constitutions, agendas and minutes	Appendix A	Further guidance with no or minor compliance impact
12: Update guidance on issue resolution process and participants	Appendix A	Further guidance with no or minor compliance impact
13: Resolving outstanding disputes after 48 hours	Chapter 10	Complex implementation
14: Clarify court powers for cases of discriminatory or coercive conduct	Appendix A	Amendment with no or minor compliance impact
15: Remove 24-hour notice period for entry permit holders	Chapter 11	Prominent issue with complex implementation
16: Align issuing and service of notices to provide clarity and consistency	Appendix A	Amendment with no or minor compliance impact
17: Extend the ability for inspectors to require information after workplace entry	Chapter 12	May have moderate compliance impact
18: Clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the model WHS laws outside of their jurisdiction	Appendix A	Amendment with no or minor compliance impact
19: Enable cross-border information sharing between regulators	Appendix A	Amendment with no or minor compliance impact
20: Review incident notification provisions	Appendix A	Review required before impact can be assessed
21: Review the National Compliance and Enforcement Policy (NCEP)	Appendix A	Review required before impact can be assessed

2018 Review Recommendation	Section	Initial assessment for Consultation RIS
22: Increase penalty levels	Appendix A	Amendment with no or minor compliance impact
23a: Enhance Category 1 offence	Chapter 13	Prominent issue with complex implementation
23b: Industrial manslaughter		
24: Improve WHS regulator accountability for investigation progress	Appendix A	Amendment with no or minor compliance impact
25: Consistent approach to sentencing	Appendix A	Further work required before impact can be assessed
26: Prohibit insurance for WHS fines	Chapter 14	Prominent issue
27: Clarify the risk management process in the model WHS Act	Chapter 15	Amendment with significant compliance impact
28: Improved recording of amusement device infringements and operator training	Appendix A	Amendment with no or minor compliance impact
29a: Add a SWMS template to the WHS Regulations, and	Chapter 16	Prominent issue, moderate compliance impact, additional option proposed
29b: Develop interactive tool to support the completion of fit-for-purpose SWMS		
30: Photographic ID on White Cards	Appendix A	Amendment with no or minor compliance impact
31a: Consider removing references to Standards in model WHS Regulations	Appendix A	Further work required before impact can be assessed
31b: Compliance with Standards not mandatory unless specified		
32: Review major hazard facilities (MHF) Regulations	Appendix A	Review required before impact can be assessed
33: Review crane licence classes	Appendix A	Review required before impact can be assessed
34a: Improving the quality of asbestos registers	Appendix A	Amendment with no or minor compliance impact
34b: Competent persons in relation to asbestos		Further work required before impact can be assessed

5. Psychosocial risks

Recommendation 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.

2018 Review findings

Psychological health and safety was one of the most frequently raised issues by stakeholders during the 2018 Review. This is perhaps to be expected, given that Safe Work Australia data shows that workplace psychological injuries are one of the most costly forms of workplace injury. They represent a relatively small proportion of serious workers' compensation claims (around 6 per cent of cases), but on average lead to significantly more time off work and a higher average payment per claim.²

Industry representatives and PCBUs typically said that business owners are uncertain about how to address psychological health in the workplace. There was a widespread view that the model WHS laws inadequately protect psychological health and safety in the workplace. There was also criticism of the absence of specific requirements for managing psychosocial risks in the model WHS Regulations or practical examples of how to comply with duties in the model Codes of Practice (model Codes). Small businesses in particular sought practical guidance to help them identify and manage risks to psychological health.

The 2018 Review found there is a need to build on the foundations of the primary duty and other duties in model WHS Act to provide a clear legislative framework within which to manage psychological health issues.

Options

Option 1 - Status quo

The option would maintain the status quo so that psychosocial risks to psychological health would continue to be regulated by the model WHS Act. The definition of 'health' in the model WHS Act makes clear that health includes psychological health, so that the health and safety duties apply equally to psychological and physical health and safety.

The primary duty of care in s 19 of the model WHS Act already requires a PCBU to protect the psychological health of workers and other persons. The PCBU must ensure, so far as is reasonably practicable the health and safety workers, while they are at work in the business or undertaking. The PCBU must also ensure the health and safety of other persons is not put at risk from the work carried out as part of the business or undertaking. The primary duty includes ensuring, so far as is reasonably practicable:

- provision and maintenance of safe systems of work and a work environment without risks to health and safety
- provision of adequate facilities for the welfare of workers in carrying out work
- provision of training, information and supervision, and
- the health of workers and conditions at the workplace are monitored to prevent illness or injury.

The duty to ensure health and safety requires the PCBU to eliminate risks, so far as is reasonably practicable, including risks to psychological health. If it is not reasonably practicable to eliminate risks, the PCBU must minimise those risks, so far as is reasonably practicable.³

² Safe Work Australia Australian Workers' Compensation Statistics 2016-17.

³ Section 17 of the model WHS Act.

The model WHS Act provides a framework for considering what is reasonably practicable in ensuring physical and psychological health and safety. It involves considering what is reasonably able to be done in the circumstances, taking into account all relevant matters including:

- an assessment of the likelihood of the hazard or risk occurring (such as a psychosocial hazard or risk) and the degree of harm that might result
- what the person knows (or reasonably ought to know) about the hazard or risk and control measures
- availability and suitability of control measures, and
- after assessing the above, the cost of control measures.

Workers also have duties under the model WHS Act, including to take reasonable care that his or her own acts or omission do not adversely affect the health and safety of other persons.⁴ This covers acts or omissions that adversely affect the psychological health of other persons, such as bullying and harassment.

It is important to note that management of psychosocial risks is a relatively new area in work health and safety. In the last year alone, there has been a significant increase in the information available to assist duty holders to comply with their obligations and to create mentally safe workplaces. In particular, Safe Work Australia has now released national guidance on managing risks to psychological health called *Work-related psychological health and safety: A systematic approach to meeting your duties* (the Guide). The Guide is intended to assist duty holders to understand their obligations under the model WHS laws by providing practical, readily understandable information that can be translated into action.

Under this option, the existing duties in the model WHS Act relating to psychological health would be supported by the Guide and other guidance and resources, for example, those published by WHS regulators. WHS regulators have guidance, tools and information to support PCBUs to manage psychosocial risks in the workplace, such as SafeWork NSW's [Mental health @ work website](#) and WorkSafe Victoria's [WorkWell Toolkit](#). Western Australia has recently developed a Code of Practice that provides guidance on mentally healthy workplaces for fly-in fly-out workers in the resources and construction industry.⁵ The WHS regulator in Western Australia is also developing a [mentally healthy workplace online hub](#) with resources for workers and management and has updated their risk management toolkit for psychologically safe and healthy workplaces.

Further, at a national level, the Mentally Healthy Workplace Alliance⁶, established by the National Mental Health Commission, is developing a National Workplace Initiative to provide information and support to workplaces in adopting workplace mental health strategies.

Anticipated impacts

If PCBUs do not understand what they are currently required to do to comply with their duties under the model WHS laws, maintaining the status quo may not address this. Where businesses are uncertain about how to address psychosocial risks they may be expending resources ineffectively, so lack of clarity may be imposing a cost on businesses, workers and the community.

However, as noted above, the Review Report was finalised before implementation of the Guide and many of the initiatives of WHS regulators in relation to psychological health. It may be the current status quo that includes the Guide (which was not the status quo at the time consultation for the Review was undertaken) would, at least partly, address the problem of practical guidance for stakeholders. The status quo would also allow time for these initiatives to become bedded in WHS practice and understanding, and to evaluate if they have addressed the existing confusion and uncertainty. It would also allow evaluation of the state of knowledge on management of work-related psychosocial risks and how it can be best applied in practice. This would support development of evidence-based actions to improve management of work-related psychosocial risks.

⁴ Section 28 of the model WHS Act.

⁵ Commission for Occupational Safety and Health (2019), *Mentally Healthy Workplaces for fly-in fly-out (FIFO) workers in the resources and construction industry - Code of Practice*, Department of Mines Industry Regulation and Safety, Western Australia.

⁶ Safe Work Australia is a member of the Alliance. Other members represent employer, worker and broader community interests.

Further, the status quo would not address the absence of specific regulations in the model WHS Regulations relating to psychological health. However, the WHS laws are designed to allow flexibility for workplaces to develop an approach that is best for their workplace, supported by more detailed requirements for specific high-risk matters. Risks to both physical and psychological health and safety not covered in the WHS Regulations must still be eliminated or minimised under the model WHS Act, so far as is reasonably practicable. Some businesses, particularly larger businesses with the resources to develop and implement their own safety management systems, prefer flexibility in how they can manage risks to achieve the best outcomes for their workplace.

Option 2 - Include requirements for managing psychosocial risks in the model WHS Regulations (Recommendation 2)

This option would amend the model WHS Regulations to introduce express requirements for identification and control of psychosocial risks that a PCBU must meet in order to satisfy the existing health and safety duties.

There are two parts to the recommended regulation: identifying psychosocial risks to psychological health and the appropriate measures to control those risks.

It is important to note that the Review Report did not provide detail of the content or formulation of these requirements and whether the regulations are to address all psychosocial risks individually, or deal with those risks more broadly as a group. It is not clear that the current knowledge about identifying and managing work-related risks to psychological health is settled enough to allow narrow prescription of known risks and detail on effective controls that are broadly applicable, however this may be possible as the evidence base becomes more settled.

One approach suggested during consultation was to mirror regulation 36 of the model WHS Regulations for the purposes of psychosocial risks.⁷ However, it is not clear how this option would address the problems identified. This would not clarify the duties for PCBUs nor in substance create explicit regulations for psychological health. Further, there is currently nothing to prevent a PCBU from applying the hierarchy of controls to manage psychosocial risks. This is reflected in the Guide, which outlines how the hierarchy of controls can be applied to minimise risks to psychological health.

It is worth noting Recommendation 27 (discussed in [Chapter 15](#) of this Consultation RIS), recommends regulation 36 of the model WHS Regulations to be moved into the model WHS Act. If accepted, this change would apply the hierarchy to psychosocial risks to psychological health mandatory without further amendment.

Anticipated impacts

This option would address stakeholder concerns about the lack of express provision about psychological health in the model WHS Regulations. Another benefit of introducing specific provisions in the model WHS Regulations is that it may raise the profile of psychosocial risks, leading to PCBUs taking more active measures to address those risks and therefore improving safety outcomes. Other impacts of this option would depend on the form and content of the regulations developed.

If broad principles-based regulations are introduced then the impacts may be minimal, as they would do little to add to the current duties under the model WHS Act that already require a PCBU to ensure the psychological health of workers. This approach would allow flexibility in the method of managing the risks and would not require frequent updating as the state of knowledge on psychosocial risks improves.

However, additional principles-based regulations are unlikely to address the problem of small business experiencing confusion and uncertainty about how to apply the laws to manage psychosocial hazards and risks at their workplace. Principles-based regulations would probably not provide business with a greater degree of certainty about what they need to do in practice to identify and manage risks at their workplace. Duty holders would still need to understand how to identify the risks relevant to their workplace and the measures to control those risks. It would be expected that in

⁷ Regulation 36 of the model WHS Regulations currently applies where a PCBU has a duty under the model WHS Regulations to manage risks to health and safety. If it is not reasonably practicable to eliminate those risks, then regulation 36 requires the duty holder to minimise risks to health and safety by implementing one or more risk control measures in accordance with the hierarchy of controls. The hierarchy ranks the ways of controlling risks from the highest level of protection to the lowest, as follows: substitution, isolation, engineering, administrative controls, and personal protective equipment.

this situation, PCBUs would rely on the current guidance, including the current national Guide, to comply with their duties. If this were the case, this option would have a minimal impact, and PCBUs would continue to implement their existing measures in relation to psychosocial risks.

Prescriptive regulations could have significant impacts. Depending on the nature of the methods prescribed, this may impose additional compliance costs on PCBUs. Current actions by PCBUs to comply with their existing duties are not measured, so it would be difficult to estimate or measure this impact.

If the methods prescribed are the most effective and efficient available, then the cost of implementing them is likely to be offset by a reduction in harm to workers' psychological health. However, if one method is prescribed by the model WHS Regulations but there are other methods available that may be more effective, then this may impose a significant compliance burden. Businesses who are already managing psychosocial risks, but in a manner other than those prescribed, are likely to bear the highest costs. Prescriptive regulations may also prevent PCBUs from implementing innovative and more effective control measures as the state of knowledge improves, resulting in unnecessary regulatory burden.

Questions

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?
- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.
- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.
- What is your preferred option and why will it be best for you, your organisation and your stakeholders?
- Is the state of knowledge on psychosocial hazards, risks and control measures widely accepted and well established? Please support your answer with evidence.
- Do you have suggestions for what prescriptive psychosocial regulations might look like?

6. Work groups and HSRs in small businesses

Recommendation 7a: New arrangements for HSRs and work groups in small businesses

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, the PCBU will only be required to form one work group represented by one HSR and a deputy HSR unless otherwise agreed.

2018 Review findings

The model WHS Act requires PCBUs to facilitate the election of HSRs to represent workers who carry out work for the business or undertaking, if requested by a worker. The PCBU must negotiate with workers on the number and composition of the work groups, as well as the number of HSRs and deputy HSRs (if any) who will represent each work group.⁸ There is nothing in the current model WHS laws that differentiates between small and large businesses for this purpose.

The 2018 Review found small businesses consider the requirements in relation to workgroups for HSRs confusing and unduly onerous. The 2018 Review also concludes that this is a barrier to HSRs being appointed in smaller businesses, which in turn means those businesses and their workers are not realising the benefits of having an HSR in a workplace. However, for larger businesses, the 2018 Review found the provisions governing negotiation of work groups and numbers of HSRs to be appropriate.

The finding of the 2018 Review aligns with Safe Work Australia research that suggests smaller businesses (i.e. with fewer than 20 employees)⁹ are much less likely than larger organisation to have an HSR. However, that research does not identify nor explore the reasons for this difference; that is, the research does not conclude nor demonstrate that the model WHS laws are a barrier for small businesses having an HSR. Further, it does not explore the WHS performance of an organisation with an HSR as compared to a business that has no HSRs.

Options

Option 1 – Status quo

This option would maintain the status quo so that a PCBU would be required to facilitate the determination of one or more work groups and the election of HSRs for those groups, if requested by a worker. Work groups and the number of HSRs (including deputy HSRs, if any) are determined by negotiation and agreement between the workers who will form the work group and the PCBU.

There is a range of guidance currently available to all duty holders explaining the application of the model WHS Act in relation to HSRs. In particular, the model Code of Practice: *Work health and safety consultation, cooperation and coordination* and the guide on *Worker representation and participation* set out the process for establishing work groups and electing HSRs.

