



The Model Work

Health & Safety Act

ACTU Briefing on Model WHS Laws 2018 Review Report

Change
THE
RULES

ACTU

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Background

The Model WHS Laws,¹ are to be reviewed every five years. In 2018, Safe Work Australia (SWA) appointed an independent reviewer, Marie Boland, to conduct the first of these reviews. On 19 February 2018, a discussion paper was released. Written submissions closed in April 2018 and the reviewer conducted a number of face to face and phone consultations with stakeholders, including unions, throughout 2018. In October 2018, a first draft of the review report was released for comment. The ACTU provided feedback. In late November 2018, a confidential copy of the final report was released to SWA members. WHS Ministers are yet to decide on a release date for the final report, but it is expected to be sometime in February 2019.

The terms of reference for the review were to consider whether:

- the model WHS laws are operating as intended;
- any areas of the model WHS laws have resulted in unintended consequences;
- the framework of duties is effective at protecting workers and other persons against harm to their health, safety and welfare and can adapt to changes in work organisation and relationships;
- the compliance and enforcement provisions, such as penalties and enforceable undertakings, are effective and sufficient to deter non-compliance with the legislation;
- the consultation, representation and issue resolution provisions are effective and used by duty holders; and workers are protected where they participate in these processes, and
- the model WHS Regulations, model Codes of Practice and National compliance and enforcement policy adequately support the object of the model WHS Act.

¹ The Model Work Health and Safety Act (the Act), the Model Work Health and Safety Regulations (the Regulations) and Codes of Practice (the Codes) - collectively referred to in this brief as 'the Model Laws' - were developed in 2009-10 following an independent review process in by the National Occupational Health and Safety Panel (the National Review Panel). To date, the Model Laws have been implemented by the Commonwealth, the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, South Australia and Tasmania.

ACTU Submission

The ACTU's submission to the review outlined the key priority areas for WHS reform common across the Australian union movement, namely:

1. A comprehensive review of the National Compliance and Enforcement Policy (NCEP), in consultation with key stakeholders to ensure effective and nationally consistent strategies to ensure compliance with the Model Laws, particularly for workers in 'non-standard' working arrangements.
2. An amendment to the Model Act to include the specific offence of causing the death of a worker or other person through a negligent act or omission, applying to duty-holders and officers who take part in the corporation's management.
3. The capacity for unions to commence legal proceedings for both civil and criminal breaches of the Model Laws.
4. A partial reverse onus of proof, placing the onus of demonstrating that it was not reasonably practicable to reduce or eliminate a risk occasioning a WHS duty of care offence on the defendant.
5. Higher penalties for criminal and civil breaches of the Model Act and Regulations to ensure that they are appropriate given the grave consequences of WHS breaches, and commensurate with penalties applicable in other jurisdictions such as environmental and consumer law.
6. Removal of the capacity to insure against penalties issued under the Model Act and Regulations.
7. Stronger Health and Safety Representative (HSR) and Entry Permit Holder (EPH) rights to strengthen their capacity to represent workers in a changing work environment, in particular to ensure that HSRs are able to operate without interference, including accessing appropriate training of their choice, and to improve the functioning of Health and Safety Committees (HSCs).
8. Updates to the Act, Codes and Regulations to ensure the Model Laws respond effectively to changing work arrangements, including clarifying the duty to consult, cooperate and coordinate with other duty-holders to identify and eliminate health and safety risks in complex labour force management structures, such as supply chains.

Summary of review report

The review report is just over 200 pages long and makes 34 recommendations for reform. A number of recommendations suggest amendments to the Model Laws, while others flag areas needing further review/analysis.² Of the ACTU's 8 priority areas above, numbers 1, 2, 5, 6 and 7 are effectively addressed by the recommendations, priority areas 3 and 4 are not addressed, and priority area 8 is inadequately addressed.

Overall, the reviewer found that the objective of harmonised, consistent national laws is still strongly supported and that the model laws are 'largely operating as intended'. However, inconsistency in the application and enforcement of the laws across different jurisdictions was identified as a key concern.

