



Decision Regulation Impact Statement

*Recommendations of the 2018 Review of the
model Work Health and Safety laws*

December 2019



Disclaimer

Safe Work Australia provides the information in this publication to facilitate consultation on the recommendations of the 2018 Review of model Work Health and Safety Laws. While Safe Work Australia makes every effort to ensure information is accurate and up-to-date, Safe Work Australia does not provide any warranty regarding the accuracy, currency or completeness of the information contained in this publication and will not be held liable for any loss, damage, cost or expense incurred or arising by reason of any person using or relying on the information in this publication.

This publication may incorporate views or information from third parties, which do not necessarily reflect the views of Safe Work Australia. The inclusion of such material does not indicate an endorsement of that material or a commitment to any particular course of action. The views in this publication should not be taken to represent the views of Safe Work Australia unless otherwise expressly stated.

ISBN 978-1-76051-887-5 (DOCX)

ISBN 978-1-76051-886-8 (PDF)

Creative Commons

With the exception of the Safe Work Australia logo, this copyright work is licensed under a Creative Commons Attribution 4.0 International licence. To view a copy of this licence, visit creativecommons.org/licenses In essence, you are free to copy, communicate and adapt the work, even for commercial purposes, as long as you attribute the work to Safe Work Australia and abide by the other licence terms.

Contact information

Safe Work Australia | info@swa.gov.au | www.swa.gov.au

Contents

Executive summary	5
About this Decision Regulation Impact Statement.....	11
Background	13
PART 1.....	16
1. About Part 1	17
2. Recommendation 2: Psychosocial risks	18
3. Recommendation 7a: Work groups and HSRs in small businesses	25
4. Recommendation 9: Cancelling a PIN.....	31
5. Recommendation 10: Choice of health and safety representative training course	37
6. Recommendation 13: Referral of disputes	43
7. Recommendation 15: Remove 24-hour notice period for entry permit holders	49
8. Recommendation 17: Inspectors' powers.....	54
9. Recommendation 23: The Category 1 offence and industrial manslaughter	59
10. Recommendation 26: Prohibit insurance for WHS fines.....	75
11. Recommendation 27: The risk management process	81
12. Recommendations 29a and 29b: SWMS	86
PART 2.....	92
13. About Part 2	93
14. Recommendation 1: Model WHS Regulations and model Codes	94
15. Recommendation 3: New industries, hazards and working arrangements	96
16. Recommendation 4: Clarify that a person can be both a worker and a PCBU.....	98
17. Recommendation 5: New model Code on the Principles that apply to duties	101
18. Recommendation 6: Consultation with workers.....	103
19. Recommendation 7b: Negotiating work groups	105
20. Recommendation 11: HSC constitutions, agendas and minutes.....	106
21. Recommendation 12: Issue resolution process and participants	108
22. Recommendation 14: Court powers for discriminatory or coercive conduct	110
23. Recommendation 16: Service of notices under the model WHS Act.....	112
24. Recommendation 18: Extra-territorial application of regulators power to obtain information	114
25. Recommendation 19: Information sharing between WHS regulators.....	116
26. Recommendation 20: Incident Notification Provisions.....	118
27. Recommendation 21: NCEP	120
28. Recommendation 22: Penalty levels.....	122
29. Recommendation 24: WHS regulator accountability for investigations	124
30. Recommendation 25: Sentencing.....	126
31. Recommendation 28: Amusement device infringements and operator training	128
32. Recommendation 30: Photographic ID on White Cards	130
33. Recommendations 31a and 31b: Referring to, and compliance with, Standards.....	133
34. Recommendation 32: MHF regulations	135
35. Recommendation 33: Crane licence classes.....	137

36.	Recommendations 34a and 34b: Asbestos registers and competent persons	138
37.	Next steps	141
	Appendix A – Glossary.....	142
	Appendix B – Submissions to the Consultation RIS	145

Executive summary

This Decision Regulation Impact Statement (Decision RIS) provides an analysis of the regulatory impacts of the recommendations of the 2018 Review into the model Work Health and Safety (WHS) laws (the 2018 Review) and proposed alternative options identified through consultation. This Decision RIS provides recommendations to Ministers responsible for WHS (WHS ministers) for decision.

The 2018 Review was the first five-yearly review of the model WHS laws, agreed by WHS ministers and conducted by independent reviewer Ms Marie Boland. The 2018 Review found that the model WHS laws are largely operating as intended, and proposed 34 recommendations to improve clarity and consistency.

The findings of this Decision RIS are based on evidence from a range of sources. These include:

- submissions to, and recommendations of, the 2018 Review
- submissions provided to the Consultation Regulation Impact Statement (Consultation RIS) released by the agency supporting Safe Work Australia (the Agency) on 24 June 2019 for a six-week consultation period
- feedback received by the Agency from WHS regulators, and
- other evidence external to this Decision RIS process such as data collected by the Agency and outcomes of relevant inquiries.

For many of the recommendations in this Decision RIS, there is insufficient data and evidence to allow a full cost benefit analysis to be conducted. Where data limitations have prevented a full quantitative analysis, qualitative assessment of the costs and benefits is provided. These limitations, and any assumptions, have been indicated as they arise in this Decision RIS.

This Decision RIS has been prepared in accordance with the Council of Australian Government's (COAG) *Best practice regulation: A guide for ministerial councils and national standard setting bodies* (the COAG Guidelines). The Office of Best Practice Regulation (OBPR) has confirmed this Decision RIS meets the best practice regulation requirements set out in the COAG Guidelines.

Broadly, this Decision RIS recommends:

- twenty-five 2018 Review recommendations be implemented (two with minor variation)
- nine 2018 Review recommendations not be implemented, with alternative options recommended to address or further scope the issues identified in the 2018 Review, and
- four 2018 Review recommendations not be implemented and the status quo maintained.

A recommendation has not been made in relation to one 2018 Review recommendation (Recommendation 8) as it falls outside the remit of WHS ministers.

This Decision RIS is divided into two parts:

Part 1 – recommendations of the 2018 Review that were assessed as having moderate or significant regulatory impact.

Part 2 – recommendations of the 2018 Review that were assessed as having minor or nil regulatory impact.

Part 1 provides a regulatory impact analysis for the recommendations which potentially have a moderate or significant regulatory impact to meet the COAG best practice regulation requirements. It also provides WHS ministers with recommended options based on an assessment of greatest net benefit. For Part 1, The Agency worked with Deloitte Access Economics to assess the regulatory impact of the recommendations of the 2018 Review, as well as alternative options arising from consultation. This involved an in-depth analysis of the quantitative (where possible) and qualitative costs and benefits of each option against the status quo.

In accordance with advice from the OBPR, a detailed regulatory impact assessment was not required for Part 2 recommendations. Part 2 provides WHS ministers with recommended options for progressing the recommendations of the 2018 Review that are assessed as having nil or minor impact.

Following WHS ministers' decision, the Agency and Safe Work Australia will progress those options that receive agreement through its usual tripartite arrangements. For any recommendations that are for further review or consultation, further regulatory impact assessments will be conducted if the outcomes of those reviews recommend regulatory change.

Table 1: Summary of Decision RIS recommendations

	2018 Review Recommendation	Decision RIS recommended option	Section	Assessed regulatory Impact
1	Review the model WHS Regulations and model Codes of Practice (model Codes)	Option 3 – Develop a tool to assist duty holders in priority industries to identify the regulations that may apply to their business or undertaking	Part 2, Chapter 14	Nil regulatory impact
2	Make regulations dealing with psychological health	Option 2 – 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	Part 1, Chapter 2	<p>Minor regulatory impact:</p> <ul style="list-style-type: none"> • Improved health and safety outcomes through greater clarity • Reduced costs of managing psychological injury • Reduced compliance costs where business are ineffectively applying their resources to meet general duties • Minor costs in ensuring compliance with new regulations that reflect existing duties
3	Continuously assess new industries, hazards and working arrangements	Option 2 – 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	Part 2, Chapter 15	Nil regulatory impact
4	Clarify that a person can be both a worker and a person conducting a business or undertaking (PCBU)	Option 3 – Update existing guidance material to clarify the operation of s 5(4) of the model WHS Act	Part 2, Chapter 16	Nil regulatory impact
5	Develop a new model Code on the principles that apply to duties	Option 2 – Develop a new model Code or other practical guidance on how PCBUs can meet the obligations associated with the principles contained in ss 13–17 (the Principles)	Part 2, Chapter 17	Nil regulatory impact
6	Provide practical examples of how to consult with workers	Option 2 – Update the model Code: <i>Work health and safety consultation, cooperation and coordination</i> to include practical examples of how meaningful consultation with workers can occur in a range of traditional and non-traditional settings	Part 2, Chapter 18	Nil regulatory impact
7a	New arrangements for health and safety representatives (HSRs) and work groups in small businesses	Option 3 – Provide practical examples of work group and HSR arrangements in small businesses in the existing model Code: <i>Work health and safety consultation, cooperation and coordination</i> with the aim of clarifying how the laws can be applied, and reducing perceived complexity	Part 1, Chapter 3	<p>Minor regulatory impact:</p> <ul style="list-style-type: none"> • Greater clarity to workers and PCBUs regarding appropriate HSR and work group structures • Improved consultation between workers and PCBUs • Improvements to health and safety outcomes

	2018 Review Recommendation	Decision RIS recommended option	Section	Assessed regulatory Impact
7b	Work group is negotiated with proposed workers	Option 2 – Amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group	Part 2, Chapter 19	Nil regulatory impact
8	Workplace entry of union officials when providing assistance to an HSR	Not in scope	Pg 12	Not assessed
9	Inspectors to deal with safety issue when cancelling a Provisional Improvement Notice (PIN)	Option 3 – Review and amend the <i>Worker Representation and Participation Guide</i> to clarify how WHS issues should be dealt with when an inspector is reviewing a PIN	Part 1, Chapter 4	Minor regulatory impact: <ul style="list-style-type: none"> Improved health and safety outcomes due to inspectors dealing with WHS issues before cancelling PINs
10	HSR choice of training provider	Option 1 – Maintain the status quo	Part 1, Chapter 5	Nil regulatory impact
11	Provide examples of health and safety committee (HSC) constitutions, agendas and minutes	Option 2 – Update the model Code: <i>Work health and safety consultation, cooperation and coordination</i> , and the <i>Worker representation and participation guide</i> with examples of HSC constitutions, agendas and minutes	Part 2, Chapter 20	Nil regulatory impact
12	Update guidance on issue resolution process and participants	Option 2 – Update the <i>Worker representation and participation guide</i> to include practical examples of how the issue resolution process works, and a list of the various representatives entitled to be parties in relation to issue resolution as well as ways of selecting a representative and informing the other parties of their involvement	Part 2, Chapter 21	Nil regulatory impact
13	Resolving outstanding disputes after 48 hours	Option 3 – Further scope the problem identified in Recommendation 13 of the 2018 Review	Part 1, Chapter 6	Nil regulatory impact
14	Clarify court powers for cases of discriminatory or coercive conduct	Option 1 – Maintain the status quo	Part 2, Chapter 22	Nil regulatory impact
15	Remove 24-hour notice period for entry permit holders	Option 2 – Amend the model WHS Act to retain previous wording in s 117 of the model WHS Act, which did not require a 24-hour notice period for entry permit holders	Part 1, Chapter 7	Minor regulatory impact: <ul style="list-style-type: none"> Increased harmonisation will improve consistency across jurisdictions, reducing costs for businesses and unions
16	Align the process for issuing and service of notices to provide clarity and consistency	Option 2 – 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	Part 2, Chapter 23	Minor regulatory impact: <ul style="list-style-type: none"> Provides clarity and certainty about the operation of model WHS laws Minimal costs in adjusting procedures to comply with change