Anticipated impacts

If the current arrangements are creating a barrier to workers in small businesses being represented by HSRs, then retaining the status quo would not address this issue.

Where workplaces do not have consultation arrangements that allow or encourage worker participation in WHS processes, then workers may be exposed to greater WHS risks. Any increase in WHS risks also imposes an indirect cost to the community who generally bear a high proportion of the cost of workplace injuries.

The extent to which the current arrangements are creating a barrier is unclear. The model WHS Act provides for a worker in any sized business to make a request for election of one or more HSRs to represent workers. In response, the PCBU must facilitate determination of work groups, the number of HSRs and the conduct of elections. For smaller businesses with up to 15 workers, one work group and one HSR may often be the most effective, convenient and accessible arrangement for the size,

⁸ Sections 50-52 of the model WHS Act

⁹ As per the Australian Bureau of Statistics definition of small business.

composition and nature of the workforce in a small business.¹⁰ Workers and PCBUs can negotiate and agree to this simple arrangement under the current arrangements, or negotiate and agree to more work groups and HSRs where, for example, workers are split between locations, shifts or perform very different types of work (e.g. office workers and field workers).

It is possible that, while requiring initial negotiation and agreement on work groups and HSRs may create a barrier, it could benefit health and safety and reduce costs in the longer term as it ensures all workers are represented in groups that are affected by similar WHS issues, which leads to effective and efficient consultation.

Option 2 – Default arrangements for HSRs and work groups in small businesses (Recommendation 7a)

This option would amend the model WHS Act to have default arrangements in relation to HSRs for a PCBU with 15 workers or fewer.¹¹

Under this default arrangement, as with the current arrangements, the formation of work groups and election of HSRs would be required when requested by a worker. However, the default arrangement would be that there is one work group, one HSR and one deputy HSR. The default arrangements would not apply where the PCBU and workers agree to another arrangement. In that case, the usual rules of negotiation about the work groups and number of HSRs would apply. There would also be no change to the processes for electing HSRs.

Anticipated impacts

The Review Report considers that this approach is simpler and therefore removes unintended barriers or disincentives for small business to support and promote HSRs. As the recommendation seeks to encourage compliance with existing provisions, any increase in the uptake of HSRs may not create an additional compliance costs beyond understanding the new provisions.

However, establishing two HSR roles (HSR and deputy HSR) as a default may have an unintended consequence of inflating HSR numbers within both small and larger organisations beyond what would otherwise have been considered reasonably necessary. While businesses and workers can still negotiate away from the default under this option, it could be taken as meaning that two HSRs per 15 workers is the minimum acceptable ratio. This may be a higher ratio than considered reasonable in most workplaces.

If numbers of HSRs within businesses increase there would be an associated cost to businesses from the election process and HSR training. Where HSRs request training, very small businesses may face disproportionately high or additional cost in having both a HSR and deputy HSR. For example, a small business may not be able to operate without a worker for five days so may need to hire an additional worker or, if that is not possible, may not be able to operate parts of their business.

As HSRs are a tool to improve worker consultation and ultimately safety outcomes it is expected any election and training costs could be at least partially offset by reduction in costs associated with improved safety outcomes.

However, in some circumstances, this option may not reduce barriers to HSRs in small business or improve safety outcomes. PCBUs and workers may rely on the default position and not agree to other arrangements even in circumstances where more than one work group may be necessary for optimal consultation and safety outcomes, such as where a business has two or more distinct groups of workers who undertake different types of work at different times or at different workplaces. Under this option, PCBUs and workers may tend to rely on the default position, instead of being required to negotiate work groups taking into account matters like nature, timing and patterns of work.

¹⁰ Regulation 16 of the model WHS Regulations requires determination of workgroups to ensure workers are grouped in a way that most effectively and conveniently enables the interests of the workers to be represented, and that HSRs are readily accessible to each worker in the workgroup.

¹¹ The *Fair Work Act 2009* (Cth) takes a similar approach in tailoring some provisions to small businesses with 15 or fewer employees, see section 23 of that Act. The 2018 Review does not explore or consider evidence in relation to the 15 worker threshold.

It is also not clear how the issues resolution procedures for failure of negotiations about work groups and HSRs in s 54 of the model WHS Act would apply under this option, as the work group and HSR are established by default, and not through negotiation as in the existing arrangements.¹²

Although this option would establish a default arrangement for work groups, it would not amend the process for election of HSRs, so would not address issues of perceived complexity with the HSR process thought to be causing a disincentive. It may also increase confusion about the HSR requirements in both small and large organisations.

Option 3 – Provide practical examples of work group and HSR arrangements in small businesses

This option would amend the existing model Code of Practice: *Work health and safety consultation, cooperation and coordination* to provide material to assist small businesses with the formation of work groups and election of HSRs, with the aim of clarifying how the laws can be applied in smaller businesses and reducing perceived complexity. It could include examples of situations where more than one work group or HSR may suit a business or undertaking and alternative consultation arrangements for small businesses without HSRs.

Anticipated impacts

As this option is non-regulatory, it is not expected to increase compliance costs. However, by clarifying the process it may operate to improve uptake of HSRs in compliance with current model WHS laws.

Additional clarity around the existing provision may reduce the cost of establishing work groups and electing HSRs if businesses would otherwise have had to look to more costly or less accessible sources of information in order to understand how the existing laws can be applied to their business. There may also be an associated increase in safety benefiting these businesses, their workers and the community.

Providing examples through guidance may in practice have similar benefits as Option 2, while allowing greater flexibility to address situations where other arrangements may be required.

Questions

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?
- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.
- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.
- What is your preferred option and why will it be best for you, your organisation and your stakeholders?
- If you are part of a business with 15 or fewer workers, are workers in that business represented by HSRs? If so, how many workgroups, HSRs and deputy HSRs are there?
- If you are part of business or undertaking with 15 or fewer workers, would a default position of one work group, an HSR and a deputy HSR suit your workplace? Please provide evidence of the costs and benefits of the default position at your workplace.

¹² Section 54 of the model WHS Act provides that parties may ask an inspector to be appointed to decide the matters referred to in s 52(3) if there is a failure in negotiations for agreement for work groups, which includes the number and composition of workgroups, the number of HSRs and deputy HSRs (if any) to be elected, and the workplace or workplaces to which the workgroups will apply.

7. Workplace entry by HSR assistants

Recommendation 8: Clarify workplace entry of union officials providing assistance to an HSR

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 2009* (Cth) or another industrial law.

2018 Review findings

HSRs can request the assistance of ‘any person’ whenever necessary in exercising a power or carrying out a function.¹³ ‘Any person’ can include a union official. The relevant PCBU must permit the HSR assistant access to the workplace if it is necessary to enable them to assist the HSR.¹⁴ The PCBU can refuse access on ‘reasonable grounds’, which includes the failure of the HSR to provide the required notice.¹⁵ The 2018 Review considered a recent decision by the Full Federal Court, in *Australian Building and Construction Commission v Powell*¹⁶ (*Powell*), could limit an HSR’s ability to seek the assistance of any person.

In *Powell*, the Full Court found the right of access conferred on a union official as an HSR assistant under the *Occupational Health and Safety Act 2004* (Vic) (Victorian OHS Act) is a ‘State and Territory OHS right’ for the purpose of s 494 of the *Fair Work Act 2009* (Cth) (FW Act). This means a union official entering a workplace as an assistant to an HSR is required to hold a valid entry permit under the FW Act (a Fair Work entry permit) and comply with certain requirements under the FW Act.¹⁷

As the HSR assistant provisions in the model WHS Act are very similar to those of the Victorian OHS Act,¹⁸ the *Powell* decision may be applied to jurisdictional WHS laws. This has the potential to limit the ability of an HSR to request the assistance of any person under those laws.

The 2018 Review found that such a limitation is not consistent with the original intent of the HSR assistant provisions in the model WHS Act.¹⁹ The Review Report considers that:

- the rights of an HSR to request assistance from any person with appropriate knowledge and experience, including union officials, should not be restricted
- the *Powell* decision, if applied to the model WHS laws, creates an inconsistency in the application of s 68(2)(g) of the model WHS Act between a union official and any other person accessing the workplace as an HSR assistant
- the *Powell* decision, if applied to the model WHS laws, creates a further inconsistency in that a union official will not be required to hold a valid WHS entry permit when they access a workplace as an HSR assistant, as this is separately regulated under Part 7 of the model WHS Act.

¹³ Section 68(2)(g) of the model WHS Act.

¹⁴ Section 70(1)(g) of the model WHS Act.

¹⁵ Sections 71(5) and (5A) of the model WHS Act.

¹⁶ [2017] FCAFC 89.

¹⁷ Sections 494 to 499 of the *Fair Work Act 2009* (Cth). Under s 494, an ‘official of an organisation’ (that is, a union official) must not exercise a ‘State or Territory OHS right’ unless the official holds a valid right of entry permit under the *Fair Work Act 2009* (Cth).

¹⁸ Sections 68(2)(g) and 70(2) of the model WHS Act and ss 58(1) and 70(1) of the Victorian OHS Act respectively.

¹⁹ Neither the 2008 National Review nor the Explanatory Memorandum to the model WHS Bill clearly set out that the original policy intent was that union officials entering a workplace as an assistant to an HSR should not be required to hold an entry permit under the FW Act or other relevant industrial law. The 2008 National Review refers to s 58(1)(f) of the *Occupational Health and Safety Act 2004* (Vic), which provides HSRs can seek the assistance of any person, whenever necessary. The second report to the 2008 National Review states an unintended consequence of this provision was that union officials had gained entry to carry out consultation with HSRs (see *National Review into Model OHS Laws: Second Report to the Workplace Relations Ministers’ Council*, January 2009, at paras [45.75] and [45.76]).

Options

Option 1— Status quo

This option would not require Safe Work Australia to undertake any further work in relation to entry permits for HSR assistants. Future case law would determine whether a union official requires a Fair Work permit to enter a workplace as an HSR assistant under the model WHS laws. This could result in union officials being required to hold a Fair Work permit to enter a workplace as an assistant to an HSR.

Anticipated impacts

The impact on businesses and unions could be an increase in costs in seeking legal and other professional advice to understand the implications of case law on their operations. Costs to business may also include loss of productivity associated with the additional time an HSR may need to identify and request assistance from an alternative person. This delay may impact the safety of workers and other persons in the workplace.

There could be an increase in the number of union officials seeking Fair Work entry permits (or an equivalent entry permit under a state or territory industrial law). For unions, this will entail direct and indirect costs in terms of the associated time and fees.

It is not clear how many union officials who do not currently hold a valid Fair Work entry permit are currently entering workplaces to provide assistance to HSRs. According to the Fair Work Commission's website, there are currently 3,055 Fair Work entry permit holders nationwide.²⁰ The Australian Building and Construction Commission maintains a [list of union officials](#) who hold executive, organiser or field officer positions in construction unions who do not have a Fair Work entry permit or have conditions applied to their permit. Forty individuals are on this list.²¹

Option 2 – Work to clarify union officials may assist an HSR without a Fair Work permit (Recommendation 8)

This option would require Safe Work Australia to work with relevant agencies to consider how to ensure that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the FW Act. This work would need to take into account the complex interaction between Commonwealth, state and territory laws.

Anticipated impacts

This option would have no regulatory burden as Safe Work Australia would simply be working with other agencies to consider options for how to address the problem.

However, if the outcome of the work was that measures were able to be taken to ensure that union officials were not required to hold an entry permit under the FW Act to access a workplace as an HSR assistant, this may have some benefits to stakeholders by removing uncertainty as to the implications of the *Powell* case, but the costs and benefits overall are expected to be limited. This is because the model WHS Act already contains provisions that ensure the power of HSRs to request assistance is used for a proper purpose, and allow PCBUs to refuse access to HSR assistants on reasonable grounds.²²

Employer groups have consistently raised concerns about the potential misuse of HSR assistant provisions by union officials to circumvent the FW Act and model WHS Act to access workplaces for industrial purposes. They say the impact is disruption to business operations and costs associated with productivity loss.

However, under the model WHS Act, an HSR must provide the PCBU and the person with management or control of the workplace at least 24 hours' notice (but no more than 14 days) before the HSR assistant's proposed entry.²³ If the assistant is a union official who holds or has held a WHS entry permit, the notice must include a declaration that the assistant's entry permit has not been

²⁰ As at 22 March 2019.

²¹ As at 1 May 2019.

²² Sections 65 and 71(5) and (5A) of the model WHS Act.

²³ Sections 68(3A) and (3B) of the model WHS Act.

suspended or revoked or the assistant is not disqualified from holding an entry permit.²⁴ This requirement may address any impact to business arising from the misuse of the HSR assistant provisions.²⁵

Questions

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?
- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.
- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.
- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

²⁴ Regulation 20A(2) of the model WHS Regulations.

²⁵ To date, these amendments have not been implemented by any jurisdiction.

8. Cancelling a Provisional Improvement Notice (PIN)

Recommendation 9: Requiring inspectors to deal with safety issue when cancelling a PIN

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.

2018 Review findings

The 2018 Review found inspectors often cancel PINs on technical grounds without resolving the WHS issue underlying the PIN. This was a point of frustration for both PCBUs and HSRs and affects working relationships. Examples of technical grounds in the Review Report include citing the wrong section of the WHS Act, or paraphrasing the WHS laws in a way that is technically incorrect.²⁶

It is worth noting that the Review Report did not reference any information or evidence about how often an inspector cancels a PIN for technical reasons, or why an inspector would do this rather than confirm the PIN with changes, if there is evidence of a contravention or likely contravention of the Act that justifies issuing the PIN.

Options

Option 1 – Status quo

This option would maintain the status quo, which means that parties could ask the regulator to appoint an inspector to review the PIN, and the inspector could confirm the PIN (with or without changes) or cancel the PIN. It is open for parties to request the assistance of an inspector to resolve underlying WHS issues under s 82 of the model WHS Act, and the inspector may exercise any of their compliance powers.

The model WHS Act provides a PIN is not invalid only because it contains formal defects or irregularities that do not cause ‘substantial injustice’ or it fails to use the correct name of the person it is being issued to, provided it is clear who the PIN applies to.²⁷ In cases where the error or defect is likely to cause substantial injustice, the PIN will be invalid. An HSR can make minor changes to the PIN to provide clarification or to correct errors and references.²⁸ They can also cancel the PIN.²⁹

The Safe Work Australia *Worker Representation and Participation Guide* provides examples of an error that could cause substantial injustice as citing the incorrect section of the laws, or referring to matters unrelated to a contravention of the WHS laws. That guide recommends HSRs cancel the invalid PIN and issue a corrected one as soon as they become aware they have issued a PIN that might be invalid.³⁰

The regulator can be requested to appoint an inspector to review the PIN within seven days after the PIN was issued.³¹ After reviewing the PIN, the inspector must confirm the PIN (with or without changes) or cancel the PIN and provide reasons for their decision.³² Confirmed PINs become Improvement Notices.