The report is thorough, balanced and makes a number of sensible recommendations for reform. While the report does not go far enough in recommending reforms to address the changing world of work or the lack of genuine consultation with workers, there are no recommendations that the ACTU strongly opposes, and a number that are strongly supported. The consultative approach adopted throughout the review was well received by all involved.

² There are a number of suggested reforms to the WHS Regulations (recommendations 27 – 34) relating to specific hazards and sectors, including amusement devices, asbestos and construction. This summary does not review these recommendations in detail.

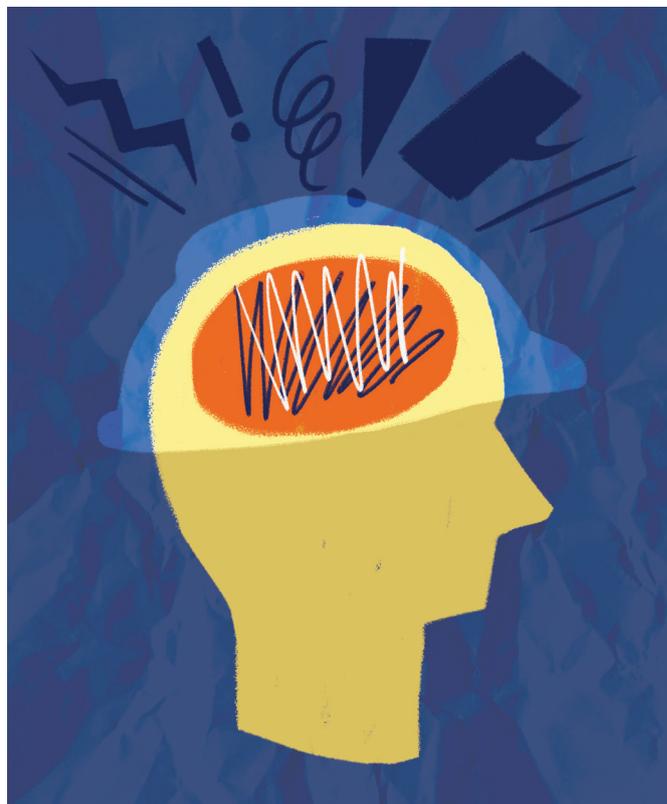
Key recommendations

A number of the reviewer's recommendations are strongly supported by the union movement, most notably the introduction of new national offence of Industrial Manslaughter, the development of a new Regulation on psychosocial hazards and reforms to strengthen workers' rights.

Psychosocial hazards

The reviewer noted that every party who participated in the review had a strong position on the issue of psychological health, 'with most favouring legislative action to specifically address psychosocial risks in the workplace (p 34)'. The reviewer found that there is a 'widespread view that psychological health is neglected' in the model laws (p 35) and that there needs to be a 'clear legislative framework' within which to manage psychological health issues (p 36). Given the 'persistent calls from stakeholders for action' the reviewer recommends that the development of a new regulation should be 'progressed as a matter of priority' (p 37). The reviewer also recommends a review of the incident notification provisions to ensure they are effective, including ensuring that they provide a notification trigger for psychological injuries and capture injuries arising from new work practices and arrangements.

The ACTU strongly supports these recommendations. Psychosocial risks such as violence, bullying, harassment (including sexual and racial harassment), stress and fatigue have significant psychological and physical health and safety impacts. There is a clear need for preventative action to control exposure to these risks. However, there is evidence that duty holders are unclear on what steps to take to eliminate or minimise such risks. While psychosocial risks to health are covered at a general level by Australia's Model Laws, specific detail in the Regulations and Codes on the management of these risks is absent. Currently, these matters are addressed in non-binding advisory material



only, and the approach of regulators to compliance and enforcement is inconsistent. Detailed WHS obligations in relation to psychosocial hazards are crucial in order to require PCBUs to take positive, proactive preventative measures. The reactive, complaints-based response to psychosocial issues (such as sexual harassment) has proven to be ineffective in making workplaces safer. It is imperative that these issues are seen as, and treated as, serious WHS issues. WHS laws in countries such as Sweden, Denmark, Japan, Korea and some jurisdictions in the USA (eg New York State) and Canada (eg Ontario) contain detailed mandatory legal obligations in relation to psychosocial hazards.