	2018 Review Recommendation	Decision RIS recommended option	Section	Assessed regulatory Impact
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	Option 2 – Amend s 171 of the model WHS Act to provide that an inspector can require production of documents and answers to question within 30 days of any inspector’s entry to that workplace provided that the request is related to the reason for the entry	Part 1, Chapter 8	Moderate regulatory impact: <ul style="list-style-type: none"> • Reduces time and costs to inspectors • Reduces need for multiple site visits by inspectors • Potentially reduces investigation costs resulting in improved health and safety outcomes
18	Clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the model WHS laws outside of their jurisdiction	Option 2 – Amend the model WHS Act to clarify that WHS regulator’s power to obtain information under s 155 has extra-territorial application	Part 2, Chapter 24	Nil regulatory impact
19	Enable cross-border information sharing between regulators	Option 2 – Amend the model WHS Act to include a specific power for regulators to share information between jurisdictions in situations where it would aid them in performing their functions under the model WHS laws	Part 2, Chapter 25	Nil regulatory impact
20	Review incident notification provisions	Option 2 – Review notification provision in the model WHS Act with the objective of ensuring that: the incident notification provisions meet the intention outlined in the 2008 National Review, the incident notification provisions capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements, and WHS regulators have appropriate visibility of work-related psychological injuries and illnesses.	Part 2, Chapter 26	Nil regulatory impact
21	Review the National Compliance and Enforcement Policy (NCEP)	Option 2 – Review the NCEP to include supporting decision-making frameworks relevant to the key functions and powers of a WHS regulator to promote a nationally consistent approach to compliance and enforcement	Part 2, Chapter 27	Nil regulatory impact
22	Increase penalty levels	Option 2 – Increase penalty levels in the model WHS Act and to review penalty levels as part of future reviews of the model WHS Act.	Part 2, Chapter 28	Minor regulatory impact: <ul style="list-style-type: none"> • Change in costs of non-compliance for businesses
23	Enhance Category 1 offence, and Industrial manslaughter	Option 2 – Include gross negligence as a fault element in the Category 1 offence	Part 1, Chapter 9	Minor regulatory impact: <ul style="list-style-type: none"> • Change in costs of non-compliance for businesses • May increase operational costs for regulators but also has the potential to increase safety standards • Provides a greater deterrent to duty holders

	2018 Review Recommendation	Decision RIS recommended option	Section	Assessed regulatory Impact
24	Improve WHS regulator accountability for investigation progress	Option 3 – Amend the model WHS Act to extend the 12-month deadline for a person to request that a WHS regulator bring a prosecution in response to a Category 1 or Category 2 offence under s 231, for a period to be determined in consultation with jurisdictions, and require a WHS regulator to provide updates to the person who made the request until a decision is made on whether a prosecution will be brought	Part 2, Chapter 29	Minor regulatory impact <ul style="list-style-type: none"> Additional resource costs for WHS regulators in responding to requests and keeping persons informed of investigations
25	Consistent approach to sentencing	Option 2 – Safe Work Australia, working with relevant experts, will undertake a review into the feasibility of developing national WHS sentencing guidelines.	Part 2, Chapter 30	Nil regulatory impact
26	Prohibit insurance for WHS fines	Option 2 – 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	Part 1, Chapter 10	Moderate regulatory impact: <ul style="list-style-type: none"> Stronger incentive on some duty holders to comply with WHS laws Improved WHS compliance decreases chances of death and injury/illness Increased costs for businesses who are liable for real cost of penalty Some economic loss in insurance industry
27	Clarify the risk management process in the model WHS Act	Option 3 – Further scope this issue to inform development of guidance, particularly for small business, on the risk management process and the application of the hierarchy of controls	Part 1, Chapter 11	Nil regulatory impact
28	Improve recording of amusement device infringements and operator training	Option 2 – 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	Part 2, Chapter 31	Minor regulatory impact: <ul style="list-style-type: none"> Costs to business in updating procedures Increased availability of safety information
29	Add a safe work method statement (SWMS) template to the WHS Regulations, and Develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS	Option 3 – Develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS	Part 1, Chapter 12	Nil regulatory impact
30	Photographic ID on White Cards	Option 3 – Undertake additional work to gain a greater understanding of the nature and scope of the problems identified in the 2018 Review, and determine whether the recommendation is the most appropriate mechanism to treat them	Part 2, Chapter 32	Nil regulatory impact

	2018 Review Recommendation	Decision RIS recommended option	Section	Assessed regulatory Impact
31	Consider removing references to Standards in model WHS Regulations, and Compliance with Standards not mandatory unless specified	Options 2a and 2b – Review the references to Standards in the model WHS laws with a view to their removal and replacement with the relevant obligations prescribed in the model WHS Regulations, and amend regulation 15 of the model WHS Regulations to make it clear that compliance with Standards is not mandatory under the model WHS laws unless this is specifically stated	Part 2, Chapter 33	Nil regulatory impact
32	Review Major Hazard Facilities (MHF) Regulations	Option 2 – Review the model WHS Regulations dealing with MHF, with a focus on administrative or technical amendments to ensure they meet the intended policy objective	Part 2, Chapter 34	Nil regulatory impact
33	Review crane licence classes	Option 2 – Review the high risk work (HRW) licence classes for cranes to ensure they remain relevant to contemporary work practices and equipment	Part 2, Chapter 35	Nil regulatory impact
34	Improving the quality of asbestos registers, and Competent persons in relation to asbestos	Option 3 – Publish additional guidance to improve asbestos register quality Option 4 – 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	Part 2, Chapter 36	Nil regulatory impact

About this Decision Regulation Impact Statement

This Decision RIS:

- Identifies the options with greatest net benefit, based on an analysis of the costs and benefits, – consistent with the COAG Guidelines (Part 1 only), and
- Provides WHS ministers with recommended options for addressing the recommendations of the 2018 Review for their decision (Parts 1 and 2).

Regulatory impact assessment process

The Agency has worked with the OBPR and Deloitte Access Economics to assess the impacts of the recommendations of the 2018 Review.

Assessing the impact of new or amended regulation, including analysis of the costs and benefits, is important to ensure that regulation delivers the intended objective without unduly causing adverse effects. The COAG Guidelines require that options for regulatory change be subject to a regulatory impact assessment process through the preparation of a draft RIS (the Consultation RIS) and a final RIS (this Decision RIS).

Consultation RIS

The Consultation RIS, released on 24 June 2019 for a six-week consultation period, canvassed the regulatory options under consideration and sought feedback and evidence from stakeholders to determine the relative costs and benefits of the regulatory options. The Agency received 102 submissions to the Consultation RIS.

The Consultation RIS's initial findings were that 12 of the 34 recommendations had 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 that requires further consideration and consultation.

The remaining 22 recommendations were assessed as having minor or no impacts or recommended further review meaning they could not be assessed at that time.

Decision RIS

The purpose of this Decision RIS is to draw conclusions based on the evidence on whether regulation is necessary, and if so, what the most efficient and effective regulatory approach might be, taking into account the outcomes of the Consultation RIS. This Decision RIS also incorporates information gathered through further research, and in targeted consultations with Safe Work Australia Members (SWA Members) and other stakeholders. The regulatory impact assessment for Part 1 has been completed with the assistance of Deloitte Access Economics.

Structure of this Decision RIS

Under the COAG Guidelines, options that are assessed as having more than a minor regulatory impact or substantially alter existing arrangements, require a regulatory impact assessment for assessment by the OBPR. Options that do not involve regulatory change or have nil or minor regulatory impact and do not substantially alter existing arrangements do not require a detailed regulatory impact assessment as outlined above.

For these reasons, this Decision RIS is separated into two parts:

Part 1 – Options that are assessed as having a moderate or significant regulatory impact

Part 2 – Options that are assessed as having nil or minor regulatory impact.

The approach to the recommendations is largely consistent with the preliminary assessment of regulatory impact provided in the Consultation RIS. Eleven of the 12 recommendations considered in the body of the Consultation RIS are considered in Part 1 of this Decision RIS. All of the recommendations that were considered in Appendix A of the Consultation RIS are considered in Part 2 of this Decision RIS.

For the detailed methodologies for Part 1 and Part 2, see Chapters 1 and 16 of this Decision RIS.

**Progressing Recommendation 8 –
Clarifying workplace entry by union officials providing assistance to an HSR**

Recommendation 8 of the 2018 Review concerns the issue of right of entry of union officials who are assistants to an HSR. This recommendation addresses whether a union official assisting an HSR should be required to hold an entry permit under the *Fair Work Act 2009* (Cth) (FW Act). In the Consultation RIS, the Agency invited submissions concerning proposed options in response to Recommendation 8.

After considering evidence and submissions received in response to the Consultation RIS it is clear that Recommendation 8 concerns issues outside the remit of WHS ministers and options to address the problem could not be implemented through the model WHS laws. Recommendation 8 would require amendments to the FW Act. Safe Work Australia and state and territory WHS ministers cannot make decisions concerning amendments to the FW Act and as such, it would not be appropriate for WHS ministers to consider this policy issue and the regulatory impacts of this recommendation. Decisions on amendments to the FW Act are a matter for the Commonwealth Attorney-General.

Therefore, Recommendation 8 has not been considered in this Decision RIS and no recommendations are proposed for consideration by WHS ministers.

Background

Development and implementation of the model WHS laws

Safe Work Australia is the statutory agency responsible for developing, evaluating and if necessary, revising the model WHS legislative framework. The Commonwealth, states and territories are responsible for implementing the model WHS laws in their jurisdictions. The model WHS laws have been implemented in all jurisdictions except Victoria and Western Australia (WA).

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 work by establishing clear responsibilities and appropriate compliance and enforcement measures. The model WHS legislative framework promotes 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 which is particularly important for those operating across jurisdictional borders.

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.

In 2018, an independent review of the model WHS laws was undertaken to examine and report on the content and operation of the model WHS laws. The terms of reference called for the 2018 Review to be evidence-based and propose actions that WHS ministers could take to improve the model WHS laws, or identify areas requiring further assessment and analysis by the Agency.

The 2018 Review process involved extensive consultations with a wide range of stakeholders. Its final report titled [Review of the model Work Health and Safety laws: Final report December 2018](#) (Final report) was provided to WHS ministers on 18 December 2018, and published on the Safe Work Australia website on 25 February 2019.

The 2018 Review found that, for the most part, the model WHS laws are working as intended. It identified some areas where stakeholders are experiencing confusion or consider the laws are overly complex. The Final report contained 34 recommendations to address the identified problems in the following areas:

- **Legal framework** (Recommendations 1, 2 and 3)

Duty holders have difficulty navigating the three aspects of the model WHS laws (Act, Regulations and Codes), understanding which requirements are relevant to them and how to comply with those requirements, particularly in relation to managing psychological risks in the workplace.

- **Duties of care** (Recommendations 4 and 5)

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** (Recommendations 6, 7a, 7b, 8, 9, 10, 11, 12, 13, 14 and 15)

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, HSR arrangements and training, and the WHS issue resolution process.

- **Compliance and enforcement** (Recommendations 16, 17, 18, 19, 20 and 21)

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 NCEP has not achieved the intended level of consistency in approach across jurisdictions, and needs review to better support inspectors, educators and stakeholders.

- **Prosecutions and legal proceedings** (Recommendations 22, 23a, 23b, 24, 25 and 26)

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** (Recommendations 27, 28, 29a, 29b, 30, 31a, 31b, 32, 33, 34a and 34b)

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 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.

Consultation RIS

To assess the impacts of the 2018 Review recommendations and alternatives, the Agency released a Consultation RIS and promoted the opportunity to provide feedback and supporting evidence through:

- a media release to over 160 media outlets
- electronic mail-outs to the approximately 28,000 subscribers to Safe Work Australia's news alerts
- promotion on business.gov.au, which also generates an electronic mail-out to subscribers
- dissemination of materials by SWA Members through their media channels, and
- Safe Work Australia's social media, including posts on Facebook, LinkedIn and Twitter.

The Consultation RIS considered all 34 recommendations of the 2018 Review. In preparing the Consultation RIS, the Agency worked closely with the OBPR to conduct an initial assessment of the impacts of the recommendations using the COAG Guidelines. The assessment used available information and included 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.

The Consultation RIS focussed on 12 of the 2018 Review's recommendations that initial assessment indicated were likely to have more than a minor impact or require additional information to explain or assess anticipated impacts.

The remaining recommendations were estimated to have minor or nil impacts on business, individuals or the community. These recommendations were set out in Appendix A of the Consultation RIS.

Each component of the Consultation RIS raised questions for consideration. Stakeholders were invited to provide information and evidence about these questions as part of the consultation process, especially if stakeholders considered the recommendations would be difficult to implement, would not address a problem or would have more than a minor impact.

Summary of feedback on the Consultation RIS

Stakeholder feedback on the impacts of the recommendations was sought through the Consultation RIS. In response, 102 submissions were received from organisations and individuals including representatives of safety regulators, business, workers, unions, industry organisations, health and safety representatives, health and safety and legal practitioners, academics and community organisations. Ten submissions were provided anonymously.

Most submissions focused on specific recommendations rather than providing broad responses in relation to all recommendations. Specific feedback on individual recommendations is captured in the respective Chapters in this Decision RIS.

Submissions provided a range of qualitative information to inform the impact analysis for the recommendations with regulatory impact. Qualitative information came in a range of forms including survey results, case studies and anecdotal evidence.