If the PIN is cancelled by an inspector, a further PIN cannot be issued for the same matter, but there is nothing to prevent an inspector exercising their existing functions or powers to resolve the outstanding WHS issues where appropriate. This includes actions such as providing advice or issuing a further notice. In some jurisdictions, operational arrangements or policies may require inspectors to address the underlying WHS issue when a PIN is cancelled.³³ In Queensland, it is policy for an inspector attending a workplace to review a PIN to contact the HSR first to obtain as much information

²⁶ *Review Report*, p 74, footnote 242.

²⁷ Section 98 of the model WHS Act.

²⁸ Section 94 of the model WHS Act.

²⁹ Section 95 of the model WHS Act.

³⁰ Safe Work Australia, *Worker representation and participation guide*, p 20.

³¹ Sections 100 and 101 of the model WHS Act.

³² Section 102 of the model WHS Act.

³³ For example, see *A guide for employers: How inspectors deal with specific issues*, WorkSafe Victoria, September 2016, p 20.

as possible about the issue before discussing with the person who requested the PIN review.³⁴ The Safe Work Australia *Worker Representation and Participation Guide* also provides that in reviewing the PIN, the inspector should seek information from both the HSR and the person issued the PIN, including finding out why it was issued, whether it was correctly issued and why it is being disputed.

Section 82 of the model WHS Act sets out the process for resolving WHS issues, which includes an ability to seek assistance from an inspector at the workplace if the issue remains unresolved after reasonable efforts have been made to achieve an effective resolution. Section 82 specifically provides an inspector may exercise any of their compliance and enforcement powers on attending the workplace to assist in resolving an issue.

Anticipated impacts

This option would not address the problem that a PIN for a WHS issue can be cancelled by an inspector on technical grounds, leaving the underlying WHS issue unresolved. This may have a negative impact on health and safety outcomes, with associated costs to business, workers and the community. It could also result in loss of trust in the WHS regulators.

This option would still provide for a process for resolution of WHS issues with the assistance of an inspector. The problem identified in the Review Report appears at least partly related to implementation of those arrangements following cancellation of a PIN by an inspector. The status quo would not prevent considering how implementation issues could be addressed. For example, the issue could be considered as part of the broader review of the NCEP recommended in the Review Report (Recommendation 21). If the existing process is clarified, parties to a dispute may not experience time delays associated with attempting to resolve the safety issue following cancellation of a PIN before they request an inspector's assistance.

Option 2 – Require inspectors to deal with safety issue when cancelling a PIN (Recommendation 9)

This option would amend the model WHS Act to provide that if an inspector cancels a PIN for technical reasons, the inspector must assist the parties to resolve the underlying WHS issue under s 82 of the model WHS Act.

The Review Report does not provide any detail about how 'technical issue' is to be defined, but includes examples of including the wrong subsection of the WHS Act or paraphrasing the WHS Act incorrectly. In some circumstances, these issues could also cause or be likely to cause 'substantial injustice', which would mean the PIN is invalid under s 98 of the model WHS Act.

The recommendation also does not detail how requiring that an inspector *must* deal with an unresolved safety issue after cancelling a PIN is intended to fit with the process in s 82 of the model WHS Act. Currently, that process only applies when the parties have made reasonable efforts to resolve the issue and then request the regulator to appoint an inspector to assist. This could be addressed by ensuring any amendments made to the model WHS Act to implement this option include that:

- s 82 applies when a WHS issue remains unresolved after a PIN has been cancelled for technical reasons by an inspector under s 102 of the model WHS Act
- the process for issuing the PIN, which includes a requirement that HSRs consult before issuing the PIN, may be taken as a 'reasonable effort' to resolve the issue for the purposes of s 82
- the request for review of the PIN under s 100 of the model WHS Act may be taken as a request for assistance to resolve the issue under s 82 of the model WHS Act, and
- the inspector appointed by the regulator to attend the workplace to review the PIN under s 100 is also the inspector appointed by the regulator to resolve the underlying WHS issue for the purposes of s 82 of the model WHS Act.

³⁴ Lyons T, *Best Practice Review of Workplace Health and Safety Queensland: Final Report*, Workplace Health and Safety Queensland, 3 July 2017, p 122.

Anticipated impacts

This option would not provide inspectors with additional functions or powers, but would require the inspector to perform the function of assisting in dispute resolution in certain circumstances, even where the parties may not have otherwise requested the assistance of an inspector under s 82 of the model WHS Act. In this respect, there may be an additional cost to regulators from inspectors spending time to resolve underlying WHS issues after cancellation of a PIN, if the parties would not otherwise have requested assistance under the existing issues resolution provisions. This cost may be offset by savings from avoiding inspectors having to re-enter the workplace at a later time to assist in resolving the same issue if the parties later request assistance.

The timely resolution of WHS issues with the assistance of an inspector is likely to result in better relationships between workers and PCBUs, improved health and safety outcomes and greater trust in the WHS regulator. This would result in reduced costs to the regulator, business, workers and the community.

Questions

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?
- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.
- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.
- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

9. Choice of HSR training course

Recommendation 10: HSR choice of training course

Amend the model WHS Act to make it clear that for the purposes of s 72:

- the HSR is entitled to choose the course of training, and
- if the PCBU and HSR cannot reach agreement on time off for attendance, payment of fees 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.

2018 Review findings

The 2018 Review found the final choice of HSR training provider was an area of contention between PCBUs and HSRs. Currently, there is an obligation on a PCBU to allow an HSR to attend an HSR training course that is approved by the WHS regulator, comprising five days initial training and one day refresher every 12 months after that. The course is chosen by the HSR in consultation with the PCBU. It is not open to either party to unilaterally decide on the choice of training course.³⁵

If an HSR makes a request to attend HSR training, the PCBU must allow them reasonable time off work to attend the training as soon as practicable within 3 months after the request is made and pay course fees and other reasonable costs associated with attendance. Where there is disagreement about the choice of course, time off for attendance and payment of reasonable costs and fees, either party can ask the regulator to appoint an inspector to decide the matter.³⁶

The 2018 Review found that these arrangements can lead to a stalemate if the HSR and PCBU cannot agree on a training course. This can delay the training, which then affects the HSR's ability to exercise some of their powers under the model WHS laws.

The extent of disagreement between HSRs and PCBUs about the choice of training course is unknown, as is possible delay that results from this disagreement, however, this issue was raised by both employer and employee representative organisations during the 2018 Review.

Options

Option 1 – Status quo

This option would retain the status quo so that neither party could unilaterally decide on a course of training. Where the HSR and PCBU cannot agree on a course of training, either party could request the WHS regulator appoint an inspector to decide the matter.

Anticipated impacts

This option would not address possible delays to HSRs attending training and exercising their full powers where they and the PCBU cannot agree on a course. This means a continuation of the costs associated with disputes about HSR training courses and delay in HSRs being able to exercise their full powers under the model WHS laws.

Option 2 – Allow HSR choice of training provider

Under this option, the model WHS Act would be amended so the HSR is entitled to choose a training course, but attendance would still be subject to agreement being reached with the PCBU about time off for attendance at that course and that the costs of attending are reasonable. If agreement cannot be reached, either party could ask the regulator to appoint an inspector to decide these matters.

Anticipated impacts

The option is intended to make the process of selecting a course of training less adversarial by streamlining the selection process, and reducing the time from election to the HSR being able to

³⁵ *Sydney Trains v SafeWork NSW* [2017] NSWIRComm 1009.

³⁶ Section 72 of the model WHS Act.

exercise all their powers. A less adversarial process may reduce instances where an inspector is requested to assist a PCBU and HSR to resolve disagreements about choice of training course.

This option would provide clarity and consistency around choice of HSR training course, which would reduce business costs to the extent it saves time and resources spent resolving those disagreements. However, more information is needed to assess the extent to which this option would reduce disagreements or the need for intervention by an inspector overall. Safe Work Australia does not have any information or data about the cause of disputes related to HSR training (i.e. whether they mainly relate to choice of course, or to payment of costs and time off). This option would have the greatest benefit if a significant proportion of disputes are related to choice of training course, but benefits would be more limited if disputes largely relate to costs and time off.

A cost may be imposed on business if implementation does not allow alternative courses, locations or dates to be considered in deciding what is reasonable time off and costs for HSR training. If PCBUs are limited to only considering the costs and time off for the course chosen by the HSR, it will be difficult to judge whether the course chosen by the HSR involves time and/or costs that are unreasonable in the circumstances. This may have the unintended consequence of increasing HSR training costs. If the person selecting the course is not the person paying course fees, there is less incentive to choose the best-value option and this could remove some incentive for training providers to price courses competitively.

Increased training costs could in turn have a negative impact on the relationship between PCBUs and HSRs in the workplace. As a result, the focus of disputes may simply shift from the choice of course to payment of reasonable costs and time off for attendance.

Questions

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings? What do you consider to be the cause and extent of disagreement over HSR training?
- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.
- Do you have suggestions for other options to address the problems identified in the 2018 Review? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.
- What is your preferred option and why will it be best for you, your organisation and your stakeholders?
- What do you consider as the main cause of disagreements over HSR training? How often do these disagreements occur, and to what extent do they affect you, your workplace or your stakeholders?

10. Referral of disputes

Recommendation 13: Introduce referral of outstanding disputes to a court or tribunal after 48 hours

Amend the model WHS Act to provide for:

- 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
- 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
- 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
- d) appeal rights from decisions of the court or tribunal to apply in the normal way.

2018 Review findings

The 2018 Review found a disparity between expectations on inspectors to resolve a WHS issue or cease work issue and their power to effectively decide the issue through the dispute resolution processes in ss 82 and 89 of the model WHS Act, beyond use of their existing compliance powers.

The Review Report notes the same issues were raised in the recent *Best Practice Review of Workplace Health and Safety Queensland* (2017 QLD Review), which found problems with the length of time it takes to resolve WHS disputes. The 2017 QLD Review recommended introduction of a process for lodging disputes with the Queensland Industrial Relations Commission, if the dispute remains unresolved 24-hours after an inspector has been requested to assist in resolution of the dispute. The 2018 Review considered a similar measure should be adopted in the model WHS laws to ensure disputes are resolved quickly and effectively.

Options

Option 1 – Status quo

This option would maintain the status quo so that an inspector would continue to be appointed to assist in resolving a WHS or cease work issue at the request of a party, and may exercise their compliance powers under the model WHS Act as part of the resolution process. 'Reviewable decisions' that an inspector makes in resolving an issue are subject to review mechanisms currently in the model WHS Act. Only certain types of decisions made by an inspector are reviewable decisions, including the decision to issue a prohibition, improvement or non-disturbance notice. A reviewable decision made by an inspector must undergo internal review by the regulator before a party can seek external review by a court or tribunal.³⁷

Anticipated impacts

This option would not address the identified problem of delays with resolving WHS issues and associated costs to business, including lost productivity, diversion of resources and potential increase in risks to health and safety.

An unresolved WHS issue could increase the risk of injury or harm to workers. The longer a WHS or cease work issue remains unresolved, the more likely it compromises relationships as well as consultation and cooperation efforts between businesses and workers.

Option 2 – Allow referral to a court or tribunal of outstanding disputes on a WHS or cease work issue after 48 hours (Recommendation 13)

This option would amend the model WHS Act to allow a party to an WHS issue or cease work issue to notify the court or tribunal of the an issue they wish to be heard, if it remains unresolved 48 hours from the time an inspector has been requested to assist in resolving the issue. The court or tribunal

³⁷ Review of decisions is dealt with in Part 12 of the model WHS Act.

may then exercise its powers to settle the dispute, which may include arbitration and conciliation. Parties can seek review of the court or tribunal's decision using existing appeal mechanisms.

Under this option, only issues under ss 82 and 89 of the model WHS Act may be referred to the relevant court or tribunal in a jurisdiction. The model WHS Act already allows disputes over the exercise, or purported exercise, of a WHS right of entry to be dealt with by the authorising authority, without internal reviews first being completed or another timeframe being imposed.³⁸

Under this option, it would be a matter for jurisdictions to decide which body is most appropriate to hear an application to resolve a WHS issue. Some jurisdictions may use a tribunal whereas others may use a court.

Anticipated impacts

This option would most benefit businesses and workers affected by disputes that are unresolved even after an inspector tries to assist the parties to resolve it under ss 82 and 89 of the model WHS Act. It would also allow parties to ask a court or tribunal to deal with an issue where the decisions an inspector makes in attempting to resolve the issue are not reviewable decisions under the model WHS Act.

Resolving matters more quickly would have a positive impact on business, workers and the wider community as it will contribute to improved safety outcomes. There may be an increased cost to the community arising from increased workloads on the courts and tribunals, which are funded by the taxpayer.

However, it is not clear if this option would lead to quicker resolution of issues. While Queensland has recently implemented amendments similar to this option, there is no publically available information on whether the availability of a court or tribunal process shortens the length of time it takes to resolve disputes or what impact it may have on the parties and the relevant court or tribunal.

This option would impose a financial burden on parties to the dispute in paying the costs associated with proceedings in courts and tribunals. The actual costs to parties will be dependent on a number of factors, including the court or tribunal to which the issue is referred. Workers or HSRs who are parties to the dispute are likely to have less resources to pay these costs than businesses. The costs of these proceedings would also be disproportionately higher for small organisations than for larger ones.

Questions

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?
- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.
- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.
- What is your preferred option and why will it be best for you, your organisation and your stakeholders?
- If Option 2 is adopted, would you seek to refer issues that are not resolved under ss 82 or 89 of the model WHS Act to a court or tribunal? Please explain why.

³⁸ Section 142 of the model WHS Act

11. WHS entry permit holders – prior notice of entry

Recommendation 15: 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.

2018 Review findings

The 2018 Review found there is confusion and ongoing disagreement over whether WHS entry permit holders are required to provide prior notice of entry to inquire into a suspected contravention of the model WHS Act. This problem is exacerbated by inconsistencies between the model WHS laws and those implemented in jurisdictions.