Industrial Manslaughter, Prosecution, Penalties and Sentencing

The reviewer recommends that Safe Work Australia develop and implement (in consultation with legal experts) of a package of reforms to increase the severity of penalties and enhance deterrence under the model laws. While they do not go far in enough in some respects, these recommendations are sensible, timely and strongly supported by the ACTU.

Rejecting arguments from employers and others about a ‘problematic overlap’ with existing criminal laws, the reviewer recommends a new nationally consistent offence of industrial manslaughter (based on modified Queensland laws) in the model WHS laws. In support of the recommendation, the reviewer cites problems with successfully convicting larger corporations under existing criminal laws, the limitations of sentencing,³ the potential for inconsistency as jurisdictions successively introduce their own industrial manslaughter offences, and the need to meet a ‘strong community expectation’ that it should be possible to prosecute for the death of a person under a statutory offence of industrial manslaughter. The reviewer noted that a new offence of industrial manslaughter is also supported by the Senate Inquiry into industrial deaths. The reviewer considers that the new national offence should differ in the following respects from the Queensland provisions:

- the offence should be able to target organisational/cultural aspects of a corporation’s conduct, as well as the conduct of individuals, which the Queensland law does not allow for;
- the new law should not adopt the definition of ‘senior officer’ used by the Queensland Act, but rather should continue to use the Corporations Act definition from the Model Laws;
- the new law should include ‘others’ killed through the negligence of duty-holders, such as visitors, clients etc, as well as workers;
- the standard of ‘gross negligence’ rather than ‘negligence’ should be used for the offence of industrial manslaughter, consistent with the original recommendation of the National Review Panel for Category 1 offences.

The reviewer recommends an amendment to include gross negligence (as well as reckless conduct) in Category 1 offences, consistent with the recommendation of the National Review Panel. The reviewer argues that this will assist prosecutors to secure convictions for the most egregious breaches, which to date have proven very difficult because the need to prove recklessness sets the bar too high. The reviewer acknowledges that this is a ‘complex area of law’ and advice from ‘legal experts’ on how best to implement the recommendations will be required.

Penalties in the model laws are expressed as monetary values, not penalty units, and have not been reviewed since the model laws commenced in 2011. The reviewer recommended increases in the value of penalties commensurate with CPI increases, and increases in the value of penalty units in participating jurisdictions since 2011. The reviewer notes the submission of the Department of Jobs and Small Business, which highlights that the penalty for a Category 1 offence would now be \$5,727,000 if it had been indexed to the Commonwealth penalty unit value – a 90.9% increase since 2011. Not all jurisdictions have increased by this

³ The crime of manslaughter is usually only punishable by imprisonment, and courts have interpreted this to mean that corporations cannot be found guilty of this offence because they cannot be imprisoned. Courts in NSW have been empowered to award fines in lieu of jailtime, but this has not happened in all jurisdictions.



much, and so the reviewer proposes a 50% increase in penalties as a compromise position. The reviewer notes that the Senate Inquiry into industrial manslaughter also recommends increased penalties, with consideration of whether larger businesses or repeat offenders should be subjected to higher fines.

Noting inconsistency in sentencing outcomes between jurisdictions, and unintended consequences of the interaction of local jurisdictional criminal procedure and sentencing legislation, the reviewer recommends that SWA (in consultation with experts) develop sentencing guidelines to facilitate a consistent national approach. The reviewer highlights guidelines issued by the UK Sentencing Council as an example worth considering.⁴ This recommendation is consistent with the recommendation of the 2008 National Review Panel.

Finally, the reviewer recommends prohibition of insurance policies which cover WHS

penalties imposed by courts, as per s 29 of the New Zealand Health and Safety at Work Act 2015. The reviewer notes that this reform is widely supported by governments, employers and unions, as well as the Senate Inquiry into industrial deaths. Note that the Senate Inquiry recommended a prohibition on insurance companies reimbursing the costs of defending a prosecution – the review recommendation does not go that far, and focuses on the WHS penalties imposed by courts only.