The recommendations with the highest engagement were Recommendation 2 – Psychosocial risks and Recommendation 23a and 23b – enhance the Category 1 offence and industrial manslaughter.

The Consultation RIS received very few submissions on those recommendations included in Appendix A (referred to in Part 2) which were identified as having either minimum impacts or no regulatory impact. Submissions mostly agreed with the Consultation RIS's initial assessment of the regulatory impact of the recommendations and how they were placed in the body or Appendix A. There were significantly fewer submissions that commented on the recommendations in Appendix A than the body of the Consultation RIS.

In assessing impacts, further information has also been drawn from other relevant inquiries or evidence.

Further detail on stakeholder submissions is provided against individual recommendations in this Decision RIS.

PART 1

Recommendations assessed as having a regulatory impact

1. About Part 1

This Part includes the recommendations of the 2018 Review that 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 that requires further consideration and consultation.

As these options have a potential regulatory impact, a regulatory impact assessment is provided in each Chapter.

Approach to options

Each Chapter of this Decision RIS deals with a separate recommendation of the 2018 Review. Most Chapters analyse two or three options that broadly fit into the below categories:

Option 1 – Maintain the status quo.

Option 2 – Implement the recommendation of the 2018 Review.

Option 3 – Implement an alternative option.

For recommendations that contained multiple components, there may be more options than those outlined above.

Impact assessment

Part 1 of this Decision RIS identifies the options in each Chapter with the greatest net benefit, based on an analysis of the costs and benefits. This Decision RIS primarily uses a qualitative approach to analyse the costs and benefits, as it is not always possible or appropriate to express the costs and benefits of regulating WHS in monetary terms. This approach is in line with the OBPR cost-benefit analysis guidance note.¹

The analysis of the options uses a range of available evidence to determine the impacts. A range of data has been used to supplement the impacts described by stakeholders. For these, this Decision RIS uses cost effectiveness or multi-criteria analysis.

For the 12 recommendations discussed in Part 1, an assessment of key costs and benefits, and any assumptions underpinning the analysis, has been made. These are outlined in the Chapter dealing with the relevant recommendation.

Impact analysis

The Agency engaged, and worked with, Deloitte Access Economics to assess the impacts of each recommendation in Part 1. The section titled “Impact assessment” in each Chapter has been drafted with the input and analysis of Deloitte Access Economics.

Recommended options

Based on the analysis of the costs and benefits of each option, the Agency has identified and recommended the option that will likely generate the greatest net benefit.

WHS ministers have been asked to consider and decide on the recommended options provided for each recommendation in this Part. Safe Work Australia will progress the recommendation agreed by WHS ministers through its usual tripartite arrangements.

Implementation

Implementation considerations have only been included in the Chapters where there are significant issues identified with implementation for the recommended option.

¹ The Department of Prime Minister and Cabinet Office of Best Practice Regulation, *Cost-Benefit Analysis Guidance Note*, February 2016.

2. Recommendation 2: Psychosocial risks

Recommended option – Option 2

That WHS ministers agree to 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.

Objective

To provide for a balanced and nationally consistent framework to secure the psychological health and safety of workers.

Current arrangements

The model WHS Act defines 'health' to include 'psychological health'. This means a PCBU must ensure, so far as is reasonably practicable, that workers and other persons are not exposed to psychosocial risks from the work carried out by the business or undertaking. The National Guide: *Work-related psychological health and safety: A systematic approach to meeting your duties* (the National Guide) was published in June 2018 and provides guidance on how a PCBU can meet this duty.

Like physical risks, the PCBU's duty to manage psychological risks is linked to work and qualified by what is reasonably practicable. While it is good practice to support and assist workers with non-work-related mental health conditions (for example through employee assistance programs) the requirement in the model WHS laws is to ensure, so far as is reasonably practicable, that work does not create a risk to psychological health and safety.

2018 Review findings

Psychological health and safety was one of the most frequently raised issues by stakeholders during the 2018 Review. 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.

The 2018 Review found that businesses, particularly small businesses, have limited understanding of their duties in relation to psychological health and safety in the workplace and sought practical guidance to help them identify and manage risks to psychological health. Lack of understanding can lead to PCBUs not acting to address psychosocial risks and expending resources inefficiently on actions that do not assist with meeting their duties.

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 risks. It made the following recommendation:

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.

Extent of the problem

Submissions in response to the Consultation RIS reinforced and expanded on the problem identified in the 2018 Review. Psychological health and safety was one of the most frequently raised issues by stakeholders in response to the Consultation RIS.

Safe Work Australia data shows workplace psychological injuries are one of the most costly forms of workplace injury, leading to significantly more time off work (17.3 weeks compared with 5.8 weeks for all serious claims) and a higher median payment per workers' compensation claim (\$30,800 compared with \$12,100).² Safe Work Australia research also indicates that for both physical and psychological injuries and illnesses, workers' compensation payments only represent a small portion of the total cost of work-related injury and illness with the majority of the total cost (approximately 74 per cent) falling on the worker.³

Several submissions from unions and worker associations highlighted the prevalence of work-related psychological injury and perceptions of how psychological risks are managed. The Australian Council of Trade Unions (ACTU) provided data from its 2019 *Safe at Work Survey* which found 61 per cent of respondents experienced poor mental health as a result of hazards in their workplace and 67 per cent did not think their employer knew how to address mental health in the workplace.⁴ Other unions provided similar data on the experiences of their members highlighting the extent of the problem, particularly in the retail, transport and health care industries, among first responders and some professional groups.

Some submissions also provided evidence about the wider impacts of psychological risks. For example, the Human Factors and Ergonomics Society of Australia noted that psychosocial factors can add to biomechanical load and increase the risk of musculoskeletal disorder.⁵

WHS regulators explained they encounter difficulties undertaking compliance and enforcement activities in relation to psychological risk in the absence of express regulations.

Options

Option number	Description
1	Status quo
2	<i>2018 Review – Recommendation 2</i> 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.

Overview of consultation findings

Seventy-four submissions in response to the Consultation RIS commented on this recommendation, with many providing substantial comments. The majority of submission (41 submissions) supported Option 2, with 25 supporting the status quo and a further eight expressing no view or suggesting alternative options.

Most of the support for the status quo came from businesses and industry representatives. Support for Option 2 came from unions and other worker representatives, researchers, mental health organisations and legal experts.

Status quo

Submissions supporting the status quo reasoned that regulation is not the most appropriate tool to address uncertainty and support businesses to meet existing requirements. In particular, they argued that prescriptive regulation would not be effective and may prevent businesses from implementing more effective control measures. They noted the need to tailor risk management to the circumstances of the business. Some employers noted they already have systems for managing psychosocial risks, and prescriptive regulation may result in costly change.

² Safe Work Australia Australian Workers' Compensation Statistics 2017-18.

³ Safe Work Australia, *The Cost of Work-related Injury and Illness for Australian Employers, Workers and the Community: 2012-13*, November 2015.

⁴ ACTU submission to the Consultation RIS, p 3.

⁵ Human Factors and Ergonomics Society of Australia Inc. submission to the Consultation RIS p 2.

Submissions supporting the status quo also discussed the developing body of knowledge around psychosocial risks, how they should be managed and how they interact with other types of risk and non-work related psychological health. Some of these submissions considered that the better approach would be to evaluate the effectiveness of the *National guide on work-related psychological health and safety – a systematic approach to meeting your duties* (the National Guide), published in June 2018, and other available material, before any changes are made to the legislative framework.

Similarly, some submissions suggested further guidance material be developed, in place of additional regulation.

Where submissions supporting the status quo addressed the nature of regulations, they generally preferred principles based regulation.

Option 2

Submissions supporting Option 2 acknowledged that the model WHS laws already deal with psychosocial risks but cited work-related psychological injury data and the experiences of workers as evidence that the existing laws are not being implemented effectively. They suggested specific regulations would remove ambiguity and raise the profile and awareness of the duties to manage psychosocial risks. Submissions from WHS regulators suggested specific regulations would assist with their enforcement activities.

Submissions and public discussions around this issue highlight confusion between managing risks to psychological health and safety under WHS laws and supporting workers with non-work-related mental health conditions as general good practice. The WHS laws currently require PCBUs to manage risks to psychological health and safety, regardless of whether a worker has any existing mental health condition. Specific regulations proposed under this option would not extend this duty.

Principles based vs prescriptive support

Generally, submissions demonstrated a clear preference for principles based regulations addressing psychosocial risks, supported by practical guidance.

Forty-one submissions addressed the form regulations should take:

- nine submissions suggested prescriptive approaches
- eighteen submissions supported broad principles based regulations such as requiring PCBUs to identify psychosocial risks, control these risks and monitor control measures to ensure they remain effective
- nine submissions did not specify their preference but highlighted likely costs and barriers to implementing prescriptive regulations, and
- five submissions provided other recommendations for the content of regulations.

Submissions from industry groups noted prescriptive regulations would be costly to businesses, may prevent them from implementing effective control measures, be difficult to update and result in generally higher costs and lower benefits.

Many submissions from businesses and industry representatives raised concerns that regulations may extend duties to psychological health issues that are outside a PCBU's control.

Specific ideas for what regulations should look like

Most stakeholders supported a principles based approach without specifying what these regulations would look like in practice. Stakeholders who provided information on what the regulations should look like supported dealing with psychological risks in the same way as physical risks.

Several submissions suggested that the existing regulations for hazardous manual tasks were a possible starting point for developing principles based regulations for psychosocial risks.⁶ Unions NSW suggested addressing psychological risks under s 19(3)(c) of the model WHS Act and Part 3.1 of the model WHS Regulations. They support using the concept of a safe system of work because it is a broad idea which can capture a range of controls. These are all broad, principles based duties which would largely address the concerns raised about prescriptive duties.

Other options suggested in submissions included international frameworks⁷ and historic requirements from the *Occupational Health and Safety Act 1986 (SA)*⁸, the *Occupational Health and Safety Act 2000 (NSW)*⁹ and the *Occupational Health and Safety Regulations 2001 (NSW)*.¹⁰

Evaluating the National Guide

Some submissions reflected broad support for the National Guide but suggested an evaluation of its effectiveness.

Impact analysis

The costs and benefits of Option 2 are assessed against Option 1 - status quo.

Any adverse impacts of the status quo are provided above in the “Extent of the problem” section of this Chapter. There are no assumed incremental costs or benefits of maintaining the status quo.

Option 2 – Costs and benefits

The impact of Option 2, in comparison to the status quo, is highly dependent on the precise nature of the regulations to be adopted. This analysis assumes regulations would be principles based, providing clarity on the existing duties but not prescribing requirements beyond them. It also assumes that, like other aspects of the model WHS laws, proposed regulations on psychological health would be limited to work-related risks and what is reasonably practicable.

The costs and benefits of Option 2 will reflect the extent to which the model WHS Regulations lead to behavioural change. This change may or may not be extensive depending on the nature of the regulations and the response to the National Guide. Because effective guidance would be essential to support any regulations developed, evaluation of the National Guide should be considered in parallel to developing regulations.

Costs

Costs of this option arise from any additional efforts required of PCBUs to identify and manage psychosocial risks and for WHS regulators to educate and support PCBUs and if necessary enforce the regulations. The impacts on PCBUs would largely depend on whether they are currently meeting their existing duties. If they are, there would be few additional compliance costs. If they are not meeting their duties or the additional guidance assists PCBUs to understand how they could better manage psychosocial risk, costs may include labour costs to identify the risks in their workplace, development of training and education to ensure the systems they implement to manage risks are implemented effectively, updating workflow management systems, improving safety management systems, and improvements to the physical environment. As the proposed regulations are intended to clarify existing requirements, not add to requirements, these costs are more properly attributed to greater compliance with existing requirements rather than the new costs of proposed regulations. Where businesses incur costs, these would likely occur in the initial year after regulations are introduced as they improve their systems and processes. There would be little to no ongoing cost.

⁶ Australian Manufacturing Workers' Union (AMWU), Tony Vane and United Voice's submissions to the Consultation RIS as well as input from WHS regulators.

⁷ Finland's [Occupational Safety and Health Act \(2002\)](#) has several sections addressing psychosocial risks including s 13 - Work design, s 25 - Avoiding and reducing workloads, s 27 - Threat of violence, s 28 – Harassment and s 31 - Work Pauses.

⁸ Section 55A covered inappropriate behaviour towards an employee.

⁹ Section 3 of the Act included adapting the work environment to a person's physiological and psychological needs.

¹⁰ Regulation 9 required employers to take reasonable care to identify hazards including those from work practices, work systems and shift working arrangements (including hazardous processes, psychological hazards and fatigue related hazards).