The model WHS Act did not initially require prior notice for entry by a WHS entry permit holder to inquire into a suspected contravention of the Act. In 2016, the model WHS Act was amended to require written notice of entry be provided at least 24 hours, but not more than 14 days, before entering a workplace under the WHS entry permit scheme, following the 2014 COAG Review.³⁹ There is an exemption from providing prior notice where the issuing authority reasonably believes there is a serious risk to health or safety from an immediate or imminent exposure to a hazard at the workplace.⁴⁰

No jurisdiction has implemented this amendment. This means the WHS laws in the model WHS law jurisdictions do not require a union official entering a workplace to investigate a possible contravention of the Act to provide 24 hours' notice. National guidance on the WHS entry permit scheme under the model WHS Act has been withdrawn from the Safe Work Australia website to minimise confusion resulting from providing guidance that is not consistent with the jurisdictional laws.

Options

Option 1 – Status quo

This option would maintain the status quo so that the current requirements in the model WHS Act for WHS entry permit holders to provide at least 24 hours' notice prior to a seeking entry to workplace to inquire about a suspected WHS contravention. This requirement is consistent with the entry permit scheme under the *Fair Work Act 2009* (Cth). Both laws provide for entry without notice if approved by the relevant issuing authority.

Anticipated impacts

The impacts of entry by WHS permit holders, particularly in the context of tension between reducing costs caused by disruption and improving safety outcomes, has been raised by stakeholders consistently throughout development and review of the model WHS laws.

The Decision RIS on the 2014 COAG Review found requiring prior notice of entry would provide a greater net benefit than entry without notice, on the basis that providing prior notice would:

*'...reduce business disruption and associated costs; reduce costs for regulators in investigating disputes relating to right of entry; enhance clarity and consistency for all parties in terms of right of entry for all purposes; maintain the safety of workers if the consultation, issue resolution and HSR roles are used as intended; and ensure the details of the suspected contravention are clear and advised well in advance of entry.'*⁴¹

However, this justification is not supported by the 2018 Review, which found aspects of the consultation, issue resolution and HSR provisions are not working as intended. As such, this option may involve an impact on the health and safety of workers through delayed access to assistance from

³⁹ Section 117(5) of the model WHS Act.

⁴⁰ For example, in New South Wales, the WHS entry permit issuing authority is the Industrial Relations Commission of New South Wales; in Queensland, this is an individual registrar under the *Industrial Relations Act 1999* (Qld).

⁴¹ *Decision Regulation Impact Statement: Improving the model work health and safety laws*, Safe Work Australia, December 2014, p 11.

their chosen representatives, in the absence of a fully functioning consultation and issue resolution framework at their workplace.

Assuming the amendments recommended by the 2014 COAG Review are implemented in the jurisdictions, there would be some costs to PCBUs, workers and union officials in becoming familiar with the new notice period for entry for a suspected WHS contravention. Authorised entry permit officials, in particular, would need to ensure they provide the required notice. It is unlikely to impose other significant additional costs to business, but may provide some benefits as outlined in the 2014 COAG Review above, including reducing disruption and associated costs.

This option is not anticipated to impose additional costs on union officials in preparing notices as this will be required regardless of the timeframe imposed, however, there may be a small additional cost to make the application for an exemption certificate.

Option 2 – Remove the 24-hour notice period for entry permit holders (Recommendation 15)

This option would involve reversing previous amendments to s 117 of the model WHS Act recommended by the 2014 COAG Review. While not expressly stated in the 2018 Review, three further amendments will be necessary to give effect to Recommendation 15.⁴² Together, these changes would remove amendments in the model WHS laws and realign them with the provisions currently in place in the model WHS laws jurisdictions.

Guidance material on WHS right of entry that was removed to avoid confusion could be re-published on the Safe Work Australia website, assisting duty holders and WHS entry permit holders to better understand the operation of the entry permit scheme.

Anticipated impacts

The Decision RIS on the 2014 COAG Review recommendations also assessed the impact of allowing entry without prior notice to inquire into suspected contraventions. It concluded that:

*'On balance, it was clear this option would not address the myriad of concerns raised by stakeholders and would continue to impose costs on PCBUs in particular, in dealing with unannounced entry and disruption by union officials on issues other than genuine WHS concerns. While the contribution of unions to health and safety in the workplace is acknowledged, it is not the role of entry permit holders to 'catch' non-compliant duty holders or otherwise enforce WHS at a workplace. This is the role of the regulator. The model WHS laws provide other mechanisms for addressing urgent WHS issues within the workplace, such as consultation and issue resolution, the powers of Health and Safety Representatives, and the rights for workers to cease unsafe work.'*⁴³

As discussed above, some of the justification for the 2014 COAG amendments is not supported by the 2018 Review, which found there are problems with the mechanisms for consultation on WHS (directly or through HSRs) and for issues resolution, which are affecting their intended operation. As such, there may be improvements to work health and safety in adopting this option where consultation is not working effectively.

As this option would bring the model WHS laws into line with enacted WHS laws operating in most jurisdictions, there would be no practical changes required by business, workers or unions and no compliance costs.

There may be a limited benefit of reduced confusion for PCBUs from restoring consistency between the model WHS laws and enacted WHS laws, as well as reinstatement of national guidance materials. This may be offset by continuing confusion from having notice requirements that are different for one type of workplace entry by WHS entry permit holders (i.e. a WHS entry permit holder is required to give at least 24 hours' notice before proposed entry to consult and advise workers under s 121 of the model WHS Act, and entry to inspect employee records under s 120 of the model WHS Act)

⁴² Related amendments were made to section 119 of the model WHS Act, and regulations 28 and 28A of the model WHS Regulations following the 2014 COAG Review.

⁴³ *Decision Regulation Impact Statement: Improving the model work health and safety laws*, Safe Work Australia, December 2014, p 10.

All other anticipated costs and benefits are ongoing. These were reiterated through submissions to the 2014 COAG Review and the 2018 Review, and include:

- disruption to business operations and associated loss of productivity from entry permit holders entering workplaces unexpectedly to enquire into any suspected WHS contravention
- costs to the business and unions in terms of the time and effort associated with resolving right of entry disputes, and
- benefits from provision of support and advice to workers who may otherwise continue to be put at risk from unaddressed hazards in the workplace.

These impacts may be greater for the construction sector where disputes about workplace entry by union officials appear more common, and injury and fatality rates are comparatively high.⁴⁴

Questions

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent? In your experience, is the extent of the problem different across industry sectors?
- What practical impact, including the costs and benefits, would requiring or not requiring a WHS entry permit holder to provide prior notice of entry have on you, your organisation or your stakeholders? Do you think the impacts would be different across industry sectors? Please provide evidence of the impacts wherever possible.
- Do you have suggestions for other options to address the problems identified in the 2018 Review? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.
- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

⁴⁴ Safe Work Australia, [Priority Industry Snapshot: Construction](#), June 2018.

12. Inspectors' powers

Recommendation 17: Require production of documents and answers to questions after entry

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.

2018 Review findings

The model WHS Act currently allows an inspector to exercise certain powers on entry to a workplace, including requiring the production of a document or answers to questions.⁴⁵ The 2018 Review found that if an inspector is required to enter a workplace each time they want to exercise these powers, it has the potential to limit the effectiveness and efficiency of investigations, particularly in regional or remote workplaces.

The 2018 Review considered an inspector cannot rely on the regulator's power to obtain information from a person under s 155 of the model WHS Act to overcome this problem. Section 155 requires the regulator to form a reasonable belief that person is capable of providing information, documents or evidence in relation to a contravention of the WHS Act or that will assist the regulator to monitor or enforce compliance. Given this, an inspector may need re-enter a workplace multiple times to obtain relevant information, where their initial visit does not provide sufficient evidence for the regulator to exercise its powers under s 155 of the model WHS Act.

Options

Option 1 - Status quo

This option would maintain the status quo so that inspectors continue to have the power to require the production of documents and answers to questions on entry to a workplace.

Anticipated impacts

This option would result in costs to the regulator, because an inspector may not know what questions and documents are relevant to the investigation if the full extent of the alleged contraventions is not clear on first entry to a workplace. If the inspector requires further information once they have left the workplace, and they do not have information to form the 'reasonable belief' necessary to rely on the regulator's power to obtain information under s 155 of the model WHS Act, there will be costs associated with the inspector having to re-enter that workplace in order to obtain the information.

This option has the potential to result in protracted investigations. An inspector may not have the capacity to travel to a workplace at the time more information is required, especially if the workplace is remote. Work schedules and other commitments can limit the inspectors' ability to enter a workplace again after the need for additional information is identified. Protracted investigations may have an effect on other ongoing or pending investigations, in turn affecting businesses and workers more broadly. It may also undermine trust in the regulator.

Delay in investigations and inspections can reduce health and safety if it diverts resources away from the regulator's other functions and delays identification and resolution of health and safety issues at a workplace. For those involved in an investigation, especially those who are injured, a protracted investigation is likely to have a negative effect on psychological health.

For businesses, maintaining the status quo may affect their operations and productivity if an inspector has to re-enter the workplace multiple times. For example, a business may have to stop part or all of its operations while an inspector is at the workplace to obtain documents and conduct interviews. A business may also need to assign a worker or officer to accompany an inspector and assist in answering questions each time the inspector enters a workplace. This too could have a negative impact on a business' costs and operations.

⁴⁵ Section 171 of the model WHS Act.

Option 2 – Allow inspectors to require information up to 30 days after entry

This option would amend the model WHS Act to provide that the inspectors' powers to require production of documents and answers to questions on entry to a workplace can be exercised by any inspector within 30 days following any inspector's entry to that workplace.

This option would not affect the power to require the production of documents and answers to questions, but would change the circumstances in which an inspector may exercise that power. Under this option, any inspector could exercise that power at any time during the 30 day period following entry by an inspector to that workplace, noting the Review Report does not make clear whether exercise of the power must be related to the reason for first entering the workplace.

Anticipated impacts

In practice, this option may result in a reduction in the number of times an inspector enters a workplace, but there could potentially be an increase in the number of requests for the production of documents or answers to questions and resulting increases in costs to business in answering these requests.

It is possible that implementation issues could result in a less efficient process for collecting information if inspectors rely on their ability to request further information, rather than ensuring they collect all relevant information that is available at the time of first entry. There may be increased costs for the person who is required to answer multiple requests by an inspector, especially where that involves attending a place other than the workplace. On the other hand, it is possible this option could be implemented in a way that has a positive impact on the effectiveness and efficiency of investigations, which in turn will have a positive impact on affected businesses and individuals.

This option would be consistent with the amendments made to the WHS laws in Queensland in October 2017. However, there is no publically available information on the impact that the Queensland amendments have had on workers, businesses, or the regulator.

Questions

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings outlined above?
- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.
- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.
- What is your preferred option and why will it be best for you, your organisation and your stakeholders?
- If Option 2 is adopted, should exercise of the power within 30-days after entry by an inspector be limited to only obtaining information that is related to the reason that inspector first entered the workplace?

13. The Category 1 offence and industrial manslaughter

Recommendation 23a: Enhance Category 1 offence

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.

Recommendation 23b: Industrial Manslaughter

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:

- 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
- the body corporate's conduct include 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

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).

2018 Review Findings

The 2018 Review noted there have been very few successful Category 1 prosecutions under the WHS laws, in part due to difficulties associated with proving the fault element of recklessness. The 2018 Review considered there is a risk that the threshold to prove the fault element of recklessness is too high, and thus difficult to establish, which means the offence is not meeting its objective to ensure compliance through deterrence.

The Review Report states that, unlike with recklessness, a prosecutor can establish gross negligence without having to prove that the failure to provide a safe environment was intentional. During the development of the model WHS Act, WHS ministers did not agree to include gross negligence in the Category 1 offence on the basis that doing so would result in the offence cutting across existing criminal laws, including general manslaughter offences.⁴⁶

The 2018 Review found there are limitations to dealing with work-related deaths through general manslaughter offences in the criminal law. There are issues in relation to attribution and aggregation of criminal conduct to a corporation, particularly larger organisations, which makes it difficult to successfully prosecute corporations for general manslaughter following a work-related death.

In addition to this, the Review Report raised concerns that in some jurisdictions, the offence of general manslaughter is only punishable by a term of imprisonment and not a fine, resulting in an inability to adequately sentence a company even if there was a finding of guilt.

The Review Report notes concerns about the potential for inconsistency between jurisdictions as they successively introduce their own industrial manslaughter offence within jurisdictional WHS laws. There is already some inconsistency in harmonised jurisdictions, as follows:

- the ACT introduced an industrial manslaughter offence in 2004, prior to introduction of the model WHS laws. That offence is in the *Crimes Act 1900* (ACT) (ACT Crimes Act) rather than in their harmonised WHS laws. The maximum penalty is 2,000 penalty units (equivalent to \$300,000 for an individual and \$1.5 million for a corporation) and/or 20 years imprisonment. No successful prosecutions have been brought under this offence to date. In their submission to the Australian Senate Education and Employment References Committee Inquiry into Industrial Deaths (the Senate Inquiry into Industrial Deaths), the ACT expressly preferred the

⁴⁶ Workplace Relations Minister's Council (WRMC) Response to Recommendations of the National Review into Model OHS Laws, 18 May 2009, response to recommendation 55, p 13.

inclusion of an industrial manslaughter offence in the model WHS Act over their approach in the ACT Crimes Act.

- Queensland introduced an offence of industrial manslaughter into its *Work Health and Safety Act 2011* (Qld) in October 2017. It carries a maximum penalty of 20 years imprisonment for an individual or for a body corporate, 100,000 penalty units (equivalent to \$10 million). There have been no prosecutions under this offence to date.

Following introduction of an industrial manslaughter offence in Queensland, a number of other jurisdictions have taken steps in this direction, including:

- the 'Best Practice Review of Workplace Health and Safety in the Northern Territory' (the 2019 NT Review) released in March 2019 recommended introducing an industrial manslaughter offence into WHS laws in the Northern Territory
- South Australian Greens MLC Tammy Franks introduced the Work Health and Safety (Industrial Manslaughter) Amendment Bill 2019 on 1 May 2019. The Bill contains an industrial manslaughter offence with jail terms of up to 20 years for officers and individual employers. It imposes a maximum fine of \$1 million for bodies corporate that commit industrial manslaughter. This is lower than the current maximum fine of \$3 million for reckless conduct in South Australia, and the maximum monetary penalty of \$10 million for industrial manslaughter in Queensland.

Options

The following options are proposed:

- Option 1 – status quo
- Option 2 – include gross negligence as a fault element in the Category 1 offence (Recommendation 23a only)
- Option 3 – introduce an offence of industrial manslaughter in the model WHS Act (Recommendation 23b only), and
- Option 4 – implement both Recommendations 23a and 23b.