The Commonwealth Government supports a review of WHS penalties, the introduction of sentencing guidelines and a prohibition on insurance products covering penalties. It does not support the introduction of a nationally consistent offence of industrial manslaughter or a union right to prosecute.⁵

A comprehensive review of the National Compliance and Enforcement Plan

The reviewer notes that ‘most stakeholders’ expressed a view that regulators across jurisdictions have ‘inconsistent approaches for their enforcement and compliance methodologies and strategies’ and found that harmonized laws must be ‘supported by a harmonized approach to their interpretation, application and enforcement’. The reviewer notes calls from both unions and employers for more detail and clarity in the NCEP, and recommends the inclusion of ‘decision-making frameworks relevant to the key functions and powers of the regulator and inspectors under the model WHS laws’. WorkSafe New Zealand’s Enforcement Decision-making model is cited as an example worth considering.

The proposed review of the NCEP is welcomed. Further detail is sought on the process for this review, including participants, timelines and the development of terms of reference. The ACTU is concerned that there

4 UK Sentencing Council, Health and Safety Offences Corporate Manslaughter and Food Safety and Hygiene Offences, Definitive Guideline, 2015

5 https://docs.jobs.gov.au/system/files/doc/other/australian_government_response_they_never_came_home.docx.pdf

is no acknowledgement in this section of the report of the key issue raised by our affiliates: i.e. the focus on soft compliance approaches at the expense of hard enforcement. The methodologies and strategies used by regulators need reconsideration as part of the NCEP review.

A comprehensive review of the Regulations and Codes of Practice

The reviewer proposes a review of the model WHS Regulations and Codes and Safe Work Australia Codes of practice and guidance material information sheets to determine what risks or activities should be prescribed in a Regulation or Code and ensure that the WHS framework remains 'relevant, appropriate and robust' into the future. High-risk industries⁶ will be prioritised, as well as certain issues, including psychological health (see commentary above). The reviewer suggests that the Regulations and Codes 'be examined through an industry-specific lens to identify whether they adequately address the changing nature of work in each priority industry'.

The ACTU does not oppose such a review, but seeks clarity about the process, including terms of reference and timelines. The review objectives must be developed in consultation with the social partners; and must align with the objectives of the Model WHS Laws. A review merely aimed at 'simplification and rationalisation' would be opposed. The review must not result in reduced protections for workers. The review should consider whether there are any additional Regulations and Codes required to address new, emerging or neglected risks.



⁶ The Australian Work Health and Safety Strategy 2012-22 identifies seven priority industries based on their high numbers and rates of injury and/or fatalities or generally hazardous nature, namely: Agriculture; Road transport; Manufacturing; Construction; Accommodation and food services; Public administration and safety; Health care and social assistance.

Rights of HSRs, Entry Permit Holders and Inspectors and Dispute Resolution

The reviewer makes some useful recommendations aimed at strengthening the rights of HSRs and unions and improving the dispute resolution procedures, including that:

- The requirements for managing risks to health and safety that are set out in Part 3.1 of the Regulations should apply to all risks and hazards, not just the risks set out in the Regulation.
- The requirement for ‘consultation’ with a PCBU in s 72 of the Model Act does not authorise a PCBU to veto a HSR’s choice of provider, as long as the cost and location are reasonable and the regulator has approved the course. (Confusion about this matter had arisen in the wake of the Sydney Trains decision.⁷)
- The removal of a 2014 amendment to s 117 of the Model Act which added a 24 hour notice requirement for an WHS Entry Permit holder (no jurisdiction to date had enacted it anyway).
- SWA should work with other agencies to consider how to ensure that a union official accessing a workplace under WHS laws for the purpose of providing assistance to a HSR is not required to hold an entry permit under the FW Act or other industrial law.
- The Model Act be amended to allow a dispute (except a right of entry dispute) to be escalated by any party to the relevant court or tribunal if an inspector has not been able to resolve the matter within 48 hours.
- the model Code of Practice: Consultation, cooperation and

coordination be updated to include practical examples of how meaningful consultation with workers can occur in a range of traditional and non-traditional settings (noting that lack of genuine consultation with workers is an ongoing problem);

- the development of a new Code to provide practical guidance on the obligations on multiple duty-holders as they relate to labour hire, out sourcing, franchising, gig economy and other modern working arrangements, and processes for PCBUs to work cooperatively and cohesively to discharge their duties.