The demand by PCBUs for assistance from WHS regulators is likely to rise initially as businesses become more aware of their duties and seek assistance to meet them. The impact this would have depends on regulators' current training, systems and guidance. In addition to the National Guide, most WHS regulators have, or are developing, resources to assist PCBUs manage psychosocial risks. For example, the NSW Government has committed \$55 million over four years to their Mentally Healthy Workplaces Strategy 2018-2022 and Workplace Health and Safety Queensland has published a *Mentally healthy workplaces toolkit*.¹¹

WHS regulators may require additional WHS inspectors to provide advice and address concerns as the awareness of psychosocial risk increases. This would impose costs due to additional staff, training and ensuring the systems are in place to support inspectors.

Ultimately the relative size of the costs and benefits described would vary depending on a number of factors, including:

- Size, complexity and industry or business. Compliance costs would vary depending on the size of the business. Risks vary depending on workplace characteristics, and workplaces may have higher exposure to psychosocial risks and therefore greater effort required to manage them. However, studies have shown positive return on investment from measures to improve psychosocial risk management for most businesses.¹²
- The extent to which the regulatory change leads to a change in behaviour. This is influenced by:
 - Effectiveness of regulation and implementation. For example, the benefits of greater regulation may be limited in areas where the evidence base around identifying and managing risks is still emerging.
 - Distance of business from acceptable levels of psychosocial risk. Businesses that are not currently managing these risks effectively would be expected to bear a greater cost but also greater benefits. For example, larger businesses who are more aware of their obligations and already have sophisticated WHS management systems may not need to change behaviour.

If the regulatory change is effective and well-designed, it is likely that the costs of intervention would be less than the benefit. A Monitor Deloitte UK report¹³ focused on the return on investment of intervention in workplace mental health. Based on a systematic review of the available literature, the report found return on investment ranges from 0.4:1 to 9:1 with an average of 4.2:1. This accords with general findings about what drives successful compliance with health and safety outcomes as summarised by Safe Work Australia (2013).¹⁴ A 2012 literature review for the Victorian Health Promotion Foundation includes analysis of economic benefits from interventions relating to various types of job stress,¹⁵ and a paper for the NSW Government also looked at the return on investment in mentally healthy workplaces.¹⁶ All of these emphasise the potential return on investment is greater when regulation is targeted to areas of greatest risk, tailored to workplaces, and directed at intervention and prevention (for example changes to work practices) compared to interventions and measures taken after risks have materialised (for example reliance on outsourced employee assistance programs).

Benefits

Principles based regulations have the potential to:

- raise the profile of psychosocial risks through their express inclusion in the model WHS Regulations

¹¹ Office of Industrial Relations (Workplace Health and Safety Queensland), *Mentally Healthy Workplaces Toolkit*, 2018.

¹² For example, see *Creating a mentally healthy workplace. Return on investment analysis* PricewaterhouseCoopers, 2014.

¹³ Monitor Deloitte UK, *Mental health and employers: The case for investment*, October 2017.

¹⁴ Safe Work Australia, *The Effectiveness of Work Health and Safety Interventions by Regulators: A Literature Review*, April 2013.

¹⁵ LaMontagne, AD and Keegel, T, *Reducing Stress in the Workplace (An evidence review: full report)*, Victorian Health Promotion Foundation, March 2012.

¹⁶ Yu, S and Glozier, N, *Mentally Healthy Workplaces in NSW: A return-on-investment study*, SafeWork NSW, October 2017.

- lead to greater compliance as PCBU's better understand how to meet existing duties
- assist WHS regulators to educate PCBU's about their duties, and where necessary enforce these duties, and
- lead to better tools to assist PCBU's manage psychosocial risks due to increased demand.

Evidence provided by workers, businesses and WHS regulators suggests there are some businesses that are not complying with current requirements because of a lack of awareness or understanding of these requirements. If regulations were introduced addressing psychological risks, the heightened awareness created by any change to legislation and by having an express requirement in legislation is likely to increase compliance rates.

Overall, the benefits of improved psychological health in the workplace and for the economy are well established. While it is not possible to accurately quantify benefits specifically attributable to the proposed regulations, some assumption-driven modelling can indicate the potential scale of the benefits.

Workers' compensation statistics show that, among all the major causes of work-related injury, claims for mental stress have the highest median cost. In 2016-17, the median cost of a mental stress claim was \$32,000, more than 2.6 times the median cost of all claims at \$12,100. Mental stress claims also consistently had the longest median time lost from work (17.7 working weeks), almost three times the overall median time lost of 5.8 working weeks in 2016-17.¹⁷

Total estimates of the cost of work-related mental stress vary, with lower estimates at around \$3.6 billion per year and higher estimates at around \$14.81 billion per year.¹⁸ This is reinforced by a 2016 study, which estimated the total cost of depression to Australian employers through presenteeism and absenteeism to be approximately \$6.3 billion per annum in 2016.¹⁹ Even if regulatory changes only resulted in a 2 per cent improvement to psychological health outcomes, this could save between \$72 million and \$296 million annually.

Where businesses are uncertain about what they need to do to address psychosocial risks they may expend resources ineffectively. Greater clarity in the regulatory requirements can reduce costs associated with legal or other advice, unnecessary interventions, and reduce time spent determining obligations.

Option 2 - Summary of impact analysis

Assumptions of analysis

Regulations developed under Option 2 are principles based, clarifying the current requirements but not going beyond them. Regulations would be limited to work-related risks and what is reasonably practicable.

Cost to the economy of injury and illness due to mental stress are conservatively estimated at \$3.6 billion per year, in 2018-19.

A reduction in the number of psychological injuries would result in proportionate savings to the economy.

Key costs	Key benefits
<p>Minimal increase in regulatory burden.</p> <p>In practice, there would be short term costs to businesses that are not currently meeting their duties – for example through implementing changes to existing work policy, process, practice or environment.</p>	<p>Reduced cost to businesses.</p>

¹⁷ Safe Work Australia Australian Workers' Compensation Statistics 2017-2018.

¹⁸ For example, see *The Cost of Workplace Stress in Australia*, Econtech on behalf of Medibank Private, August 2008.

¹⁹ Becher, H and Dollard, M, *Psychosocial Safety Climate and Better Productivity in Australian Workplaces: Costs, Productivity, Presenteeism, Absenteeism*, Safe Work Australia, November 2016, p 8.

Key costs	Key benefits
	Where businesses undertake activities to eliminate or minimise psychological risks the improvement in psychological health and safety in workplaces provides them with benefits through increased productivity and lower injury rates. This would be an ongoing benefit.
Small initial cost to all businesses in understanding new regulations.	<p>Reduced cost to businesses</p> <p>Where businesses are uncertain about what they need to do to address psychosocial risks they may be expending resources ineffectively. Greater clarity can reduce costs associated with legal or other advice, unnecessary interventions, and reduce time spent determining obligations. It can also maximise benefits of any investment. This would be an ongoing benefit.</p>
Cost to regulators from additional requests and advice.	<p>Reduced cost to regulators.</p> <p>Regulators would have greater clarity on obligations, enabling inspectors to assess workplaces more efficiently. This would be an ongoing benefit.</p>
	<p>Reduced cost to the community.</p> <p>If the impact were to reduce the number of claims by 2 per cent, the savings to the economy could be in the order of \$72 million to \$296 million a year. This would be an ongoing benefit.</p>

Option with greatest net benefit

Option 2 is recommended as the option likely to provide the highest net benefit, assuming that regulations provide clarity on existing arrangements and do not prescribe additional requirements.

There may be some increases in costs for businesses and WHS regulators in the short-term as some businesses move to improve compliance with existing duties. These may be partially or wholly offset by reduced costs over the long-term as the investment in WHS compliance leads to more efficient long-term practices to prevent psychological injury and improve health and safety outcomes.

Importantly, only relatively small improvements in psychological health outcomes are necessary to achieve significant reductions in the costs to the Australian business of work-related poor psychological health outcomes. On balance, the benefits to businesses, WHS regulators and the community are considered likely to outweigh the costs.

3. Recommendation 7a: Work groups and HSRs in small businesses

Recommended option – Option 3

That WHS ministers agree to provide practical examples of work group and HSR arrangements in small businesses in the existing model Code: *Work health and safety consultation, cooperation and coordination* with the aim of clarifying how the laws can be applied, and reducing perceived complexity.

Objective

To provide for fair and effective workplace representation, consultation, cooperation and issues resolutions in relation to WHS.

Current arrangements

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. PCBUs 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. There is currently nothing in the model WHS laws that differentiates between small and large businesses for this purpose.

The consultation provisions in the model WHS laws intentionally provide flexibility in how meaningful consultation may occur. This flexibility is intended to respond to varied business types, sizes and needs. Under the model WHS laws, unless workers have requested an HSR, PCBUs are not required to appoint HSRs and work group arrangements if other consultation arrangements have been agreed by PCBUs and workers.²⁰

The model WHS Act currently provides for flexibility with respect to the composition of work groups and number of HSRs. Work groups need to be formed if requested by workers and if work groups are formed, HSRs need to be elected. The model WHS Act currently provides that the PCBU and workers decide on how the work groups are structured and how many HSRs are elected in a work group.

The model Codes and associated guidance material provide further information on the consultation requirements in the model WHS Act.

2018 Review findings

The 2018 Review found small businesses consider the requirements in relation to work groups for HSRs confusing and unduly onerous. The 2018 Review also concluded 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. 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.

The 2018 Review made the following recommendation:

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.

²⁰ Sections 50-52 of the model WHS Act.

Extent of the problem

The Consultation RIS sought views on whether, and to what extent, confusion around forming work groups and electing HSRs is preventing small businesses adopting these arrangements. No submissions received provided evidence that elaborated on or confirmed the extent of the problem as described in the 2018 Review.

A Safe Work Australia 2014 survey found that 19 per cent of small business have HSRs compared to 53 per cent of large businesses.²¹ This may be due to a number of reasons including that:

- processes to form work groups and elect HSRs may not meet the needs of small business, or
- HSRs may not be the most appropriate consultation mechanism for many small businesses where workers can directly contribute to WHS discussions.

The 2018 Review did not assess the appropriateness and effectiveness of alternative consultation arrangements used by small business. However, it noted the benefits of the work group and HSR framework in that PCBU and workers benefit from access to appropriately trained WHS representatives that understand the work and its risks. The HSR framework supports this by enabling access for workers to a trained HSR and the PCBU to a trained individual representing workers.

Whilst no submissions directly elaborated on the extent of the problem, NSW WHS Regulators submitted that information they have collected indicates small businesses do not appoint HSRs because direct consultation with workers is more effective. They also noted that they had received very few requests to resolve disagreements about forming work groups or the number of HSRs in a business.²²

Despite anecdotal evidence that some small businesses find applying the HSR requirements confusing or onerous, it is not clear that this is a significant or widespread problem. Further, it is not clear that the cause of confusion or lower numbers of HSRs in small businesses is due to issues with the current consultation and participation provisions in the model WHS Act.

Options

Option number	Description
1	Status quo
2	<i>2018 Review – Recommendation 7a</i> Amend the model WHS Act to provide that where the operations of a business or undertaking ordinarily involve 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.
3	<i>Alternative option – proposed by the Agency in response to stakeholder consultation</i> Provide practical examples of work group and HSR arrangements in small businesses in the existing model Code: <i>Work health and safety consultation, cooperation and coordination</i> with the aim of clarifying how the laws can be applied, and reducing perceived complexity.

Option 2

Option 2 provides a 'default' representative structure for small businesses of 15 workers or less, where an HSR is requested. This option seeks to remove potential barriers (i.e. confusion and lack of clarity) to the use of this framework as a method for consultation.

²¹ Safe Work Australia, *Health and Safety at Work: Your Experiences and Costs Survey*, 2014.

²² NSW WHS Regulators submission to the Consultation RIS, p 7.

Option 2 would not impose an additional requirement for PCBUs to facilitate the election of an HSR. As is currently the case, PCBUs would only be required to facilitate the election of an HSR and form work groups if requested by workers.

Option 3

Option 3 seeks to address those same barriers through education rather than default, legislated arrangements. Option 3 has been developed to respond to concerns that Option 2 may impose additional regulatory burdens for small business. Also, a default representative structure may preclude small business from effectively conducting consultation without electing HSRs.

Option 3 does not impose an additional requirement for PCBUs to use the HSR and work group framework or any additional requirements in negotiating arrangements.

Overview of consultation findings

Forty submissions provided information and views on this recommendation. Of these, 13 did not indicate a preference for any option, one supported the status quo, 15 supported Option 2, 10 supported Option 3, and one suggested an alternative option.