As these options relate to the results of non-compliance with the model WHS laws, they would not impose compliance or regulatory impacts on business or workers. Accordingly, the options are discussed in terms of their effectiveness and appropriateness in enforcing compliance and penalising non-compliance.⁴⁷

There are a number of factors that may affect the extent of the anticipated impacts outlined below. Evidentiary issues, litigation strategies and budgetary constraints will affect all of the options below and influence any potential costs or benefits.

If either Option 3 or Option 4 is adopted, implementation would require further consideration of the current manslaughter laws in each individual jurisdiction. Further consideration about the issues related to attribution and aggregation in jurisdictional criminal law would also be required.

This Consultation RIS considers the impact of implementing the policy intent of introducing the industrial manslaughter offence as outlined in Recommendation 23b, to the extent possible in the absence of further consideration and detailed analysis of how jurisdictional criminal laws impact on the extent of the problems identified in the 2018 Review and how the offence is to be drafted. In accordance with 2018 Review's recommendation, Safe Work Australia would work with legal experts to develop the provisions for the model WHS laws.

Option 1 - Status quo

This option would not amend the model WHS laws and instead would rely on the current offence provisions. There are three offences for breach of a health and safety duty under the model WHS Act, which relate to the culpability of the offender and level of risk, not just the actual consequences of the

⁴⁷ COAG *Best Practice Regulation: A guide for ministerial councils and national standard setting bodies*, October 2007, p 16.

breach.⁴⁸ Currently the most serious offence under the model WHS Act is a Category 1 offence, which provides:

31 Reckless conduct—Category 1

(1) A person commits a Category 1 offence if:

- (a) the person has a health and safety duty; and
- (b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and
- (c) the person is reckless as to the risk to an individual of death or serious injury or illness.

Recklessness is not defined in the model WHS laws. The test to establish recklessness depends on the law that applies in the jurisdiction in which the prosecution takes place. Some jurisdictions rely on the common law meaning of recklessness, which can vary depending on the offence. It generally involves conduct where the person can foresee some possible or probable harmful consequence but nevertheless decides to continue with those actions with an indifference to, or disregard of, the consequences.⁴⁹

In other jurisdictions, recklessness is defined. For example, in the Commonwealth and ACT criminal codes, recklessness with respect to a circumstance is defined with the following elements:

- the person is aware of a substantial risk that his or her conduct could result in serious injury, and
- engages in the conduct despite the risk and without adequate justification, having regard to the circumstances.⁵⁰

Both the statutory and common law test for recklessness are subjective because they require the defendant to foresee the possibility of risk.

The Category 1 offence is based on exposure to risk of death or serious injury. The outcome of that exposure is not relevant to the offence. There does not need to be a death or serious injury for the offence to occur. However, Category 1 can still be used where death results and may result in imprisonment for individuals and significant fines for bodies corporate. The maximum penalty for a Category 1 offence is currently:

- \$300 000 or 5 years imprisonment, or both, for an individual
- \$600 000 or 5 years imprisonment, or both, for an individual as a PCBU or officer
- \$3 million for a body corporate.

Anticipated impacts

There is currently limited evidence to measure the impact of maintaining the status quo, including whether an industrial manslaughter offence would improve safety outcomes.

Recklessness

Maintaining the status quo would not address the identified difficulty in establishing recklessness for the purposes of a Category 1 offence.

There is very limited data to indicate the number of unsuccessful prosecutions for Category 1 offences or the number of cases that have not proceeded due to difficulties in establishing reckless conduct. The jurisdictions each have responsibility for enforcing the WHS laws that apply in their jurisdiction. This makes it difficult to compile data about prosecutions, particularly where charges are not laid or a prosecution is discontinued due to difficulties in proving reckless conduct.

⁴⁸ Recommendation 51 in the *National Review into model OHS laws: First report*, October 2008.

⁴⁹ *R v Nuri* [1990] VR 641.

⁵⁰ *Criminal Code Act 1995* (Cth), section 5.4(1); *Criminal Code 2002* (ACT), section 20.

Since the implementation of the WHS laws, Category 1 has been used a number of times. For example, there have been successful Category 1 prosecutions in NSW and South Australia.⁵¹ Queensland also had a matter which was successful at first instance, but overturned (and set down for retrial) on appeal.⁵² There are ongoing Category 1 prosecutions in Queensland⁵³ and the ACT.⁵⁴

In Victoria, which is not a harmonised jurisdiction, a PCBU was recently jailed as a result of being prosecuted for recklessly engaging in conduct that resulted in the death of a worker.⁵⁵ Although Victoria has not implemented the model WHS laws, this case provides supporting evidence that reckless conduct can be successfully prosecuted and result in a jail sentence.

Since 2007, there has been a sustained downtrend in workplace fatalities, when the fatality rate was double the rate in 2017.⁵⁶ More evidence is needed to measure the extent to which the prosecutions for offences under the model WHS laws has contributed to this trend. The model WHS laws are still relatively recent and as such are still settling. Given the length of time it takes for finalisation of court proceedings, it will take time before meaningful trends in prosecutions emerge and any analysis will need to account for differences in jurisdictional laws governing criminal procedure, which are outside the scope of the model WHS laws.

Attribution and aggregation

Maintaining the status quo would also not address the issues identified by the 2018 Review relating to attribution and aggregation of conduct to a company under general manslaughter in the criminal law. However, the criminal law in some jurisdictions already include provisions that deal with this issue. For example, the ACT criminal law expressly allows the physical and the fault elements of an offence to be attributed to a corporation in certain circumstances.⁵⁷ Under s 55 of the ACT Criminal Code, negligence in relation to conduct of a corporation may be evidenced by the fact that the conduct was substantially attributable to:

- inadequate corporate management, control or supervision of the conduct of 1 or more of the corporation's employees, agents or officers, or
- failure to provide adequate systems for giving relevant information to relevant people in the corporation.

There is limited case law in respect of aggregation and attribution of conduct to a company, particularly in relation to conduct that has resulted in a work-related death.⁵⁸ It is difficult to estimate the total number of general criminal manslaughter prosecutions that concern work-related deaths and the extent to which prosecutions have been affected by issues of attribution and aggregation.

Sections 244 and 251 of the model WHS Act allow for imputing conduct of employees, agents or officers to a corporation or public authority. The inclusion of these provisions in the model WHS Act is the basis for the 2018 Review's position that an industrial manslaughter offence should be included in the WHS Act.

⁵¹ *Stephen James Orr v Cudal Lime Products Pty Ltd* [2018] NSWDC 27, *Martyn Campbell v Jeffrey Rowe* [2019] SAET 104.

⁵² *R v Lavin* [2019] QCA 109.

⁵³ OHS Alert, 'Director charged under s 31 after fireball death', 30 October 2017.

⁵⁴ ACT WorkSafe media release, '[Manslaughter and other charges laid following fatal worksite incident](#)', 19 May 2018. A general manslaughter charge was laid against the driver of a crane that tipped over, killing a worker. Category 1 offences were laid against officers, managers and supervisors of the crane company and construction company.

⁵⁵ OHS Alert, 'Reckless company owner jailed, and employer handed high OHS discrimination fine', 15 January 2019. The Victorian offence (*Occupational Health and Safety Act 2004* (VIC), s 32) is not the same as the model WHS offence, but it does include 'recklessness' as a fault element.

⁵⁶ Work-related traumatic injury fatalities report 2017 - The fatality rate for 2017 was 1.5 per 100,000 workers. This rate has decreased by 48 per cent since 2007, when it peaked at 3.0 per 100,000 workers.

⁵⁷ Sections 50-52 of the *Criminal Code 2002* (ACT).

⁵⁸ In *R v A.C. Hatrick Chemicals Pty Ltd* (a Victorian matter where the company was charged with negligent manslaughter) Hampel J applied English case law to find that neither the plant manager, nor the safety coordinator were the embodiment of the company, as they were not sufficiently senior within its organisation so that it could be said in law that their minds were the company's mind. Justice Hampel held that on this basis the company itself could not be held negligent.

Maintaining harmonisation

One of the main impacts of maintaining the status quo identified in the Review Report is a risk that harmonisation would be undermined if jurisdictions each introduce their own industrial manslaughter offence, which many jurisdictions are considering. Given that the ACT and Queensland already have industrial manslaughter laws, there is already inconsistency in the approach of jurisdictions with harmonised WHS laws. However, this option would not address the risk of further inconsistency across jurisdictions with harmonised WHS laws.

Community concerns

This option would not address the increasing community concerns identified in the 2018 Review that there should be an outcome-based offence in circumstances where there is a gross deviation from a reasonable standard of care that leads to a work-related death.

Option 2 – Include gross negligence in the Category 1 offence (Recommendation 23a only)

This option would implement only Recommendation 23a, which provides for the amendment of 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. Under this option, a separate offence of industrial manslaughter would not be included in the model WHS laws.

Anticipated Impacts

The introduction of gross negligence as an element of the Category 1 offence may increase deterrence and result in improved safety outcomes, with associated benefits to business, workers and the community.

Recklessness and gross negligence

The Review Report suggests that the threshold of recklessness sets the bar for conviction too high and including gross negligence in s 31 of the WHS Act will assist prosecutors to secure convictions for the most egregious breaches of duty. This may result in an increase in the number of Category 1 offence prosecutions, as prosecutors will no longer have to prove subjective awareness of the risk (as required by recklessness).

Gross negligence involves an objective test, where the conduct involves a great falling short of the standard of care that a reasonable person would exercise in the circumstances and such a high risk that death or grievous bodily harm would follow that the act or omission merits criminal punishment.⁵⁹ Recklessness implies a higher degree of culpability, because the person engages in the reckless conduct even though they are subjectively aware of the risk or possibility of harm.

However, the Review Report does not provide evidence that including gross negligence in the Category 1 offence would result in an overall increase in the number of matters prosecuted. It is possible this approach may not lead to an overall increase in the number of Category 1 prosecutions, because the high risk of serious harm required to prove gross negligence is potentially more difficult to establish than the substantial risk of harm required for recklessness.

An increase in Category 1 prosecutions would increase legal expenditure, as indictable offences are dealt with by higher Courts, usually take longer to finalise and require more processes and court time. Without data in relation to the likely increase in number of matters being dealt with on indictment, it is not possible to accurately measure the potential impact on the court system. These costs would be offset by improvements in health and safety and a reduction in breaches of the health and safety duties, if the deterrent effect of the offences framework is enhanced as a result.

Attribution and aggregation

Like Option 1, this option would also not address the issues identified by the 2018 Review relating to attribution and aggregation of conduct to a company under general manslaughter in the criminal law.

Maintaining harmonisation

This option would not undermine harmonisation in relation to the Category 1 offence, assuming that all jurisdictions with harmonised WHS laws implement the change. However, like Option 1, there is a risk that adopting this option would undermine the harmonisation process by failing to achieve a national approach to industrial manslaughter, should jurisdictions proceed in introducing their own industrial manslaughter offences.

⁵⁹ *Nydam v The Queen* [1977] VR 430; *R v Buttsworth* [1983] 1 NSWLR 658.

Community concerns

As with Option 1, this option would not address the increasing community concerns identified in the 2018 Review that there should be an outcome-based offence in circumstances where there is a gross deviation from a reasonable standard of care that leads to a work-related death.

Option 3 – Introduce an industrial manslaughter offence (Recommendation 23b only)

This option would introduce an industrial manslaughter offence, without any changes to the current Category 1 offence. The fault element for Category 1 would remain recklessness, without the addition of a fault element of gross negligence.

Anticipated Impacts

The anticipated impacts of not including the element of gross negligence into the Category 1 offence described in Option 1 are also relevant to this option. This option may have a similar impact to Option 2 in respect of the court system.

Recklessness and gross negligence

An additional impact of adopting this option would be inconsistency in the offences framework. Recklessness implies a greater level of culpability because the duty holder must have had subjective awareness of the risk. Imposing a higher penalty level for industrial manslaughter based on gross negligence, compared to the current Category 1 offence involving recklessness, means the maximum penalty for each offence may not reflect the subjective culpability of the duty holder in breaching the WHS laws. On the other hand, this structure may be seen as appropriate given that the industrial manslaughter offence is focussed on the most serious outcome from a breach of the health and safety duties – work-related death.

Attribution and aggregation

This option would also address problems related to aggregation and attribution of conduct in relation to manslaughter identified in the 2018 Review. While this option would address these concerns, there is limited evidence on the extent to which such an offence would be used by regulators or deter non-compliance with the laws. The industrial manslaughter offence in the ACT Criminal Code has not been used successfully since it was introduced in 2004 and the Queensland industrial manslaughter offence is yet to be tested. As such, the practical difference that this option might make to the number of matters prosecuted, or the deterrent effect it would have, is unclear.

Maintaining harmonisation

Unlike Option 2, this option may support harmonisation and encourage a national approach to industrial manslaughter. However, given that there is already some inconsistency in jurisdictional approaches to industrial manslaughter, this benefit will only be achieved if jurisdictions implement the model industrial manslaughter offence.

Community expectations

This option would directly address increasing community concerns that there should be a separate industrial manslaughter offence, as identified in the 2018 Review.

Option 4 - Implement both Recommendations 23a and 23b

This option would implement both Recommendation 23a (including gross negligence as a fault element in the Category 1 offence) and Recommendation 23b (introducing the offence of industrial manslaughter) as described above.

The implementation considerations discussed above in respect of Options 2 and 3 would also apply to Option 4.

Anticipated Impacts

This option would combine the anticipated impacts from Options 2 and 3 above.

Questions

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?
- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide

evidence of the impacts wherever possible, especially if you have any evidence about the benefits of introducing an industrial manslaughter offence.

- Do you have suggestions for other options to address the problems identified in the 2018 Review? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.
- What is your preferred option and why will it be best for you, your organisation and your stakeholders?
- What do you see as the main limitations of the model WHS laws in deterring breaches of the health and safety duties?
- What benefits and costs are associated with Category 1 offence including two alternative fault elements? If available, please provide evidence of these costs and benefits.
- What do you consider the practical impacts of an industrial manslaughter offence to be for you, your business and your stakeholders? What need, if any, would they address? Please provide evidence of how an industrial manslaughter offence would address this need.

14. Prohibit insurance for WHS fines

Recommendation 26: Prohibit insurance for WHS fines

Amend the model WHS Act to make it an offence to:

- 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 indemnity.

2018 Review findings

The 2018 Review found the deterrent effect of the model WHS laws is reduced if companies can take out insurance to protect themselves and their officers from liability to pay penalties for non-compliance with WHS laws. There is currently nothing in the model WHS laws that expressly prohibits a company, its directors or employees from entering into arrangements that provide insurance or indemnity against paying penalties in relation to breaches of that law.