Finally, there are some useful recommendations aimed at strengthening the powers of the regulator, including authorising inspectors to require production of documents and answers to questions for 30 days after leaving a workplace inspection, to clarify that a regulator’s power to obtain information under s 155 has extraterritorial application, and to enable regulators to share information between jurisdictions.

Shortcomings of report

The ACTU would have liked the reviewer to show greater ambition in relation to changes needed to the model laws to address changing work arrangements. Only a few recommendations touch on the issue, and while positive, do not go far enough. For example, the reviewer recommends that Safe Work Australia continues to 'regularly assesses' new and emerging business models, industries and hazards to identify if there is a need for legislative change, new model WHS Regulations and/or Codes. While this is a sensible approach for Safe Work Australia to take to its work, this does not appear to be a recommendation for SWA to do anything other than continue with 'business as usual'. The ACTU would have preferred to see the reviewer provide detail on exactly what SWA will be required to do – specifically or additionally – to ensure that new industries, hazards and working arrangements are dealt with effectively by the Model WHS Laws.

While the reviewer notes that lack of genuine consultation with workers is a key concern with the operation of the model laws, the recommendations made do not adequately address the issue. Similarly, while the reviewer notes union submissions seeking a right as an 'eligible person' to bring reviews for all decisions under the WHS Act, no recommendations to change the current process are made.

The ACTU and others advocated for a prohibition on the use of enforceable undertakings (EU) in circumstances of a fatality, as is the case in Queensland. The reviewer declined to make such a recommendation and recommended that the EU regime is left as is.

Citing the review's recommendations to increase the severity of penalties, the reviewer rejects calls to provide a union right to prosecute and to reverse the onus of proof. Instead, the review recommends reforms to the provisions allowing unions (or others) to ask a regulator to commence a prosecution, namely removing the 12 month time-limit and requiring regular updates after the 3 month notice is issued until a final decision regarding the prosecution is made. While these improvements are welcomed, they are no substitute for providing a union right to prosecute and reversing the onus of proof.

ACTU

2 February 2019

Attachment A

Recommendation	Position	Comments
<p>Recommendation 1: Review the model WHS Regulations and model Codes</p> <p>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 Australian Strategy priority industries.</p>	<p>Support in principle</p>	<p>The reviewer proposes a review of the model WHS Regulations and Codes and Safe Work Australia Codes of practice and guidance material information sheets to determine what risks or activities should be prescribed in a Regulation or Code and ensure that the WHS framework remains 'relevant, appropriate and robust' into the future. High-risk industries will be prioritised, as well as certain issues, including psychological health (see commentary above). The reviewer suggests that the Regulations and Codes 'be examined through an industry-specific lens to identify whether they adequately address the changing nature of work in each priority industry'.</p> <p>The ACTU supports the review and seeks clarity about the process, including terms of reference and timelines. The review objectives must be developed in consultation with the social partners; and must align with the objectives of the Model WHS Laws. A review merely aimed at 'simplification and rationalisation' would be opposed. The review must not result in reduced protections for workers. The review should consider whether there are any additional Regulations and Codes required to address new, emerging or neglected risks.</p>