Those who had no preference were either not affected by the problem or did not believe the recommendation would address the problem. The view that the recommendation would not address the problem was primarily expressed by unions.

Option 2

Four of the 15 submissions supporting Option 2 did so as part of a blanket statement supporting all recommendations of the 2018 Review. A further six supported Option 2 in principle but with minor changes such as exemptions for micro-businesses, exclusion of a default deputy HSR, or clarification that HSRs are only required if requested by workers. Option 2 was also often supported with qualification, including that:

- no deputy HSR is required, or required in a business under 5 employees as this would double training costs
- the wording be changed from 'business' to 'site'
- it not operate as a minimum acceptable ratio, or
- there should also be an education campaign to clarify requirements.

The Australian Chamber of Commerce and Industry (Australian Chamber) submission, which supported Option 3, was concerned that including a default work group and HSR structure in the legislation might cause confusion or the perception that these are the mandatory arrangements for all PCBUs.

Option 3

Ten submissions indicated a preference for Option 3 as it would retain flexibility for small business and improve clarity through guidance, as compared to Option 2 which would introduce more regulatory burden and higher costs.

Submissions suggested Option 3 would provide the clarity and guidance small businesses are seeking, without increasing prescription in the model WHS Act.

Impact analysis

The costs and benefits of Options 2 and 3 are assessed against Option 1 - status quo.

Any adverse impacts of the status quo are provided above in the "Extent of the problem" section of this Chapter. There are no assumed incremental costs or benefits of Option 1.

Option 2 – Costs and benefits

Option 2 would not have any additional regulatory impact on:

- PCBUs that adopt other consultative structures where an HSR has not been requested, and
- PCBUs with more than 15 workers.

Costs

Increased HSR use

Option 2 would increase HSR training costs to business where:

- more workers request work group and HSR arrangements
- PBCUs use the work group and HSR framework under the model WHS laws instead of lower cost alternative consultation and representation arrangements
- a deputy HSR is appointed when ordinarily only an HSR would be appointed.

It is not possible to predict the extent to which this proposed amendment would change existing arrangements in practice.

Workers in any workplace currently have the right to request the formation of a work group and the election of an HSR. Therefore costs associated with training are only those costs above which would occur under the status quo.

Further, HSRs are not required to undertake training, unless requested by the HSR. However, without training, HSRs are unable to exercise the full range of powers under the model WHS Act.

Negotiation

Option 2 would impose some cost where PCBUs and/or workers consider that a different approach to the 'default' would be more appropriate to the type and nature of the work. Option 2 reduces flexibility by imposing an additional step for PCBUs, which would need to consider the 'default' representative structure and record the negotiations, if any alternative were agreed, for example, if a small business were to agree to one HSR being elected without a deputy. It is possible that the 'default' would itself become a barrier that prevents other more effective consultation mechanisms being negotiated.

Compliance

Option 2 would impose some compliance costs for businesses to ensure requirements are met, although this would likely only be a minimal change. These costs are likely to be short term and will decrease once awareness of the requirements become understood. In the long term, the compliance costs for business could be reduced due to increased clarity and a reduced need to learn about the requirements and seek advice or guidance.

Benefits

Increased HSR use

In the long term, Option 2 is intended to clarify expectations for small business and workers concerning appropriate worker representation and may therefore increase the use of the work group and HSR framework.

This option would provide safety benefits where the work group and HSR framework is a more appropriate and effective consultation framework than is currently in use by a small business.

It could also reduce the costs of establishing work group and HSR arrangements if there is less confusion around the model WHS law requirements.

The extent to which these benefits are realised would depend on the number of small businesses that:

- have not used the work group and HSR framework due to barriers to its use, or
- do not have alternative consultation arrangements that are as effective, or more effective than this framework.

Overall, the benefits of Option 2 would arise from any increase in clarity concerning the appointment of HSRs in small business. However, it is not clear from submissions on the nature and the extent of the issue that Option 2 would achieve that clarity or simplify requirements.

Negotiation

A 'default' representative structure may reduce the need for negotiation in some circumstances and provide a simplified approach. However, these benefits may be limited, applying primarily to businesses for which the 'default' provides a model for consultation and representation that best fits the particular needs of the workplace.

WHS regulator assistance

Clearer requirements may reduce regulators' need to assist small business. However, the extent to which WHS regulators are requested to assist in resolving issues related to establishing consultation and representation arrangements appears low. NSW WHS Regulators noted they had received very few requests to resolve disagreements about forming work groups and the number of HSRs.²³

Option 3 – Costs and benefits

Costs

Option 3 would increase costs to business of HSR training where removing barriers to using the work group and HSR framework leads to an increase in HSRs. However, it should be noted that any increased costs to business from additional HSR training costs that arise from removing unintended barriers under Option 3, would not arise from an increased regulatory burden beyond existing requirements. Workers in any workplace have the right under the current model WHS laws to request the formation of a work group and the election of an HSR. It should be noted that other non-regulatory factors could increase appointments of HSRs (e.g. increased awareness) and that PCBUs would be responsible for the costs associated with this increase.

Further, HSRs are not required to undertake training and a PCBU is not required to provide training, unless requested by the HSR. However, without training an HSR is unable to exercise the full range of powers under the model WHS Act.

Benefits

As with Option 2, Option 3 seeks to remove barriers to the use of the work group and HSR framework as a method for consultation. In Option 3, the barrier addressed is a lack of clear and consistent information. This option would provide safety benefits in supporting small businesses to adopt effective representation and consultation arrangements and reducing barriers to using the work group and HSR framework.

The extent to which this benefit is realised would depend on the number of small business that:

- have not used the work group and HSR framework due to barriers to its use
- do not have alternative consultation arrangements that are as effective, or more effective than this framework.

Overall, the benefits from Option 3 would arise from any increase in clarity concerning the appointment of HSRs in small business. The size of the potential benefit depends on the extent to which barriers to appointment of HSRs (including a lack of clarity) exist at present. The benefits are likely to be more evident in the long term as more businesses begin to elect HSRs.

The regulatory costs associated with Option 3 are unlikely to be significant, either in the short or long-term. Some PCBUs and workers may spend time understanding the new guidance material. However, guidance is not mandatory to read; it is intended to clarify existing requirements. It would be useful for businesses that are currently experiencing problems understanding the requirements, which means it could reduce time spent on compliance over time.

Option 3 would also retain the flexibility that workers and PCBUs currently have during negotiations, i.e. workers and PCBUs would more easily be able to agree to a single HSR being elected to represent a work group in a small business.

²³ NSW WHS Regulators submission to the Consultation RIS, p 10.

Overall, the long term benefits to be gained from Option 3 would arise from any increase in clarity concerning the appointment of HSRs in small business - leading to better consultation and representation and consequently improved health and safety outcomes. The size of the potential benefit largely depends on the extent to which barriers to appointment of HSRs (including a lack of clarity) exist at present.

While not possible to quantify, the cost under Option 3 is likely to be small and offset by the safety benefits to be gained.

Option 2 - Summary of impact analysis

Assumptions of analysis

This option is new regulation in relation to HSRs and work groups.

Key costs	Key benefits
While this option does not alter existing rights to establish HSRs, removing barriers to the use of these provisions could increase the use of HSRs and associated establishment and training costs to PCBUs.	Increase in clarity and removal of barriers to appointment of HSRs - leading to better HSR representation, higher quality representation from trained HSRs and therefore improved health and safety outcomes.
Negotiation costs when seeking to use an alternative to the default. This could also reduce use of the most effective alternative consultation mechanism.	Reduced negotiation costs when the 'default' meets the needs of workers and PCBUs.
Compliance costs.	

Option 3 - Summary of impact analysis

Assumptions of analysis

There is no additional regulation or requirement under this option. It provides targeted guidance material.

Key costs	Key benefits
While this option does not alter existing rights to establish HSRs, removing barriers to the use of these provisions could increase the use of HSRs and associated establishment and training costs to PCBUs.	Increase in clarity and removal of barriers to appointment of HSRs - leading to better HSR representation, higher quality representation from trained HSRs and therefore improved health and safety outcomes.

Option with greatest net benefit

Option 3 is recommended as the option likely to provide the highest net benefit.

Options 2 and 3 both remove barriers to the use of the HSR provisions and increase clarity. However, Option 3 does not require new regulation and would likely achieve these benefits with fewer costs and in a way that maintains flexibility to address the divided views of stakeholders. Therefore, Option 3 would likely offer the highest net benefit.

4. Recommendation 9: Cancelling a PIN

Recommended option – Option 3

That WHS ministers agree that Safe Work Australia review and amend the *Worker Representation and Participation Guide* to clarify how WHS issues should be dealt with when an inspector is reviewing a PIN.

Objective

To ensure that the issue resolution processes provided for in the model WHS Act enable parties to resolve WHS issues fairly and efficiently.

Current arrangements

An HSR may issue a PIN if they reasonably believe a person is contravening the WHS Act or where a contravention has occurred and it is likely to continue or be repeated.²⁴ A PIN can require a person to remedy the contravention, prevent a likely contravention from occurring or remedy the things or operations causing the contravention or likely contravention.²⁵

A WHS regulator can be asked to appoint an inspector to review the PIN.²⁶ If such a request is made, an inspector must attend the workplace as soon as practicable and review the PIN.²⁷ After reviewing the PIN, the inspector must confirm, modify or cancel the PIN and provide reasons for their decision.²⁸

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 2018 Review include citing the wrong section of the WHS Act, or paraphrasing the WHS laws in a way that is technically incorrect.²⁶

The 2018 Review 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.

The 2018 Review recommended:

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.

Extent of the problem

Submissions to the Consultation RIS indicated that the extent of the problem was not as widespread or significant as identified in the 2018 Review.

The Australian Chamber stated that a survey of its members found 15 members (7.2 per cent) had been issued with a PIN. Of the 15, six (2.9 per cent of members) advised that the inspector cancelled the PIN for technical reasons. None of those respondents indicated that in those circumstances the WHS issue remained unresolved.²⁹ Other submissions stated that cancelled PINs have not been an issue for them or have had no experience with PINs.³⁰

Data from WHS regulators suggested that there have been instances where a PIN is cancelled for technical reasons, but that this does not occur frequently. Namely:

- NSW WHS Regulators stated it does not receive a high volume of requests for review.

²⁴ Section 90 of the model WHS Act.

²⁵ Section 90 of the model WHS Act.

²⁶ Section 100 of the model WHS Act.

²⁷ Section 101 of the model WHS Act.

²⁸ Section 102 of the model WHS Act.

²⁹ Australian Chamber submission to the Consultation RIS, p 55.

³⁰ Anthony Bate submission to the Consultation RIS, p 3; NSW Nurses & Midwives' Association submission to the Consultation RIS, p 9; Bridgestone Australia Ltd (Bridgestone) submission to the Consultation RIS, p 3.

- Northern Territory (NT) WorkSafe stated that five PINs have been cancelled since the model WHS laws were implemented, four of those on technical grounds.
- Another WHS regulator noted that it has not experienced dispute resolution issues in regards to cancelled PINs to the same degree as identified in the 2018 Review.
- Between 2013-2019, there were 27 requests for an inspector to review a PIN in South Australia (SA). Of those, eight were cancelled for technical reasons. In most cases, an inspector replaced the cancelled PIN with an improvement notice. In other cases the HSR withdrew the PIN for reasons including that they became aware of technical issues with the PIN.

Interestingly, there appears to be no common position among WHS regulators on the meaning of 'technical grounds' for cancelling a PIN. Evidence from WHS regulators suggests that technical grounds for cancelling a PIN may overlap with circumstances where there is a "substantial injustice", rendering the PIN invalid.

- Safe Work Tasmania considers that technical grounds for cancelling a PIN are not different to 'defects or irregularities that make the PIN invalid'.
- Safe Work SA takes the view that cancelling a PIN for technical reasons differs from cancelling a PIN for defects or irregularities (but in both cases the PIN is invalid).
- WorkSafe NT considers technical grounds for cancelling a PIN to include where the PCBU has taken reasonable action or where there was a lack of evidence to support the PIN being issued. It considers non-technical grounds to include incorrect identification of the relevant PCBU or the HSR issuing a PIN out of power.
- Service NSW did not provide evidence of what they consider technical grounds. Instead, they outlined a number of general grounds on which their inspectors cancel a PIN.