There is uncertainty about the interaction between such arrangements and s 272 of the model WHS Act, which provides that a term of a contract or agreement seeking to contract out a duty owed under the WHS Act or to transfer the duty to another person is of no effect.

The 2018 Review considered alternative options including making courts aware of the existence of insurance or indemnity policies prior to sentencing so they could be considered as part of the total penalty, and empowering the regulator to request that courts make a personal payment order that requires the offender to pay any fines themselves. The Review ultimately concluded that there is overwhelming support to prohibit indemnity insurance, similar to the approach taken in New Zealand. The Review Report noted the recommendation would not prevent the use of insurance to pay the costs of legal proceedings.

Options

Option 1 – Status quo

This option would maintain the status quo. Currently, the model WHS Act laws do not expressly prohibit insurance or indemnification against paying a monetary penalty for breach of a WHS law. A court may find these arrangements void or unenforceable, if challenged, on the basis that it is contrary to public policy to allow insurance and indemnity for unlawful acts. Whether a court will find an insurance or indemnity arrangement is void or unenforceable is dependent on the particular facts of a case. This means there is some uncertainty about the validity of these arrangements and the circumstances in which a person who has to pay a penalty for breach of a WHS law will be unable recover that penalty under an indemnity or contract of insurance.

Anticipated impacts

Availability of indemnity insurance may mean a PCBU is able engage and retain more skilled and experienced directors and WHS managers, with resulting benefits to WHS outcomes and reduced business costs.

Conversely, the status quo is unlikely to benefit workers or the wider community if the uptake of insurance liability policies creates a disincentive for duty holders to comply with the law. This could negatively impact health and safety outcomes, with increased costs to business, workers and the community. Regulators may experience increased enforcement costs if businesses become less vigilant in carrying out their WHS duties because they are covered by liability insurance.

Under this option, courts will ultimately decide the validity of an insurance policy. If a challenge to the validity of an insurance policy is successful, there is a cost to business in holding an insurance product that has no value.

Court outcomes may be limited to the circumstances of the particular case and not establish a precedent, so that uncertainty about the validity of these insurance policies would remain. Businesses

will incur costs to obtain advice on the validity of their arrangements and defending them if challenged.

Option 2 - Prohibit indemnity against WHS penalties (Recommendation 26)

This option would amend the model WHS Act to make it an offence to:

- 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, or
- take the benefit of such insurance or such an indemnity.

The Review Report does not recommend a penalty level for this offence, but suggests this is developed as part of the implementation process. Further, the Review Report does not recommend preventing the use of insurance for the cost of legal proceedings.

Anticipated impacts

Businesses, their officers and workers who have these arrangements will be directly impacted by this option, as such arrangements will no longer be enforceable. These parties will directly bear any penalties imposed on them, but this is a cost of non-compliance with existing obligations under the model WHS laws.

This option may increase costs in conducting business, such as costs associated with difficulty in attracting and retaining officers if they cannot be indemnified against penalties.

Insurance providers would also be impacted as they will be prohibited from offering these types of insurance contracts for WHS offences.

There could also be a resource impact for regulators and courts in monitoring and enforcing the prohibition on insurance policies.

This option would positively benefit the community to the extent it enhances the deterrent effect of the WHS penalty provisions. It may also contribute to improving worker health and creating a safer working environment by encouraging businesses and their officers to take a best practice approach to their WHS obligations to avoid penalties. Improved work health and safety will increase the business' operational performance and productivity.

Questions

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?
- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.
- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.
- What is your preferred option and why will it be best for you, your organisation and your stakeholders?
- In your experience, how common are insurance policies or arrangements that provide indemnity for breach of the WHS laws? Please support your answer with evidence.
- Do you consider that health and safety is affected by the availability of these arrangements? How?

15. The risk management process

Recommendation 27: 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 the model WHS Regulations) and making any corresponding amendments necessary.

2018 Review findings

The 2018 Review found there is a tension between the need for flexibility in the laws and certainty in what to do to manage risks. Generally, larger organisations preferred flexibility and smaller organisations called for provisions that clearly stated what they have to do to comply with the laws. Stakeholders frequently raised the complexity and volume of laws as a cause of confusion and uncertainty for small business.

The 2018 Review identified the issues experienced by small business as stemming from uncertainty in how to apply the overarching principles that apply to the health and safety duties, and confusion about the requirements to manage risk using the hierarchy of control measures.

The hierarchy of controls is set out in regulation 36 of Part 3.1 of the model WHS Regulations. Regulation 36 provides that if it is not reasonably practicable to eliminate risks to health and safety, a duty holder must minimise those risks, so far as is reasonably practicable, by implementing one or more of the listed risk control measures. The risk control measures are ranked from the highest level of protection and reliability (substitution, isolation and engineering) to the lowest (administrative controls and personal protective equipment).

The requirements for managing risks to health and safety in Part 3.1 of the model WHS Regulations (including the hierarchy of controls) must be complied with where there is a specific duty to manage risks to health and safety under the model WHS Regulations. The specific duties to manage risk in accordance with Part 3.1 are linked to the health and safety duties in the model WHS Act, in that they set out the way the duties or obligations in the Act are to be performed. For example, regulation 48 requires a PCBU to manage risks to health and safety associated with remote or isolated work, in accordance with Part 3.1, which is linked to the primary duty in s 19 of the model WHS Act.

There is no express requirement in the model WHS Act for PCBUs to apply the risk management requirements in Part 3.1 of the model WHS Regulations to manage risk more broadly, but there is also nothing to prevent a duty holder from applying that approach if it assists them to meet their health and safety duties.

The 2018 Review did not specifically recommend a general risk management process be included in the model WHS Act. However, the Review Report noted that, if the hierarchy of controls is included in the model WHS Act, there may need to be consequential amendments to other provisions, including s 17 of the model WHS Act which concerns the management of risks and s 18 relating to what is reasonably practicable in ensuring health and safety.

Options

Option 1 – Status quo

This option would retain the current arrangements. Under the model WHS Act, the duty to ensure health and safety requires elimination of risks to health and safety, so far as reasonably practicable. If it is not reasonably practicable to eliminate a risk, then those risks must be minimised so far as is reasonably practicable.⁶⁰

Risk management, including applying the hierarchy of controls where appropriate, is implicit to the definition of reasonably practicable in the model WHS Act. What is reasonably practicable in relation to a duty to ensure health and safety means what is (or was at a particular time) reasonably able to be done to ensure health and safety, taking into account all relevant matters, including the likelihood of the risk or hazard occurring, the degree of potential harm, and the suitability and availability of control

⁶⁰ Section 17 of the model WHS Act.

measures to eliminate or minimise risk. In practice, this involves identifying a range of available control measures in order to determine what can be done and the most effective way to minimise risk in the circumstances.

There is a range of guidance material available to help duty holders to apply a risk management approach and the hierarchy of controls more broadly to meet their health and safety duties. The Safe Work Australia guide *How to determine what is reasonably practicable to meet a health and safety duty* steps out a process for determining what is reasonably practicable that is consistent with the risk management process, including application of the hierarchy of controls. The steps include determining what can be done to eliminate or minimise risk by identifying the control measures that are available and suitable in the circumstances, and implementing the control measures with the highest level of protection. The guide sets out the hierarchy of controls as a way to determine the measures that are most likely to eliminate or minimise the risk or hazard.

The guide is consistent with the model Code of Practice: *How to manage work health and safety risks*, which provides practical guidance about how the risk management process and hierarchy of controls can be applied to eliminate or minimise all risks to health and safety, not only those specifically referred to in the model WHS Regulations. Other Codes also provide practical steps for applying the risk management process and hierarchy of controls in specific circumstances, such as managing the risks associated with hazardous chemicals, falls, and hazardous manual tasks.

Anticipated impacts

This option would not address confusion about the steps a PCBU needs to take to meet the primary duty of care, but it also does not prevent a PCBU from using the risk management process in the model WHS Regulations to manage risks more broadly. A duty holder can apply the hierarchy of controls outlined in the model WHS Regulations if it assists in identifying and assessing risk control measures. However, risks may be managed without prescribing the hierarchy of controls in all cases, such as where the hazards and their controls are well known (for example, there is a standard industry practice that effectively controls a risk that is well-known in that industry, or a Code of Practice or other guidance sets out established measures to control a specific hazard or risk). There is already national guidance material and jurisdictional information tailored for small businesses, which explains the risk management process and hierarchy of controls.⁶¹ Some WHS regulators also offer small business advisory services. Maintaining the status quo is therefore not expected to increase costs.

The benefit of the status quo is that it provides flexibility for businesses in how they identify, manage and control WHS risks and hazards. It enables businesses to tailor the risk management process to the particular circumstances when managing new risks and hazards, as well as develop innovative, effective and efficient practices to manage risks and hazards.

This option would be consistent with the original policy intention of the model WHS laws. The 2008 National Review specifically recommended that the model WHS Act should not require a process of hazard identification and risk assessment, or mandate a hierarchy of controls. It recommended the regulation making power in the model WHS Act should allow for a process to be established via regulation, with further guidance in a code of practice.⁶²

The 2009 National Review took this approach to address concerns that incorporating an obligation that mandates application of the risk management process in all cases may lead duty holders to believe they have met their duty simply by applying that process. Instead, the focus was placed on eliminating or minimising risk so far as reasonably practicable, with the risk management process only one method to achieve this. The definition of reasonably practicable in s 18 of the model WHS Act requires consideration of the degree and likelihood of harm, and availability and suitability of control measures, which provides for the application of risk management principles.

⁶¹ Safe Work Australia Guide: *Work-related psychological health and safety: A systematic approach to meeting your duties*.

⁶² Recommendation 136 of the *National Review into Model OHS laws: Second report*, January 2009.

Option 2 – Including risk management in the model WHS laws (Recommendation 27)

This option would amend the model WHS Act to include a hierarchy of controls (consistent with regulation 36) that applies more broadly to all risks, not just those identified in the model WHS Regulations, and making any corresponding amendments necessary to the model WHS laws.

Anticipated impacts

Including the hierarchy of controls in the model WHS Act may increase certainty for some businesses leading to a small reduction in business costs. However, businesses are confused about what they need to do to meet their duties, that is, exactly what to do to eliminate or minimise risks arising from a particular WHS hazard or risk at their workplace. The hierarchy of controls ranks the level and reliability of protection a risk control measure will provide. It does not set out in detail the steps a PCBU must take to minimise risks or the control measures that are most suitable in particular circumstances. Therefore, the extent to which this option will reduce uncertainty for businesses is not clear.

This option will increase the amount of regulation and could increase costs for some businesses. For instance, it could result in an increase in unnecessarily detailed documentation as a way of businesses demonstrating that they have minimised risk according to the hierarchy. This would likely increase costs, particularly for small businesses, and potentially affect business operations (such as delaying the commencement of a particular task until documentation is completed, even where the task involves known risks and controls).

It is possible this option will result in some improvement to work health and safety outcomes because PCBUs are better informed about how to discharge their duties. This benefit is expected to be minimal because the duty to ensure health and safety under the model WHS Act already requires a PCBU to do all that is reasonable to eliminate or minimise risk, including taking into account the suitability and availability of ways to eliminate or minimise the risk as far as is reasonably practicable. This is consistent with the approach recommended in the 2008 National Review and accepted by WHS ministers.⁶³

This option is therefore contrary to the original policy intent of the model WHS laws. As discussed in the second report of the 2008 National Review, it could result in duty holders being lead to believe they can meet their duty by simply applying the mandated process, with negative impacts on health and safety.

The consequential amendments to the model WHS Act that would be required under this option, including to the definition of reasonably practicable, are not yet clear. Changes to the principles in the model WHS Act may lead to duty holders, particularly small business, being more uncertain about how to eliminate and manage risks, so far as is reasonably practicable.

Questions

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?
- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.
- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.
- What is your preferred option and why will it be best for you, your organisation and your stakeholders?

⁶³ Recommendation 136 of the *National Review into Model OHS laws: Second report*, January 2009, which was agreed to by the Workplace Relations Ministers' Council.

16. Safe Work Method Statements

Recommendation 29a: Add a SWMS template to the WHS Regulations

Amend the model WHS Regulations to prescribe a SWMS template.

Recommendation 29b: Develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS

Safe Work Australia develop an intuitive, interactive tool to assist in the effective and efficient completion of fit-for-purpose SWMS.

2018 Review findings

During consultation undertaken as part of the 2018 Review, stakeholders in the construction industry raised numerous concerns relating to the efficacy and value of SWMS, including that:

- many PCBUs do not understand when a SWMS is required – that is, only for high risk construction work as defined in the model WHS Regulations
- when produced, SWMS are often not fit for purpose, with information provided in a template or pro-forma document rather than being developed to deal with a specific issue at a particular worksite, and
- once completed, SWMS are often shelved and not reviewed, maintained or used on site.

Industry feedback also indicated that there is inconsistency among WHS regulators regarding what is required to be included in a SWMS. A number of stakeholders were frustrated by the lack of a consistent approach to, and understanding of, requirements for SWMS.

The Review Report found a problem with PCBUs requesting a SWMS and seeking additional safety information from contractors and sub-contractors through other means, where it is not required by the model WHS Regulations. However, it did not consider whether there may be other, relevant reasons for this, for example, whether the additional information sought by PCBUs was required contractually and leading to improve safety outcomes.

The Review Report concludes this is an area of the model WHS Regulations which is not operating as intended, largely as a result of misunderstanding the requirements of the model WHS Regulations rather than a result of an unintended consequence or an ambiguity arising from the Regulations themselves. There appears to be a lack of understanding about the information required by a SWMS and what is required to meet the compliance standards of different WHS regulators.

Options

To address problems related to SWMS, the following options are proposed:

- Option 1 – status quo
- Option 2 – implement only Recommendation 29a to add a SWMS template to the model WHS Regulations
- Option 3 – implement only Recommendation 29b to develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS, and
- Option 4 – implement both Recommendation 29a and 29b to add a SWMS template to the model WHS Regulations and develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS.

Option 1 – Status quo

This option would maintain the status quo so the template for SWMS is contained in the model Code of Practice: *Construction work* (the Construction Code). The Construction Code and other existing guidance material will continue to inform PCBUs about SWMS requirements.

The information that must be included in a SWMS is prescribed in regulation 299(2) of the model WHS Regulations. The Construction Code provides national guidance, including the SWMS template and completed examples, to demonstrate how to comply with these requirements. Safe Work

Australia has also published an information sheet on *Safe work method statement for high risk construction work* and four of the seven jurisdictions with harmonised WHS laws have specific guidance on SWMS.