<p>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.</p>	<p>Strongly support</p>	<p>The reviewer noted that every party who participated in the review had a strong position on the issue of psychological health, ‘with most favouring legislative action to specifically address psychosocial risks in the workplace (p 34)’. The reviewer found that there is a ‘widespread view that psychological health is neglected’ in the model laws (p 35) and that there needs to be a ‘clear legislative framework’ within which to manage psychological health issues (p 36). Given the ‘persistent calls from stakeholders for action’ the reviewer recommends that the development of a new regulation should be ‘progressed as a matter of priority’ (p 37). The reviewer also recommends a review of the incident notification provisions to ensure they are effective, including ensuring that they provide a notification trigger for psychological injuries and capture injuries arising from new work practices and arrangements.</p> <p>The ACTU strongly supports these recommendations. Psychosocial risks such as violence, bullying, harassment (including sexual and racial harassment), stress and fatigue have significant psychological and physical health and safety impacts.</p> <p>There is a clear need for preventative action to control exposure to these risks. However, there is evidence that duty holders are unclear on what steps to take to eliminate or minimise such risks. While psychosocial risks to health are covered at a general level by Australia’s Model Laws, specific detail in the Regulations and Codes on the management of these risks is absent. Currently, these matters are addressed in non-binding advisory material only, and the approach of regulators to compliance and enforcement is inconsistent. Detailed WHS obligations in relation to psychosocial hazards are crucial in order to require PCBUs to take positive, proactive preventative measures. The reactive, complaints-based response to psychosocial issues (such as sexual harassment) has proven to be ineffective in making workplaces safer. It is imperative that these issues are seen as, and treated as, serious WHS issues. WHS laws in countries such as Sweden, Denmark, Japan, Korea and some jurisdictions in the USA (eg New York State) and Canada (eg Ontario) contain detailed mandatory legal obligations in relation to psychosocial hazards.</p>
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<p>Recommendation 3: Continuously assess new industries, hazards and working arrangements Safe Work Australia develop criteria to continuously assess new and emerging business models, industries and hazards to identify if there is a need for legislative change, new model WHS Regulations or model Codes.</p>	Support	While this is a sensible approach for Safe Work Australia to take to its work, the ACTU would have liked the reviewer to show greater ambition in relation to changes needed to the model laws to address changing work arrangements.
<p>Recommendation 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>	Support	
<p>Recommendation 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). 	Strongly support	

<p>Recommendation 6: Provide practical examples of how to consult with workers</p> <p>Update the model Code of Practice: Work health and safety consultation, co-operation and co-ordination to include practical examples of how meaningful consultation with workers can occur in a range of traditional and non-traditional settings.</p>	<p>Strongly support</p>	<p>However, the ACTU notes that this recommendation is the only one in the report addressed to the problem of lack of genuine consultation with workers, despite the reviewer noting that this is a key issue of concern in relation to the operation of the Model Laws currently.</p>
<p>Recommendation 7a: New arrangements for HSRs and work groups in small businesses</p> <p>Amend the model WHS Act to provide that, where the operations of a business or undertaking ordinarily involves 15 workers or fewer and an HSR is requested as per the requirements of the model WHS laws, the PCBU will only be required to form one work group for all workers represented by one HSR and a deputy HSR unless otherwise agreed between the workers and the PCBU.</p>	<p>Not opposed</p>	<p>The ACTU is concerned about how this process will work in practice. For example, how will it be determined whether or not a business involves 15 or fewer people? Which employees will be counted for this purpose? Will there be access to dispute settlement if there is a disagreement about this matter?</p>
<p>Recommendation 7b: Work group is negotiated with proposed workers</p> <p>Amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group.</p>	<p>Support</p>	<p>This reflects what the ACTU and affiliates understood the obligation to be already – clarification of this in the Model Act for avoidance of doubt is welcome.</p>
<p>Recommendation 8: Workplace entry of union officials when providing assistance to an HSR</p> <p>Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the Fair Work Act or another industrial law, taking into account the interaction between Commonwealth, state and territory laws.</p>	<p>Strongly support</p>	<p>Union officials should not be required to hold multiple different permits in order to perform their functions under WHS laws effectively. It is inefficient, unsafe and inconsistent with the policy intention of nationally harmonised WHS laws.</p>