No substantial evidence was provided substantiating concerns that WHS issues remain unresolved in cases where an inspector cancelled a PIN. However, the Community and Public Sector Union (CPSU) suggested that their members may have experienced such issues. The CPSU submitted that Option 2 would address a shared frustration in the underlying, substantial issues not being addressed when a PIN is cancelled.³¹

Options

Option number	Description
1	Status quo
2	<i>2018 Review – Recommendation 9</i> 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.
3	<i>Alternative option – proposed by the Agency in response to stakeholder consultation</i> Safe Work Australia to review and amend the <i>Worker Representation and Participation Guide</i> to clarify how WHS issues should be dealt with when an inspector is reviewing a PIN.

Overview of consultation findings

Thirty-seven submissions provided views on this recommendation. Of these, two did not indicate a preference for any option, 13 supported the status quo, 21 supported Option 2, and one suggested an alternative option.

³¹CPSU submission to the Consultation RIS, p 13.

Status quo

A main contention of those supporting the status quo was that inspectors already have an existing power under s 102(1)(b) of the model WHS Act to review and confirm a PIN with changes, as well as the power to issue improvement and prohibition notices.³²

Another main assertion of submissions supporting the status quo is that there is a lack of data to support Option 2. The Chamber of Minerals and Energy of WA cited a lack of evidence about how often an inspector cancels a PIN for technical reasons. Bridgestone and an anonymous submission, which did not provide an express preference, stated further clarification and information is required about cancelled PINs, presumably before changes should be considered.³³

Option 2

A common theme amongst those submissions was that Option 2 would improve health and safety outcomes. The NSW Nurses & Midwives Association supported the recommendation on the basis it would boost workers' confidence that WHS issues would be addressed, increasing the likelihood of workers engaging with the mechanisms for resolving WHS issues in the workplace, including electing HSRs and having HSRs exercise their power to issue a PIN.³⁴ The Department of Defence considers Option 2 to be a positive change, which may lead to more timely rectification of issues and further define the role WHS regulator.³⁵

Option 3

Whilst this option was not presented in the Consultation RIS, it is clear from submissions that processes already exist under the model WHS Act to enable the resolution of WHS issues, including the use of inspector powers (e.g. issuing a prohibition notice), and the resolution process under s 82. It appears that the problem identified in the 2018 Review is, therefore, related to the implementation of these processes in circumstances where a PIN is cancelled or invalid. Option 3 seeks to address this problem.

Most WHS regulators noted that they have operational measures in place to guide inspectors in reviewing a PIN.³⁶ Further, some regulators also noted that additional guidance to inspectors could assist with ensuring underlying WHS issues are being addressed when PINs are cancelled.

The Royal Australasian College of Physicians (RACP) commented on the way in which inspectors undertake investigations into WHS issues that arise under a PIN. The RACP observed that in its experience, a WHS issue is left unresolved after a PIN is cancelled where the WHS risk is complex, expensive, difficult or otherwise 'unfixable'. It suggested that inspectors and workplaces have access to better advice from occupational and environmental medicine physicians and other relevant experts to solve these difficult issues.

Impact analysis

The costs and benefits of Options 2 and 3 are assessed against Option 1 - status quo.

Any adverse impacts of the status quo are provided above in the "Extent of the problem" section of this Chapter. There are no assumed incremental costs or benefits of Option 1.

³² Minerals Council of Australia submission to the Consultation RIS p 8; NSW Minerals Council submission to the Consultation RIS p 23; Queensland Resources Council submission to the Consultation RIS (Attachment A) p 1.

³³ Bridgestone submission to the Consultation RIS, pp 3-4.

³⁴ NSW Nurses & Midwives Association submission to the Consultation RIS, p 9.

³⁵ Department of Defence submission to the Consultation RIS, p 3.

³⁶ NSW WHS Regulators submission to the Consultation RIS, p 9; Confidential Submission; SafeWork SA submission to the Consultation RIS, p 4-5.

Option 2 – Costs and benefits

Costs

Under Option 2 the involvement of an inspector may lead to businesses spending more time on a WHS issue than would otherwise be the case. This cost would be immediate for affected businesses. There may also be ongoing costs for regulators if inspectors are required to assist on a WHS issue that may otherwise have been resolved between the parties themselves once a PIN is cancelled. On the basis of information provided during consultation, it is not possible to be definitive regarding the cost impact on businesses and regulators. However, costs are likely to be minimal and ad hoc depending if and when a PIN is cancelled for a technical reason.

The impact of Option 2 cannot be reliably identified because of the uncertainty about the number of PINs it may affect. Contributing to this uncertainty is a lack of a common position among WHS regulators regarding what is a 'technical reason' for cancelling a PIN.

Overall, the impact of Option 2 on WHS and costs to businesses and WHS regulators is likely to be small. There is no evidence that there is a significant problem to be addressed, or that Option 2 would impact on a material number of PINs (therefore impacting costs). There is already a process for inspectors to address underlying WHS issues, although this may differ across jurisdictions.

Benefits

Option 2 is intended to result in improved health and safety outcomes because the inspector is required to assist parties to resolve underlying WHS issues that may otherwise remain unresolved, or take longer to resolve. In such cases, this would lead to improved health and safety outcomes.

Other potential benefits of Option 2 could include reduced long-term costs for businesses and WHS regulators. The assistance provided on a WHS issue by an inspector could mean that businesses spend less time trying to resolve the issue. The ACTU identified potential savings to businesses from avoiding the need to actively request the assistance of an inspector under s 82, which places an unnecessary layer of administration on the parties to the dispute.³⁷

Similarly, Option 2 could reduce costs to WHS regulators in the longer term. For example, costs associated with re-entering a workplace at a later time to assist parties, at their request, in resolving the same or similar issue.

The magnitude of these benefits depends on the number of PIN cancellations, the number of PINs cancelled due to 'technical reasons' and the number of cases where cancelled PINs had an underlying safety issue that remained unresolved.

Some data on these issues was provided in submissions to the Consultation RIS, as set out above, but it is not comprehensive. Given that the extent of the problem has not been substantiated, it is likely that any benefits from Option 2 would be small.

The benefits (and costs) of Option 2 would only be realised to the extent that the proposed change removes barriers to parties initiating the process in s 82.³⁸ It is not clear that there is currently any barrier to parties using s 82 after a PIN is cancelled for technical reasons. Therefore, the potential benefit to be gained from amending the model WHS Act is unlikely to be significant.

Option 3 – Costs and benefits

Costs

Option 3 would generate immediate costs to businesses and WHS regulators, but to a lesser degree than Option 2. This is because the option would more directly address the key issue of simplifying and expediting resolution of the WHS issue, meaning the benefits are more likely to be realised without the risk of unnecessary costs.

³⁷ ACTU submission to the Consultation RIS, p 24-25.

³⁸ Section 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.

Benefits

The intention of Option 3 is for Safe Work Australia to amend the *Worker Representation and Participation Guide* to clarify how inspectors should deal with WHS issues when reviewing a PIN. The benefit of this option is that it would provide clarity about the role of an inspector in the PIN process, particularly where an inspector intends to cancel a PIN or where a PIN is invalid and where appropriate, the implementation of the dispute resolution arrangements under s 82. This option could result in a more timely and efficient resolution of disputes and improve worker confidence in the resolution process. It could also achieve long-term improvements in business productivity as the frequency of disputes declines, as well as long-term cost savings to WHS regulators from a reduced need to intervene in disputes.

Option 3 is anticipated to replicate the benefits under Option 2.

Option 2 - Summary of impact analysis

Assumptions of analysis

N/A

Key costs	Key benefits
Affected businesses will incur immediate productivity costs associated with additional interaction with WHS regulators – including in relation to issues that may otherwise have been addressed.	Improved health and safety outcomes and relationships between workers and affected businesses due to inspector assistance in resolving dispute.
Ongoing WHS regulator costs associated with greater inspector involvement in the resolution of WHS issues – including in relation to issues that may otherwise have been addressed.	Possible reduction in long-term WHS regulator cost due to more efficient process for resolution of issues. However benefit is not likely to be significant.
	Possible long-term improvements in business productivity. However, benefit is not likely to be significant.

Option 3 - Summary of Impact analysis

Assumptions of analysis

This option provides guidance to clarify existing requirements without additional regulation.

Key costs	Key benefits
Affected businesses may incur immediate productivity costs associated with additional interaction with WHS regulators (to a lesser degree than Option 2).	Improved health and safety outcomes and relationships between workers and affected businesses due to greater inspector involvement and assistance in resolving dispute.
Possible ongoing WHS regulator costs associated with greater inspector involvement in the resolution of WHS issues (to a lesser degree than Option 2).	Possible reduction in long-term WHS regulator costs due to more efficient process for resolution of issues (however, benefit is not likely to be significant).
	Possible long-term improvements in business productivity. However, benefit is not likely to be significant.

Option with greatest net benefit

Option 3 is recommended as the option likely to provide the highest net benefit.

Amendments to existing guidance are likely to improve the resolution of WHS issues, without the risk of ongoing costs to business associated with Option 2.

Submissions to the Consultation RIS provided evidence that the extent of the problem was not as widespread or significant as first identified in the 2018 Review. Data from WHS regulators indicated that a low number of PINs were cancelled by inspectors on technical grounds. Further, there was no evidence provided that the parties involved in those PINs considered the WHS issue was left unresolved. Evidence provided in support of Option 2 indicated a shared frustration with the issue but did not point to particular circumstances where the cancellation of a PIN had resulted in a reduction in safety.

Submissions supporting Option 2 stated the recommendation would assist in resolving disputes. However, processes already exist under the model WHS Act that enable the resolution of WHS issues including the use of inspector powers and the resolution process under s 82. The problem to be resolved therefore is the implementation of these processes in circumstances where a PIN is cancelled or invalid. Weighing up all considerations, this problem is best addressed through non-regulatory measures under Option 3 by making inspectors and parties aware of the current processes and providing guidance that simplifies and expedites the process for resolving a WHS issue.

5. Recommendation 10: Choice of health and safety representative training course

Recommended option – Option 1

That WHS ministers agree to maintain the status quo.

Objective

To provide for fair and effective workplace representation, consultation, cooperation and issue resolution in relation to WHS.

Current arrangements

The model WHS laws require 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.³⁹

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 WHS regulator to appoint an inspector to decide the matter.⁴⁰

2018 Review findings

The 2018 Review found the final choice of HSR training provider was an area of contention between PCBUs and HSRs. 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 was unknown, as is the length of delays that result from this disagreement. However, this issue was raised by both employer and employee representative organisations during the 2018 Review.

Submissions to the 2018 Review raised issues with the current wording and interpretation of s 72 of the model WHS Act. Unions in particular expressed a view that the provision lacks clarity on the scope of "consultation" and fails to reflect the recommendations of the *National Review into Model Occupational Health and Safety Laws*⁴¹ - that HSRs should have a primary or an overarching right to choose their training course.

The 2018 Review made the following recommendation:

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 WHS regulator to appoint an inspector to decide the matter.*

Extent of the problem

Consultation with stakeholders demonstrated that the issue of choice of HSR provider is an issue in workplaces. However, the issue was more predominant in some specific workplaces. Consultation has demonstrated that the current provisions work well in the majority of circumstances.

³⁹ *Sydney Trains v SafeWork NSW* [2017] NSWIRComm 1009.

⁴⁰ Section 72 of the model WHS Act.

⁴¹ *National Review into Model OHS Laws: Second Report to the Workplace Relations Ministers' Council (WRMC)*, January 2009, p 145-146.

Submissions to the Consultation RIS repeated issues raised with the current wording and interpretation of s 72 of the model WHS Act. The nature of what constitutes “consultation” was confirmed to some extent by the case of *Sydney Trains v SafeWork NSW* [2017] (Sydney Trains), which found that neither the worker nor PCBU can unilaterally decide on a training course and that a PCBU can propose an alternative training course during the consultation process.⁴² Sydney Trains also considered that if the HSR and PCBU cannot agree, either party can request the WHS regulator appoint an inspector to choose the preferred course, which can include the PCBU’s preferred option.

The Consultation RIS sought feedback on the cause and extent of disagreements over HSR training. The evidence from WHS regulators showed that they see a relatively small number of disputes between HSRs and PCBUs. However, of those disputes, most relate to HSR training selection. WHS regulators noted that:

- the training provider is the area of most contention when HSRs and PCBUs are trying to agree on a training course. However, no data is available on the number or cost of delays, and this information is anecdotal.
- WorkCover NSW/Safe Work NSW indicated that since the implementation of the model WHS laws, they had received approximately 36 requests relating to disagreements between PCBUs and HSRs about HSR training. In half of these instances, the dispute related to the choice of training provider.⁴³ This represents approximately 2-3 disputes per year in NSW referred to SafeWork NSW for resolution of this issue.