Anticipated impacts

This option would not address confusion around the requirements for SWMS, ensure that they are fit-for-purpose, or ensure that PCBUs and workers are taking them into account once developed. SWMS that are not fit for purpose or are not being used appropriately may result in an ongoing cost to business, community and the government due to increased risk of injury, illness or fatalities.

Option 2 - Add a SWMS template to the model WHS Regulations (Recommendation 29a)

This option would amend the model WHS Regulations to prescribe a SWMS template.

Implementation involves including a basic SWMS template in the WHS Regulations to assist duty holders in the construction industry understand the format and type of information to be included in a SWMS. Adding a SWMS template would not amend or create any additional the requirements under the model WHS Regulations.

Anticipated impacts

Smaller businesses may benefit from a SWMS template being available through the model WHS Regulations. Small business will be more likely to be aware of the template if it is located in the WHS Regulations and so save time and resources looking for SMWS templates or formats to use. The extent of this benefit is expected to be limited, given a template is already available in the Construction Code, which is available on the Safe Work Australia website and jurisdictional websites. Some WHS regulators also provide the template as a separate document or as part of a package of resources. This option would simply move the location of the template to the model WHS Regulations. As noted throughout the Review Report, many smaller businesses are already concerned that the model WHS Regulations are unnecessarily complex, confusing and prescriptive. Adding the SWMS template to the model WHS Regulations will increase prescription and may also increase perceptions of complexity, rather than assist smaller businesses to understand the information required in a SWMS.

A template or pro-forma in the model WHS Regulations may also increase the risk of businesses or workers taking a 'tick and flick' approach where the SWMS is just a routine they complete without critically considering the risks for the particular task or site. However, this risk is already present with the template in the Construction Code and templates from other sources.

Those larger businesses that have their own template or pro-forma SWMS in place may incur some costs associated with changing their material to align with the new prescribed template. However, these costs could be alleviated if PCBUs were allowed to use their own existing SWMS documents, as long as they incorporate the requirements of the prescribed template. Other than the costs associated with aligning existing systems with the new template, adding a SWMS template to the model WHS Regulations should not result in any increased compliance costs for business, workers or the community.

Clear, focussed SWMS are more likely to achieve their intended purpose of supporting a safer environment for high risk construction work. A template will assist in ensuring all required information is covered and also assist with 'over-compliance' in terms of ensuring a PCBU only includes the information required in a SWMS. However, it will not address concerns that businesses are requiring PCBUs in a supply chain to prepare SWMS where one is not required by the model WHS laws.

Option 3 - Develop a tool to support the completion of fit-for-purpose SWMS (Recommendation 29b only)

This option would require Safe Work Australia to develop an intuitive, interactive tool that provides clear guidance on what information and actions are required to complete each section of the SWMS template. This tool would reinforce existing requirements, for example consulting with workers when preparing SWMS and increase knowledge and understanding of the practical purpose of SWMS. The SWMS template would not be prescribed in the model WHS Regulations.

Anticipated impacts

There are no additional regulatory requirements associated with this option. As such, there should be no increased compliance costs for business, workers or the community.

The time it takes an individual to familiarise themselves with and use the tool to create a SWMS would be offset by the benefits of creating fit-for-purpose SWMS for the workplace.

The costs associated with development of the tool would be borne by Safe Work Australia, with the tool expected to be hosted (initially) on the Safe Work Australia website.

As Safe Work Australia would utilise the technical expertise that sits within jurisdictional WHS regulators to assist in developing and testing the tool, participating jurisdictions will incur the costs associated with their involvement. These costs will be directly proportional to the jurisdiction's involvement in the development process.

Those businesses that are in the market of developing and selling customised SWMS may incur a loss of income if the tool gains widespread use.

Option 4 – Implement both Recommendations 29a and 29b

This option would combine Options 2 and 3, so that a basic SWMS template would be prescribed in the model WHS Regulations with an intuitive, interactive tool that provides clear guidance on what information and actions are required to complete each section of the SWMS template.

Anticipated Impacts

The anticipated impacts of this option are the combined impacts for Option 2 and Option 3 described above.

Questions

- How are you, your organisation or your stakeholders affected by the problems identified in the 2018 Review findings, and to what extent?
- What practical impact, including the costs and benefits, would the options set out in this Consultation RIS have on you, your organisation or your stakeholders? Please provide evidence of the impacts wherever possible.
- Do you have suggestions for other options to address the problems identified in the 2018 Review findings? Please provide information and evidence on the impacts of your suggested option, including how it would improve the WHS outcomes or reduce compliance costs.
- What is your preferred option and why will it be best for you, your organisation and your stakeholders?
- Do you already have systems in place for developing customised (workplace specific) SWMS?
- What barriers may prevent you using an online SWMS tool in your workplace?
- Does your business derive an income from developing SWMS? If so, do you expect to incur a financial loss if Safe Work Australia develop an on-line interactive tool to assist in developing SWMS? Can you predict the extent of this loss?

17. Consultation Plan

Safe Work Australia has a comprehensive stakeholder engagement plan with strategies to bring the Consultation RIS to the attention of interested parties. We will engage with audiences using a range of communication channels and messages tailored to each audience. This includes using our consultation platform Engage. Once registered with Engage, users can:

- ask questions about the RIS process, and
- make a formal submission on the questions asked in this Consultation RIS.

Electronic mail-outs will be sent to several Safe Work Australia subscriber lists to promote the Consultation RIS. These lists have over 28,000 subscribers. Social media, including posts on Facebook, LinkedIn and Twitter, will be used to promote the opportunity to provide views and evidence on the options proposed in the Consultation RIS. We may also contact stakeholders directly for comment.

Safe Work Australia Members will be provided with material to publish on the Consultation RIS, including links to the Engage platform. Safe Work Australia will also work with national organisations, businesses and associations to promote the consultation process on their respective websites and through their contact lists.

Previous consultation

Extensive consultation was undertaken as part of the 2018 Review. A discussion paper was published to guide consultations over an eight-week public consultation period. Ms Boland travelled to every capital city and two regional centres (Tamworth and Cairns) and conducted six online discussion forums on specific topics.

Over the course of consultation, Ms Boland attended 81 meetings with 387 people, received 136 written submissions and 127 online comments. Participants included representatives of safety regulators, business, workers, unions, industry organisations, health and safety representatives, health and safety and legal practitioners, academics and community organisations. Ms Boland published a [consultation summary](#) in August 2018. Submissions to the 2018 Review can be viewed on Safe Work Australia's [Engage website](#).

Stakeholder contributions to the 2018 Review helped to shape identification of the problems and formulate the recommendations for improvement to the model WHS laws, both of which are the foundation of this Consultation RIS.

Next steps

Once the consultation period has closed, stakeholders may be contacted for further information or to clarify information provided in submissions.

Safe Work Australia will use the stakeholder feedback received as part of this Consultation RIS to prepare a Decision RIS for WHS ministers. The Decision RIS will identify options that result in the greatest net benefit to the Australian community, based on an analysis of the relative costs and benefits. It is expected the Decision RIS will be provided to WHS ministers for consideration towards the end of 2019.

WHS ministers will make decisions in relation to all of the 2018 Review's recommendations, including those recommending further review.

Appendix A – Recommendations likely to have nil or minor impacts

These recommendations below are expected to have no or only minor impact on business, individuals or the community. Inclusion of recommendations in this table does not reflect the importance of the issue, but rather the impact the proposed changes are expected to have. They propose amendments to the model WHS laws, enhancements to guidance material, or further work to determine the scope of identified problems and to develop options for consideration. Any options arising from the further work that require ministerial decision will be subject to a separate regulation impact assessment process. Questions on these recommendations are at the end of the table.

Cross-references are included for recommendations already addressed in the body of this Consultation RIS.

Recommendation	2018 Review findings	Anticipated impacts	Summary
<p>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 <i>Australian Work Health and Safety Strategy 2012-2022</i>.</p>	<p>The Review Report identifies limitations with the model WHS Regulations and Codes in that business find them complex, confusing and lacking practical detail. It considers there is a disconnect between the model WHS Act and the Regulations and Codes and that there may be gaps in the coverage leading to a perception that areas not specifically covered by Regulations or a Code there are no WHS duties.</p> <p>Many small business says it is difficult to work out what parts of the Regulations and Codes are applicable to them.</p>	<p>This recommendation would require a significant investment of time and resources to implement. The criteria against which the model WHS Regulations and Codes are to be assessed would need to be developed and agreed by Safe Work Australia Members, following a comprehensive assessment of the duties prescribed by the model WHS Act. Reviewing the Regulations and Codes against the criteria for each of the seven priority industries will require the involvement of those with appropriate WHS expertise in each industry.</p> <p>The conduct of this review would have no impact: an assessment of any impact can only be made once the findings from the review are available.</p>	<p>No impact – further work recommended</p>
<p>2: Make regulations dealing with psychological health</p>	<p>See Chapter 5 of this Consultation RIS.</p>		
<p>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.</p>	<p>The Review Report found the model WHS laws establish a robust framework for new and emerging work arrangements. While Safe Work Australia already identifies and assesses the evolution of new workplace risks, there are no set criteria around how this is done. The criteria envisaged by this recommendation would be developed by Safe Work Australia Members, in consultation with other stakeholders.</p>	<p>There would be no impact on business from the creation of 'assessment criteria'. While the application of such criteria could lead to consideration of changes to the model WHS laws, any impacts on business could only be assessed once specific problems and options have been identified.</p>	<p>No impact – further work recommended</p>

Recommendation	2018 Review findings	Anticipated impacts	Summary
<p>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.</p>	<p>The 2018 Review found stakeholders are unclear as to whether a person can be both a worker and a PCBU for the purposes of the model WHS laws.</p>	<p>Implementing the recommendation would involve adding an express provision, likely a legislative note, to s 5(4) of the model WHS Act stating that a person can be both a worker and a PCBU. This is already the case under the model WHS Act.</p> <p>This would support ss 15 and 16 of the model WHS Act, which states a person can have more than one duty and more than one person can have the same duty respectively.</p> <p>As this amendment only clarifies the existing operation of the model WHS Act no impacts are expected.</p>	<p>No impact – clarification</p>
<p>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:</p> <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). 	<p>The 2018 Review found that core principles underpinning WHS law, like the requirement for duty holders to consult with other persons who share responsibilities for WHS, are difficult to apply in practice. The Review Report states that the model WHS Act is not operating as intended because PCBUs are unsure about when, how and to what extent they must consult, co-operate and co-ordinate with other persons who have a duty in relation to the same matter. In other words, there is confusion about the interaction of the principles in ss 13-17 and the duty to consult, co-operate and co-ordinate in s 46. This is particularly the case in relation to modern working arrangements, such as labour hire, outsourcing, franchising and the gig economy.</p>	<p>The recommendation to develop a standalone model Code with practical examples that illustrate how duties can be met will not increase regulatory burden on business. This material is already contained in a model Code; it would just be separated out into a standalone Code under this recommendation. The Code would cover existing duties and only provide additional explanation, not additional obligations.</p> <p>There are no statutory changes associated with this recommendation. There may be a minor benefit if material is easier to find and provides greater clarity on existing provisions.</p>	<p>Minor benefit – additional guidance</p>
<p>6: Provide practical examples of how to consult with workers Update the model Code of Practice: Work health and safety consultation, co-operation and co-ordination to include practical examples of how meaningful</p>	<p>The 2018 Review found that genuine consultation is not always occurring as required under the model WHS law. This may be impacting on safety outcomes as consultation provides the opportunity for workers to raise safety issues as well as</p>	<p>There is already a model Code on consultation, co-operation and co-ordination. This recommendation aims to improve the useability of that Code through the inclusion of practical</p>	<p>Minor benefit – additional guidance</p>

Recommendation	2018 Review findings	Anticipated impacts	Summary
consultation with workers can occur in a range of traditional and non-traditional settings.	ensuring the PCBU can draw on the expertise of workers in managing risks.	examples illustrating how meaningful consultation can be achieved in different workplaces. Implementing the recommendation would not place any additional duties on business: the recommendation merely seeks to improve the ability of duty holders to meet their existing obligations.	
7a: New arrangements for HSRs and work groups in small businesses	See Chapter 6 of this Consultation RIS.		
7b: Work group is negotiated with proposed workers Amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group.	Under the current arrangements for forming work groups to elect HSRs, it may be difficult for a PCBU to identify who they must negotiate with. The model WHS Act states the workers who must be party to the negotiations are those who will form the group, the identification of which is the subject of the negotiations. This issue was raised in the case of <i>NSW Fire Service v SafeWork NSW</i> [2016] NSWIRComm 4. The 2018 Review found this issue could be addressed by clarifying that the negotiations must be with workers <i>proposed</i> to form the work group, which aligns with language used in the Explanatory Memorandum to the model WHS Bill. The extent of the problem is unknown but thought to impact PCBUs at workplaces where multiple work groups are formed.	This option would amend the model WHS Act for consistency with the language used in the Explanatory Memorandum – that is that PCBUs must negotiate with the workers who are proposed to form the work group or their representatives. This option would provide clarity for PCBUs on which workers they must negotiate with when forming work groups. This is likely to result in less time required to clarify the duties in the model WHS Act and lower consultation costs if PCBUs are undertaking further consultation during the process to ensure all workers are captured. It may also reduce costs to the PCBU if it prevents the need for specialist advice where PCBUs are unable to determine their obligations.	No impact – clarification
8: Workplace entry of union officials when providing assistance to an HSR	See Chapter 7 of this Consultation RIS.		
9: Inspectors to deal with safety issue when cancelling a PIN	See Chapter 8 of this Consultation RIS.		
10: HSR choice of training provider	See Chapter 9 of this Consultation RIS.		