<p>Recommendation 9: Inspectors to deal with safety issue when cancelling a PIN</p> <p>Amend the model WHS Act to provide that, if an inspector cancels a PIN for technical reasons under s 102 of the model WHS Act, the safety issue which led to the issuing of the PIN must be dealt with by the inspector under s 82 of the model WHS Act.</p>	Support	
<p>Recommendation 10: HSR choice of training provider</p> <p>Amend the model WHS Act to make it clear that for the purposes of s 72:</p> <ul style="list-style-type: none"> • the HSR is entitled to choose the course of training, and • if the PCBU and HSR cannot reach agreement on time off for attendance or the reasonable costs of the training course that has been chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter. 	Strongly support	
<p>Recommendation 11: Provide examples of HSC constitutions, agendas and minutes</p> <p>Update the model Codes and guidance with examples of HSC constitutions, agendas and minutes.</p>	Not opposed	

<p>Recommendation 12: Update guidance on issue resolution process and participants</p> <p>Update the Worker representation and participation guide to include:</p> <ul style="list-style-type: none"> • if the PCBU and HSR cannot reach agreement on time off for attendance or the reasonable costs of the training course that has been chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter. • 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>Support</p>	<p>Unions should be consulted on the developments of these updates.</p>
<p>Recommendation 13: Resolving outstanding disputes after 48 hours</p> <p>Amend the model WHS Act to provide for:</p> <ul style="list-style-type: none"> a) disputes under ss 82 and 89 of the model WHS Act to be referred to the relevant court or tribunal in a jurisdiction if the dispute remains unresolved 48 hours after an inspector is requested to assist with resolving disputes under the default or agreed procedures and with cease work disputes 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. 	<p>Strongly support</p>	

<p>Recommendation 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>	Support	
<p>Recommendation 15: Remove 24-hour notice period for entry permit holders Amend the model WHS Act to retain previous wording in s 117.</p>	Strongly support	
<p>Recommendation 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 provisions under s 155 and s 171 with those in s 209 of the model WHS Act dealing with improvement, compliance and non-disturbance notices.</p>	Support	
<p>Recommendation 17: Provide the ability for inspectors to require production of documents and answers to questions for 30 days after the day they or another inspector enter a workplace Amend the model WHS Act to provide that, instead of being limited to the inspector who enters (or has entered) a workplace, the powers to require production of documents and answers to questions can be exercised by any inspector within 30 days following an inspector's entry to that workplace.</p>	Support	

<p>Recommendation 18: Clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the model WHS laws outside of their jurisdiction</p> <p>Amend the model WHS Act to clarify that the regulator’s power to obtain information under s 155 has extraterritorial application.</p>	Support	
<p>Recommendation 19: Enable cross-border information sharing between regulators</p> <p>Amend the model WHS Act to include a specific power enabling regulators to share information between jurisdictions in situations where it would aid them in performing their functions in accordance with the model WHS laws.</p>	Support	
<p>Recommendation 20: Review incident notification provisions</p> <p>Review incident notification provisions in the model WHS Act to ensure they meet the intention outlined in the 2008 National Review, that they provide for a notification trigger for psychological injuries and that they capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements.</p>	Strongly support	See response to Recommendation 2 for further details.
<p>Recommendation 21: Review the National Compliance and Enforcement Policy (NCEP)</p> <p>Review the NCEP to include supporting decision-making frameworks relevant to the key functions and powers of the regulator to promote a nationally consistent approach to compliance and enforcement.</p>	Strongly support	<p>The proposed review of the NCEP is welcomed. Further detail is sought on the process for this review, including participants, timelines and the development of terms of reference.</p> <p>We note that there is no acknowledgement in this section of the report of the key issue raised by our affiliates: i.e. the focus on soft compliance approaches at the expense of hard enforcement. The methodologies and strategies used by regulators need reconsideration as part of the NCEP review.</p>

<p>Recommendation 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>Strongly support</p>	<p>Penalties under the Model Laws currently do not meet community expectations and must be increased to ensure that they are appropriate given the grave consequences of breaches and are commensurate with penalties applicable in other jurisdictions.</p> <p>The ACTU does not support the reviewer's suggestion to implement only 50% of the increase in the value of the Commonwealth penalty unit: 100% of the increase should be applied. As noted by the Department of Jobs, the penalty for a Category 1 offence would now be \$5,727,000 if it had been indexed to the Commonwealth penalty unit value – a 90.9% increase since 2011.</p> <p>The ACTU will continue to advocate for larger penalties depending on the size of the business which has committed the offence, based for example on a percentage of annual turnover. This would be consistent with the approach taken by other corporate regulators, including the Australian Competition and Consumer Commission.</p>
<p>Recommendation 23a: Enhance Category 1 offence</p> <p>Amend s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is grossly negligent in exposing an individual to a risk of serious harm or death.</p>	<p>Strongly support</p>	