An ACTU survey found that 21 per cent of respondents to a question for current or former HSRs had experienced a disagreement about their choice of training.⁴⁴ Also, 23 per cent had experienced disputes about time off to attend training, and 16 per cent about the cost of training.⁴⁵ The ACTU stated that the current requirements place unnecessary and unjustifiable limits on access to HSR training and provide insufficient protection to HSRs against interference.

The Transport Workers Union (TWU), which is a training provider, stated that HSRs often face difficulties when choosing the TWU as their training provider.⁴⁶ The TWU submission stated that HSR training disputes are common and result in significant delays to training.⁴⁷ These disputes appear to be generally solved by the inspector in favour of the HSR and TWU.

The Australian Chamber found from its survey of businesses that 90 per cent of respondents cited quality of training as their top concern in allowing HSRs to choose their training provider.⁴⁸

Options

Option number	Description
1	Status quo
2	<p><i>2018 Review – Recommendation 10</i></p> <p>Amend the model WHS Act to make it clear that for the purposes of s 72 of the model WHS Act:</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 WHS regulator to appoint an inspector to decide the matter.

⁴² *Sydney Trains v SafeWork NSW* [2017] NSWIRComm 1009.

⁴³ NSW WHS Regulators submission to the Consultation RIS, p 14.

⁴⁴ ACTU submission to the Consultation RIS, p 26.

⁴⁵ ACTU submission to the Consultation RIS, p 26.

⁴⁶ TWU submission to the Consultation RIS, p 7.

⁴⁷ TWU submission to the Consultation RIS, p 7.

⁴⁸ Australian Chamber submission to the Consultation RIS p 50.

Overview of consultation findings

Of the submissions to the Consultation RIS that commented on this recommendation, seven submissions did not express a preference, 14 submissions supported the status quo, 23 supported Option 2 and six suggested alternative approaches. Businesses and unions largely took opposing views.

Status quo

Support for the status quo generally came from industry/business stakeholders. Generally industry and business raised the quality of HSR training courses as the main reason the current consultation approach is important. Reasons for supporting the status quo included:

- Through the consultation process, PCBUs can be satisfied the training provided meets quality standards and delivers appropriate learning outcomes.
- The current requirements allow PCBUs to provide a common HSR training course which maintains consistency in training and HSR knowledge across a workplace.
- It is more consistent with the PCBU's obligation under the primary duty of care to provide training for other WHS matters.⁴⁹
- It avoids unnecessary or unreasonable costs to business, for example, unreasonably expensive training courses, or travel costs where the HSR's choice of training is not within close proximity to the workplace.

Option 2

Union submissions generally strongly supported Option 2. As unions are commonly providers of HSR training, they provided practical insight into the issues they have experienced with the current arrangements. Submissions supported Option 2 for the following reasons:

- Option 2 will reduce unnecessary disputes.
- HSRs in choosing their training provider should be able to choose a provider independent from their PCBU.
- Option 2 will reduce delays in HSRs being trained. This means that there will be less delays in HSRs being able to issue PINs and cease work notices.

Unions strongly affirmed the quality of the training they provide. They also contended that their training is not more expensive than the courses employers choose. Unions emphasised in their submissions that HSRs are only able to select from WHS regulator approved courses, which counters the arguments raised for the status quo that union provided HSR training is not of a suitable quality.

Union submissions also asserted the importance of HSRs having independence in choosing their training providers, and argued that the current arrangements provide too much scope for PCBUs to delay the provision of training.

Alternative options

Some submissions suggested alternative options. These included:

- The Australian Industry Group (AiG) suggested that inspectors should have the power to resolve all issues associated with HSR training.⁵⁰
- The Australian Chamber suggested that PCBUs should have the choice of training provider with consultation.⁵¹
- NSW WHS Regulators submitted that a review of the SWA *Worker Representation and Participation Guide* should occur to determine whether further practical guidance could be developed as to what are 'reasonable costs'.⁵²

⁴⁹ Section 19(3)(f) of the model WHS Act.

⁵⁰ AiG submission to the Consultation RIS, p 20.

⁵¹ Australian Chamber submission to the Consultation RIS, p 50.

⁵² NSW Work Health and Safety Regulators submission to the Consultation RIS, p 10.

None of these options were proposed by other parties through consultation. It is also not clear that these alternative options would go towards resolving the problems identified in the 2018 Review. For these reasons, they have not been considered further. The Australian Chamber's alternative option also had the support of the Chamber of Commerce and Industry Queensland.⁵³ This option may address some of the identified issues such as delays in HSR training and may reduce industrial disputes. Despite this, the Australian Chamber's option would not provide HSRs with independence in their choice of HSR training course.

It is also noted that under Queensland's WHS laws, HSRs are required to complete training within 3 months of their election if a course is reasonably available. These laws, which were an amendment to the *Work Health and Safety Act 2011* (Qld) and the *Work Health and Safety Regulation 2011* (Qld), are intended to ensure HSRs are properly trained and that training is not delayed.

Impact analysis

The costs and benefits of Option 2 are assessed against Option 1 - status quo.

Any adverse impacts of the status quo are provided above in the "Extent of the problem" section of this Chapter. There are no assumed incremental costs or benefits of Option 1.

Option 2 – Costs and benefits

Costs

Option 2 could have a cost to business. The most significant is the risk that HSR choice of training may result in some PCBUs being asked to fund HSR attendance at a training course at an inconvenient time, or for a length of time, or at a cost that is more expensive than might be necessary or preferred by the PCBU. These costs which exist in the short and long term may be particularly acute for smaller businesses or in rural or remote areas. Whilst this issue may increase costs in some circumstances, it is important to note that time off work would remain a matter of agreement with the PCBU which could mitigate this risk. If agreement cannot be reached between the HSR and PCBU, either party can ask the WHS regulator to appoint an inspector to arbitrate the dispute. These costs may decrease in the long term due to workers and PCBUs being more familiar with the amended laws and more able to proactively manage expectations regarding HSR training and risks of dispute.

Under Option 2, considerations of cost and timing would interact with the right of an HSR to their choice of course. While the HSR may choose the course provider, a dispute over 'reasonable cost' could still arise and, depending on the inspector's decision, could ultimately mean that the HSR's preferred course cannot be undertaken. In this circumstance, the HSR would be required to choose a course which has a 'reasonable cost'. The interpretation of what is 'reasonable cost' has potential implications for costs and benefits.

It is unlikely there will be costs related to the quality of the course. This is because all HSR training courses need to be approved by the WHS regulator and therefore, in the majority of cases, it can be assumed that an HSR training course chosen by an HSR will be appropriate. Despite this, in some circumstances, the PCBU's choice may be more appropriate to meet the WHS needs of the PCBU's workplace based on the assumption that the PCBU has a good understanding of the health and safety issues associated with the workplace. Whilst unlikely to be an issue in the majority of cases, inappropriate HSR training courses may lead to poorly trained HSRs and poorer health and safety outcomes. These concerns were reflected in submissions from industry groups which submitted that under Option 2, they would lose opportunities to consult and reach agreement with HSRs.

Whilst a benefit of Option 2 is the potential reduction in industrial disputes, there may be some potential that Option 2 could cause other disputes if the option leads to less consultation between HSRs and PCBUs. This could occur because the proposed solution changes arrangements even for the vast majority of HSR training course selections that are effectively conducted. It removes the need for consultation on choice of training provider. This cost is also more likely to be a factor in the short term because in the long term, parties will be more familiar with the laws and the benefits of consultation. The objective of the model WHS laws is that the HSR and PCBU agree on which course of training the HSR should attend. As best practice, consultation should be the starting point and the default, with the HSR right to choose only a last resort.

⁵³ Australian Chamber submission to the Consultation RIS.

Benefits

The benefits for Option 2 are likely to be small. This is because the current provisions operate well in the vast majority of cases. It is only in a small number (e.g. less than 20 cases in NSW since the laws commenced) of cases where a dispute concerning the choice of HSR training course has occurred. Whilst there remains the possibility of dispute under the current provisions, the probability of a dispute arising under the current provisions is not significant.

Option 2, in some circumstances, could lead to improved health and safety outcomes. In these circumstances, HSRs would be trained more quickly and would be able to exercise all of their powers to ensure WHS issues are identified and resolved due to a decrease in the number of disputes between HSRs and PCBUs relating to approval of training courses. Also, in some circumstances more HSRs may be willing to request training if there is less possibility of that request leading to a dispute. This, in turn, avoids risk of harm to workers and others and may reduce costs associated with workplace accidents. Despite this, due to the small number of cases where disputes occur, the benefit is likely to be small.

There is unlikely to be any benefit relating to the quality of the training courses. All HSR training courses need to be approved by the WHS regulator. Option 2 would enable HSRs to choose training that may, in some circumstances, not be preferred by the PCBU but is nonetheless the most beneficial option (although it is equally possible that it would not be any more beneficial than a course selected by the PCBU).

Business productivity is another benefit of this option and would be achieved primarily through less time spent in disputes. This is because the HSR course selection process would be clearer, resulting in fewer instances where an inspector is requested to assist a PCBU and HSR resolve disagreements about choice of training course. This would also equate to reduced regulatory costs. Although, as above, the savings are likely to be small.

Factors impacting estimation of costs and benefits

There are some risks to these benefits being realised. To the extent that there are delays and disputes about training, it is likely that Option 2 will lead to a reduction in disputes. The extent to which delays and disputes are caused by HSR training has not been established therefore the scale of benefit is not known.

The content and quality of HSR training courses should continue to be monitored by the WHS regulator to ensure all courses are valid. If there is a tendency for courses to vary in quality depending on whether they are preferred by the HSR or PCBU, this could impact the assessment of costs and benefits of Option 2.

Summary of Option 2 analysis

Assumptions of analysis

All possible HSR courses are valid and have appropriate content.

The extent of the issue to be addressed is not clear.

Key costs	Key benefits
Cost to business. Separating issues about choice of provider from issues about timing and cost considerations may lead to less choice for employers to balance cost considerations.	Improved health and safety outcomes. More qualified HSRs leading to avoided risk of harm to workers. This is likely to be a small benefit.
Increased WHS risk resulting from reduced consultation between HSR and PCBU.	Increased business productivity. Workers and PCBUs may spend less time spent in dispute over HSR training. This would be an ongoing benefit. This is likely to be a small saving.

Key costs	Key benefits
	<p>Reduced costs to WHS regulators.</p> <p>There would be fewer instances where the WHS regulator is required to resolve disputes. This would be an ongoing benefit. This is likely to be a small benefit.</p>

Option with greatest net benefit

Option 1 is recommended as the option likely to provide the highest net benefit.

Option 1, the status quo, is preferred as the current provisions operate well in the majority of circumstances. Option 2 is likely to support the resolution of issues in only limited circumstances. While the cost of Option 2 would be small, the benefits would be equally small and may not be realised. On the available evidence, the case for change cannot be sufficiently made. Therefore the status quo is likely to provide the highest net benefit.

6. Recommendation 13: Referral of disputes

Recommended option – Option 3

That WHS ministers agree that Safe Work Australia further scope the problem identified in Recommendation 13 of the 2018 Review.

Objective

To ensure that the dispute resolution process set out in the model WHS Act enables parties to resolve disputes fairly and effectively.

Current arrangements

Under the model WHS Act, parties are required to make reasonable efforts to resolve WHS issues in accordance with an agreed procedure, or if that does not exist, the default procedure prescribed in the model WHS Regulations.⁵⁴ If the issue remains unresolved, a party to the issue may ask the WHS regulator to appoint an inspector to attend the workplace to assist in resolving the dispute.⁵⁵ In that instance, an inspector may exercise any of their compliance powers in relation to the workplace.⁵⁶ If parties remain dissatisfied and the inspector has made a reviewable decision (e.g. issued a PIN or improvement notice) parties can apply for the decision to be internally reviewed by the WHS regulator and then externally reviewed by the relevant court or tribunal.⁵⁷

Parties involved in an issue arising in relation to the cessation of work can also ask a WHS regulator to appoint an inspector to help resolve the issue.⁵⁸ Similar to above, if an inspector makes a reviewable decision, this can be internally then externally reviewed.

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 2018 Review noted 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.

The 2018 Review made the following recommendation:

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.*

Extent of the problem

The Consultation RIS sought information on the extent of the identified issue. However, the evidence provided does not substantiate the problem identified in the 2018 Review.

⁵⁴ Section 81 of the model WHS Act.

⁵⁵ Section 82 of the model WHS Act.

⁵⁶ Section 82 of the model WHS Act.