Recommendation	2018 Review findings	Anticipated impacts	Summary
<p>11: Provide examples of HSC constitutions, agendas and minutes Update the model Codes and guidance with examples of Health and Safety Committee (HSC) constitutions, agendas and minutes.</p>	<p>The 2018 Review found stakeholders are confused about the administration of HSCs and that the rules can be onerous for smaller businesses: e.g. developing a constitution, agendas and minutes can be onerous for smaller businesses.</p>	<p>This recommendation aims to assist those establishing and servicing HSCs by adding practical information to existing model Codes. Implementing the recommendation would not place any additional duties on business: the recommendation merely seeks to improve the ability of duty holders to meet their existing obligations.</p>	<p>Minor benefit – additional guidance</p>
<p>12: Update guidance on issue resolution process and participants Update the Worker representation and participation guide 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. 	<p>The 2018 Review found stakeholders are confused about how to identify ‘parties’ to a WHS issue and have difficulties in understanding and applying the model WHS laws issue resolution process.</p>	<p>This recommendation aims to improve understanding of the model WHS laws dispute resolution provisions by adding practical examples to existing guidance. Implementing the recommendation would not place any additional duties on business: the recommendation merely seeks to improve the ability of duty holders to meet their existing obligations.</p>	<p>Minor benefit – additional guidance</p>
<p>13 Resolving outstanding disputes after 48 hours</p>	<p>See Chapter 10 of this Consultation RIS.</p>		
<p>14: 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>	<p>The 2018 Review found that there is uncertainty over whether the model WHS laws allow a court to make a declaratory order under the model WHS laws’ discriminatory and coercive conduct provisions following <i>Thornburn v Safe Work SA</i> [2014] SAIRC 29.</p> <p>This problem only affects workers seeking a declaratory order for discrimination under the WHS laws in their jurisdiction.</p>	<p>This recommendation would clarify that discriminatory orders are able to be granted by courts in matters relating to discriminatory or coercive conduct. The courts ability to issue declaratory orders for breaches of the discriminatory and coercive conduct provisions supports individual’s ability to access procedural fairness by ensuring the use of a mechanism that is considered an efficient and flexible way of resolving matters.</p> <p>As this amendment only clarifies the existing operation of the model WHS Act no impacts are expected.</p>	<p>Minor benefit – clarification</p>

Recommendation	2018 Review findings	Anticipated impacts	Summary
15: Remove 24-hour notice period for entry permit holders	See Chapter 11 of this Consultation RIS.		
16: 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 under s 155 and s 171 with those in s 209 of the model WHS Act dealing with improvement, compliance and non-disturbance notices.	The 2018 Review found that provisions in the model WHS laws dealing with the service of notices is inconsistent and therefore impractical.	This recommendation would clarify the way notices under s 155 and s 171 of the model WHS Act are served and ensure consistency across harmonised jurisdictions, but is unlikely to result in significant impacts. This is because service of notices issued under s 155 and s 171 in harmonised jurisdictions is currently similar to service as required in s 209 of the model WHS Act.	Minor benefit – clarification
17: Provide the ability for inspectors to require production of documents and answers to questions for 30 days after they or another inspector enters a workplace	See Chapter 12 of this Consultation RIS.		
18: 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.	The 2018 Review found that co-operation between regulators is restricted in cases where inspectors need to perform their functions in another jurisdiction. This is because there is uncertainty as to whether inspectors can gather information for the purpose of suspected breaches outside their jurisdiction. This affects WHS regulators seeking information outside their industry or geographical jurisdiction.	This recommendation would put beyond doubt that a regulator can issue a s 155 notice to a person outside of its jurisdiction. As this amendment only clarifies the existing operation of the model WHS Act no impacts are expected.	No impact – clarification
19: 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.	The 2018 Review found that regulators are concerned that they are restricted in sharing information across jurisdictions due to the confidentiality provisions in the model WHS Act. This problem affects WHS regulators who have been asked to provide information to a regulator with a different jurisdiction (e.g. industry or geographical jurisdiction).	This recommendation would put beyond doubt that regulators may share information across jurisdictions. As this amendment only clarifies the existing operation of the model WHS Act no significant impacts are expected. However, it may improve information sharing and ensure investigations proceed more efficiently.	No impact – clarification

Recommendation	2018 Review findings	Anticipated impacts	Summary
<p>20: Review incident notification provisions 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>The 2018 Review found the incident notification provisions in the model WHS laws are not operating as intended. They are often misunderstood by business and do not capture all relevant incidents, particularly psychological injuries.</p>	<p>A review of the incident notification provisions would be undertaken by Safe Work Australia and would draw on the views of a range of stakeholders including PCBUs, workers, Health and Safety Representatives, union officials, inspectors and WHS experts/academics.</p> <p>The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.</p>	<p>No impact – further work recommended</p>
<p>21: Review the National Compliance and Enforcement Policy (NCEP) Review the NCEP to include supporting decision-making frameworks relevant to the key functions and powers of the regulator to promote a nationally consistent approach to compliance and enforcement.</p>	<p>The 2018 Review identified inconsistent approaches to enforcement and compliance across jurisdictions and concludes the NCEP:</p> <ul style="list-style-type: none"> • provides insufficient detail for regulators and inspectors, and • insufficient information for duty holders about how and when a regulator might use enforcement tools. 	<p>The review of the NCEP would be undertaken by Safe Work Australia, in consultation with other stakeholders.</p> <p>The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.</p>	<p>No impact – further work recommended</p>
<p>22: 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>The 2018 Review found that current penalty levels (in place since 2011) do not act as an effective deterrent, especially for larger companies.</p>	<p>Increasing penalty levels to align with increases in the consumer price index would ensure that penalties under the WHS laws retain their real value as a deterrent.</p> <p>This will contribute to improving worker health and creating a safer working environment as businesses and their officers are encouraged to take a best practice approach to their WHS obligations so as to avoid penalties. Improved work health and safety may also increase the business' operational performance and productivity. The increases are not expected to result in significant increased costs to business overall, as only those business who breach their obligations are subject to the penalties.</p>	<p>No regulatory cost. Legislative amendment required.</p>

Recommendation	2018 Review findings	Anticipated impacts	Summary
23a: Enhance Category 1 offences	See Chapter 13 of this Consultation RIS.		
23b: Industrial manslaughter	See Chapter 13 of this Consultation RIS.		
<p data-bbox="192 336 696 400">24: Improve WHS regulator accountability for investigation progress</p> <p data-bbox="192 400 696 676">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 data-bbox="696 336 1267 496">The 2018 Review found the 12-month deadline to request a prosecution is brought often lapses before an investigation is complete. This leaves the injured parties and their families without an avenue for recourse.</p> <p data-bbox="696 496 1267 836">The 2018 Review found there may be negative consequences to the 12-month deadline for a person to request the regulator to bring a prosecution in response to a Category 1 or Category 2 offence if no prosecution has been brought within six to 12 months of the occurrence (s 231). In particular, any delay or inaction in making a decision on prosecution may result in a person not being able to request the regulator to bring a prosecution.</p>	<p data-bbox="1267 336 1888 528">A person with an interest or connection to an investigation would be able to request the regulator to bring a prosecution at any time, not just within 12 months of an occurrence. They will also be kept informed until a decision is made on bringing a prosecution.</p> <p data-bbox="1267 528 1888 751">There is a potential benefit to the community in this approach, as it increases transparency and accountability. It could also benefit the community and workers if greater transparency in the progress of investigations results in more timely prosecutions and an increase in safety standards through deterrence.</p> <p data-bbox="1267 751 1888 916">There would be potential resource costs to the regulator in responding to requests and keeping persons informed of investigations. These resource costs are ultimately borne by the taxpayer.</p>	<p data-bbox="1888 336 2123 464">No regulatory cost. Legislative amendment required.</p>
<p data-bbox="192 916 696 1251">25: Consistent approach to sentencing</p> <p data-bbox="192 1251 696 1361">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>	<p data-bbox="696 916 1267 1043">The 2018 Review found that stakeholders were concerned that there are inconsistent and inadequate sentences across jurisdictions for WHS offences.</p>	<p data-bbox="1267 916 1888 1235">The development of sentencing guidelines would be a complex undertaking due to variations in general sentencing law, criminal procedure legislation and courts across the jurisdictions. Given the complexities involved, Recommendation 25 would be treated as a recommendation for Safe Work Australia, working with relevant experts, to undertake a review into the feasibility of developing national WHS sentencing guidelines.</p> <p data-bbox="1267 1235 1888 1361">The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.</p>	<p data-bbox="1888 916 2123 1011">No impact – further work recommended</p>

Recommendation	2018 Review findings	Anticipated impacts	Summary
26: Prohibit insurance for WHS fines	See Chapter 14 of this Consultation RIS.		
27: Clarify the risk management process in the model WHS Act	See Chapter 15 of this Consultation RIS.		
<p data-bbox="192 352 696 440">28: Improved recording of amusement device infringements and operator training</p> <p data-bbox="192 440 696 871">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>	<p data-bbox="696 352 1265 871">The 2018 Review found that the requirements for log books for amusement devices may not provide sufficient information to assess whether a ride is safe, and the operator competent to operate it.</p>	<p data-bbox="1265 352 1888 544">Operators are already required to keep log books for amusement devices. This recommendation suggests expanding the content of the log books which may result in minor additional cost to businesses that do not already voluntarily retain the records on operator training or notices issued.</p> <p data-bbox="1265 544 1888 735">This recommendation would not change WHS duties relating to amusement devices, but may reinforce existing requirements to make relevant information available to enable informed decisions on the safety of amusement devices and to provide training and instruction to operators.</p> <p data-bbox="1265 735 1888 871">Implementation of this recommendation may result in some improvement in health and safety outcomes, if it increases availability of information and training.</p>	<p data-bbox="1888 352 2123 871">Minor costs – new record keeping process</p>
29a: Add a SWMS template to the WHS Regulations	See Chapter 16 of this Consultation RIS.		
29b: Develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS	See Chapter 16 of this Consultation RIS.		
<p data-bbox="192 1031 696 1062">30: Photographic ID on White Cards</p> <p data-bbox="192 1062 696 1372">Amend the model WHS Regulations to require photographic ID on White Cards consistent with high-risk work licences.</p>	<p data-bbox="696 1031 1265 1372">The 2018 Review found that there is confusion for stakeholders caused by inconsistent photo ID requirements between high risk work (HRW) and construction induction (White) cards.</p>	<p data-bbox="1265 1031 1888 1254">Amending the WHS Regulations to require photo identification on White Cards is expected to help ensure that the White Card holder is the person who completed the white card training, which is anticipated to improve safety in the construction industry. This requirement will also ensure consistency with HRW licences.</p> <p data-bbox="1265 1254 1888 1372">However, this option may involve transitional compliance costs for businesses or individuals holding an existing White Card which may need to be reissued. Additionally, individuals may face</p>	<p data-bbox="1888 1031 2123 1372">Minor benefit – if implemented to minimise transitional costs of the new process</p>

Recommendation	2018 Review findings	Anticipated impacts	Summary
		<p>costs associated with either providing a photo or travelling to a physical location to have the licence issued. These costs will depend on how the card is re-issued.</p> <p>There are also potential costs to the regulator to establish or extend an existing system to issue photographic White Cards.</p>	
<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>Australian Standards (standards) are currently referenced in the model WHS Regulations (15 standards) and model Codes (160 standards). The 2018 Review identifies stakeholder concerns with the use of standards in the model WHS laws, primarily the currency of standards referenced, the cost of accessing standards and whether compliance with a standard is mandatory.</p>	<p>The recommendation proposes reviewing the references to the standards and identifying where they can be replaced with a prescribed duty in the Regulations or Codes.</p> <p>The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.</p>	<p>No impact – further work recommended</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>	<p>The 2018 Review found that there is confusion among stakeholders about when compliance with a standard is voluntary or mandatory under the model WHS laws. Additional confusion can arise when the referenced standards are updated or withdrawn by Standards Australia. As the model WHS Regulations refer to a specific published standard, the originally referenced version remains in force until the model and jurisdictional WHS laws are amended. Stakeholders may be uncertain about which version applies.</p>	<p>This recommendation intends to clarify that compliance with standards is not mandatory under the model WHS laws unless this is specifically stated. All standards referenced in the model WHS Regulations are already mandatory in the circumstances to which the regulations apply.</p> <p>As this amendment only clarifies the existing operation of the model WHS Act, no impacts are expected.</p>	<p>No impact – clarification</p>
<p>32: Review MHF Regulations Review the model WHS Regulations dealing with MHFs, with a focus on administrative or technical amendments to ensure they meet the intended policy objective.</p>	<p>The 2018 Review found inconsistencies in the application of jurisdictional WHS Regulations for Major Hazard Facilities (MHFs), with impacts especially felt by businesses operating across multiple jurisdictions. The 2018 Review notes the difficulties in achieving national consistency in</p>	<p>This recommendation proposes reviewing the MHF chapter in the model WHS Regulations with a focus on administrative or technical amendments. The intention is to improve the usability of the MHF regulations, without impacting external industries or other regulatory schemes.</p>	<p>No impact – further work recommended</p>

Recommendation	2018 Review findings	Anticipated impacts	Summary
	MHF regulation (which often overlaps with regulation of explosives and mining).	<p>The review would be undertaken by Safe Work Australia, in consultation with stakeholders, and drawing on appropriate external expertise.</p> <p>The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.</p>	
<p>33: Review crane licence classes Review the high-risk work licence classes for cranes to ensure that they remain relevant to contemporary work practices and equipment.</p>	The 2018 Review found that high-risk licences may not be keeping up with modern requirements, based on concerns raised by the Crane Industry Council of Australia.	<p>This recommendation proposes a review to investigate whether the licensing classes for cranes are appropriate in light of crane capacity and incident rates. It would be undertaken by Safe Work Australia and follow the established process for reviewing high-risk work licence classes.</p> <p>The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.</p>	No impact – further work recommended
<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>	The 2018 Review found stakeholders were experiencing issues with quality and consistency of the information in the asbestos registers. This may be affecting asbestos management plans and workers' ability to know where asbestos is located and what its condition is.	<p>This recommendation would increase costs for business from engaging a competent person to complete their asbestos register. This cost may be less if the engagement occurred as part of the asbestos identification process, which a competent person is already required to perform. The impact could also be reduced by implementing the new requirement after the review of existing requirements for competent persons (Recommendation 34b) is completed, and time allowed for any new training to be established and to build capacity in the work force to meet market demand.</p> <p>The costs may be offset by improvements in safety through increased quality of information on the register.</p>	Minor benefit – if implemented after the review (Rec 34b)

Recommendation	2018 Review findings	Anticipated impacts	Summary
<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>The 2018 Review found that stakeholders consider the definition of what constitutes a 'competent person' unclear with regard to who should or must perform certain asbestos-related tasks and what skills and experience a competent person should hold.</p>	<p>This recommendation proposes a review to be undertaken by Safe Work Australia in consultation with stakeholders. It would examine the existing requirements in the model WHS Regulations for a competent person and identify whether specific competencies, skills and experience should be prescribed for all asbestos related tasks.</p> <p>The conduct of this review would have no impact on business: an assessment of any impact on business would only be able to be made once the findings from the review are available.</p>	<p>No impact – further work recommended</p>

Questions

- If you do not agree that one or more of recommendations in Appendix A will have minor or no impacts, please provide your assessment of the impacts for each, supported with evidence if possible.
- Do you have suggestions for other options to address the problems identified in the 2018 Review for recommendations in Appendix A? Please provide information or evidence on the impacts of your suggested option, if possible, including how it would improve the WHS outcomes or reduce compliance costs.