<p>Recommendation 23b: Industrial manslaughter</p> <p>Amend the model WHS Act to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and include the following:</p> <ul style="list-style-type: none"> • The offence can be committed by a PCBU and an officer as defined under s 4 of the model WHS Act. • The conduct engaged in on behalf of a body corporate is taken to be conduct engaged in by the body corporate. • A body corporate’s conduct includes the conduct of the body corporate when viewed as a whole by aggregating the conduct of its employees, agents or officers. • The offence covers the death of an individual to whom a duty is owed. <p>Safe Work Australia should work with legal experts to draft the offence and include consideration of recommendations to increase penalty levels (Recommendation 22) and develop sentencing guidelines (Recommendation 25).</p>	<p>Strongly support</p>	<p>SWA must also work closely with the social partners in the drafting of these new provisions.</p>
<p>Recommendation 24: Improve WHS regulator accountability for investigation progress</p> <p>Amend the model WHS Act to remove the 12-month deadline for a request under s 231 that the regulator bring a prosecution in response to a Category 1 or Category 2 offence and to ensure ongoing accountability to the person who made the request until a decision is made on whether a prosecution will be brought.</p>	<p>Support</p>	<p>While these improvements are welcomed, they are no substitute for providing a union right to prosecute and a partial reverse onus of proof.</p>

<p>Recommendation 25: Consistent approach to sentencing Safe Work Australia work with relevant experts to develop sentencing guidelines to achieve the policy intention of Recommendation 68 of the 2008 National Review. As part of this process, any unintended consequences due to the interaction of local jurisdictional criminal procedure and sentencing legislation should also be considered. (I note that the work required by Recommendation 22 (Increase penalty levels), Recommendation 23a (Enhance Category 1 offence) and Recommendation 23b (Industrial manslaughter) could be combined with the work required by this recommendation).</p>	<p>Strongly support</p>	<p>SWA must also work closely with the social partners in the drafting of these new guidelines.</p>
<p>Recommendation 26: Prohibit insurance for WHS fines Amend the model WHS Act to make it an offence to:</p> <ul style="list-style-type: none"> • enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the model WHS Act • provide insurance or a grant of indemnity for liability for a monetary penalty under the model WHS Act, and • take the benefit of such insurance or such an indemnity. 	<p>Strongly support</p>	
<p>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 reg 36) and making any corresponding amendments necessary to the model WHS Regulations.</p>	<p>Strongly support</p>	

<p>Recommendation 28: Improved recording of amusement device infringements and operator training Amend reg 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>Strongly support</p>	
<p>Recommendation 29a: Add a SWMS template to the WHS Regulations Amend the model WHS Regulations to prescribe a SWMS template.</p>	<p>Strongly support</p>	
<p>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.</p>	<p>Strongly support</p>	
<p>Recommendation 30: Photographic ID on White Cards Amend the model WHS Regulations to require photographic ID on White Cards consistent with high-risk work licences.</p>	<p>Support</p>	
<p>Recommendation 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>Support</p>	
<p>Recommendation 31b: Compliance with Standards not mandatory unless specified Amend reg 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>Support</p>	

<p>Recommendation 32: Review MHF Regulations</p> <p>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>	Support	
<p>Recommendation 33: Review crane licence classes</p> <p>Review the high-risk work licence classes for cranes to ensure that they remain relevant to contemporary work practices and equipment.</p>	Support	
<p>Recommendation 34a: Improving the quality of asbestos registers</p> <p>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>	Support	
<p>Recommendation 34b: Competent persons in relation to asbestos</p> <p>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>	Support	