⁵⁷ Part 12 of the model WHS Act.

⁵⁸ Section 89 of the model WHS Act.

WHS regulators provided evidence that a relatively small number of parties seek assistance from inspectors and most disputes are resolved through this process. The evidence included:

- NSW WHS Regulators received approximately 353 requests for issue resolution under ss 82 and 89 since the implementation of the model WHS laws. Of these, 25 requests were made under s 89 in relation to cessation of work, 24 of which were resolved without requiring further action.
- SafeWork SA's records show that the majority of requests for assistance under s 82 relate to HSR election processes, consultation processes, and disputes relating to PCBUs allowing HSRs to carry out their duties/functions. The majority of matters in SA are resolved after an inspector is appointed to assist under ss 82 or 89. Since 2013, SafeWork SA has only received two complaints from HSRs in relation to assistance from an inspector and their resolution of a matter.
- WorkSafe Tasmania indicated that there have been a minimal number of issues left unresolved after an inspector was appointed to assist under ss 82 and 89.
- There have been no WHS or cease work matters left unresolved after WorkSafe NT appointed an inspector.

The Australian Chamber stated that disputes occur relatively infrequently in smaller businesses. Of surveyed members, 4.3 per cent (nine members) responded that they have had a WHS dispute that required them to apply the dispute resolution process. Of those, only five had to ask an inspector to resolve the dispute.⁵⁹

The ACTU stated that of those who responded to their Safe at Work Survey, 24 per cent had had a safety inspector attend their workplace to assist with resolving a disagreement and of those, 23 per cent said the dispute had not been resolved.⁶⁰

The ACTU stated that the current system can cause delays in the resolution of safety issues, which are costly and dangerous.⁶¹ The NSW Nurses & Midwives' Association stated that workers are disillusioned because significant issues are not addressed for extended periods, which contributes to a poor culture where workers do not bother to raise safety issues.⁶²

The Electrical Trades Union (ETU) stated that inspectors are not always able to attend the workplace due to resourcing issues. When an inspector does attend, the ETU suggested inspectors are reluctant to exercise their compliance powers or fail to make a decision and leave the workplace with the issue unresolved.⁶³

Some submissions identified that the issue has not affected them.⁶⁴

⁵⁹ Australian Chamber to the Consultation RIS, p 56.

⁶⁰ ACTU submission to the Consultation RIS, pp 3, 29.

⁶¹ ACTU submission to the Consultation RIS p 29.

⁶² NSW Nurses & Midwives' Association submission to the Consultation RIS, p 11.

⁶³ ETU submission to the Consultation RIS, p 6.

⁶⁴ Submissions to the Consultation RIS from Anthony Bate, p 4; Bridgestone, p 5.

Options

Option number	Description
1	Status quo
2	<p><i>2018 Review – Recommendation 13</i></p> <p>Amend the model WHS Act to provide:</p> <ol style="list-style-type: none"> disputes under ss 82 and 89 of the model WHS Act 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 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 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 appeal rights from decisions of the court or tribunal to apply in the normal way.
3	<p><i>Alternative option – proposed by the Agency in response to stakeholder consultation</i></p> <p>Safe Work Australia further scopes the problem identified in Recommendation 13 of the 2018 Review.</p>

Overview of consultation findings

Four submissions did not express a preference for the status quo or Option 2, nine supported the status quo, 21 supported Option 2 (with some conditional on changes to its scope) and three suggested alternative arrangements (Option 3 was not presented in the Consultation RIS).

Status quo

Submissions that supported the status quo asserted that the referral of disputes to a court or tribunal would not result in a more efficient or effective process or would be inconsistent with the objective of the model WHS Act (s 3(1)(b)).⁶⁵ Some submissions considered that Option 2 could increase the administrative burden and financial cost of resolving safety issues.⁶⁶ The Chamber of Minerals and Energy of WA stated that the referral of matters to a court or tribunal is typically an option of last resort due to the cost, time and effort involved in legal proceedings.⁶⁷

Option 2

Union submissions supported Option 2 on the basis that the current system is delaying the resolution of safety issues. The ETU stated that simply knowing that a matter may be escalated to an independent arbitrator would serve as motivation for disputes to be taken 'seriously' and be dealt with in a timely manner. The ETU also stated that Option 2 would prevent any delay in the resolution of WHS issues, prevent complacency and make for safer workplaces.⁶⁸

⁶⁵ Submissions to the Consultation RIS from NSW Mineral Council, p 14; Mineral Council, p 12; Queensland Resource Council; Chamber of Minerals and Energy of Western Australia (WA), p 17; Australian Small Business and Family Enterprise Ombudsman, pp 1-2.

⁶⁶ Submissions to the Consultation RIS from Department of Defence p 4; Australian Small Business and Family Enterprise Ombudsman, pp 1-2.

⁶⁷ Chamber of Minerals and Energy of WA submission to the Consultation RIS p 17.

⁶⁸ ETU submission to the Consultation RIS, p 6.

Some WHS regulators suggested altering the scope of Option 2, particularly the time period of 48 hours. Tasmania and the NT wanted to increase it to 72 and 96 hours respectively. The ETU also suggested altering the time period for disputes relating to imminent risk.⁶⁹

Service NSW suggested limiting the scope of the recommendation to s 89.⁷⁰ NSW WHS Regulators stated that it is unclear whether the proposed changes would result in stronger safety outcomes than those currently being achieved through inspector assistance.⁷¹

Submissions raised concerns about the appropriateness of courts and tribunals to assist with the resolution of disputes. The Australian Chamber, which supports Option 2 in principle, stated its members are unwilling or unable to utilise a court or tribunal process on the basis that it would be too expensive, time consuming and stressful. It was also claimed that the process would disproportionately disadvantage small and rural/remote businesses.⁷² NSW WHS Regulators also raised concerns about the expertise of the chosen court or tribunal to hear WHS matters.⁷³

Option 3

Evidence presented in submissions suggests that very few WHS issues remain unresolved after an inspector is involved. Of those that may remain unresolved, it is unclear whether this is due to an inspector's lack of power or their inability to resolve WHS issues in an acceptable timeframe. Therefore, Option 3 proposes to further investigate the problem identified by Recommendation 13 of the 2018 Review in order to gain a better understanding of the current situation and ensure that any proposed solution is fit for purpose.

Alternative options

Some submissions also suggested alternative options. The AiG suggested considering whether the powers of inspectors could be amended or clarified to enable the quicker resolution of disputes in the workplace rather than inserting another layer of dispute resolution. However, if Option 2 was pursued, the AiG identified the following possible alternative approaches:

- make an inspector's decision a 'reviewable decision'
- develop an alternative mechanism, to be determined, that would assist inspectors to resolve the issue, or
- referral to an independent person appointed by the relevant Minister.

Another suggested alternative is to amend the requirements of the issue resolution procedure in the model WHS Regulations to include the possibility of a referral to a court, tribunal or third party for conciliation and arbitration. This would be an alternative to escalating the issue with an inspector.

Impact Analysis

The costs and benefits of Options 2 and 3 are assessed against Option 1 - status quo.

Any adverse impacts of the status quo are provided above in the "Extent of the problem" section of this Chapter. There are no incremental costs or benefits of Option 1.

Option 2 – Costs and benefits

Costs

Under Option 2, there would be additional costs to business and workers from engaging with court or tribunal proceedings. The extent of this cost cannot be quantified as the number of cases expected is difficult to estimate, as are the nature and length of cases. The cost would also vary depending on the mechanism adopted in each jurisdiction to hear the dispute. The costs of court or tribunal proceedings in individual cases could be significant for both businesses and workers in terms of productivity losses.

⁶⁹ ETU submission to the Consultation RIS, p 7.

⁷⁰ Service NSW submission to the Consultation RIS, p 12.

⁷¹ NSW WHS Regulators submission to the Consultation RIS, p 12.

⁷² Australian Small Business and Family Enterprise Ombudsman submission to the Consultation RIS, pp 1-2; AiG submission to the Consultation RIS, p 22.

⁷³ NSW WHS Regulators submission to the Consultation RIS, p 12; AiG submission to the Consultation RIS, p 22.

Small businesses may be disproportionately impacted by the short-term costs of court or tribunal proceedings. They may be less able to absorb these costs than larger businesses and obtain the expected benefit. Businesses in rural or regional areas also have additional barriers to accessing a court or tribunal process. Workers may also be required to bear the cost of proceedings where the business or their union does not cover such costs.

While a WHS dispute is before the court and remains unresolved, there remains a higher risk of adverse health and safety outcomes. There is also a risk that referral to a court or tribunal could have a negative effect on relationships and affect morale and health and safety outcomes.

Option 2 would also increase the existing case load of the relevant court or tribunal, in which case there would be an increase in operational costs in the longer term. The court or tribunal as well as the WHS regulator would bear these costs, which ultimately would be borne by government.

Option 2 has potential to increase operational costs for WHS regulators in the longer term if they are required to resolve a dispute in 48 hours. This scenario could require the redeployment of resources from existing and potentially higher risk safety issues.⁷⁴

There may also be one-off costs, which would vary by jurisdiction. For example, SA has indicated regulatory change would be required to the *South Australian Employment Tribunal Act 2014* (SA) to expand the jurisdiction of the SA Employment Tribunal to hear and determine disputes relating to requests for assistance by HSRs and cease work matters.⁷⁵

It is difficult to estimate the totality of these costs or how the costs compare to the benefits. In part, this is because it is difficult to estimate the number of cases that would proceed to the courts. As noted the 'threat' of courts may mean parties resolve issues quicker and potentially without resorting to the use of an inspector. This could reduce costs, however any savings could be outweighed by the costs of even a small number of cases proceeding to a court or tribunal. Ultimately, the number of cases referred to a court or tribunal could be much greater, or much less, than the existing number of unresolved disputes.

Benefits

Under Option 2, WHS issues might be resolved more quickly than under the status quo because the 'threat' of courts or tribunals becoming involved provides affected parties with an additional incentive to resolve issues amongst themselves or with the assistance of an inspector.

Improved health and safety outcomes could result from the risk to health and safety being reduced or eliminated more quickly than otherwise would have been the case.

Quicker resolution could also result in less short-term costs to businesses and unions in dealing with the dispute. However, it is not clear that courts or tribunals would be more efficient than under the status quo in resolving disputes. Queensland has recently implemented amendments similar to Option 2, but there is no publicly 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. The lack of data may be due to the fact the amendments have only been operational for two years.

Option 3 – Costs and benefits

Option 3 recognises that there might be a problem to address but also that further work is required to understand the nature and extent of the problem and develop a workable solution, which may include alternative dispute resolution options.

To understand the extent of the problem, data would be needed on the:

- number of disputes under s 82 of the model WHS Act
- number of cases unresolved after 48 hours including reasons why it remains unresolved, and
- cost of current dispute resolution.

The scoping work would consider a broader range of options and their consequences, including interaction with existing jurisdictional laws.

⁷⁴ NSW WHS Regulators submission to the Consultation RIS, p 12.

⁷⁵ WHS regulator response to additional questions.

Costs

There would be additional short-term costs to government in conducting further analysis and consultation with business, WHS regulators, unions and other key stakeholders. The cost of this on business and WHS regulators is expected to be minimal.

Benefits

The benefit of Option 3 is that it would enable Safe Work Australia to engage in further consultation and assessment to understand the underlying problem. This would involve clarification of whether the key issue is inspectors' lack of power to resolve issues, or the inability of inspectors to resolve issues in an acceptable timeframe. This would inform development of robust options and enable more informed analysis to be undertaken.

Option 2 - Summary of impact analysis

Assumptions of analysis

N/A

Key costs	Key benefits
Short-term cost to business and workers of additional tribunal and court processes.	Business productivity - from less time spent on dispute resolution.
Long-term cost to government of additional tribunal and court processes.	Long-term regulatory cost savings – fewer instances where the WHS regulator is required to resolve disputes.
	Better WHS outcomes – avoidance of risk from more efficient resolution of issues, and better incentive to resolve issues.

Option 3 - Summary of impact analysis

Assumptions of analysis

Implementation of any alternative options identified is not part of this option.

Key costs	Key benefits
Possible short-term costs to business, unions and other key stakeholders, however this is expected to be minimal.	Enables further consultation and analysis that will assist in accurately identifying the problem and ensuring an appropriate resolution is adopted.

Option with greatest net benefit

Option 3 is recommended as the option likely to provide the highest net benefit.

Based on evidence presented in submissions to the Consultation RIS, it not clear that many WHS issues remain unresolved after an inspector is involved. Of those WHS issues that remain unresolved, it is also unclear whether the delay is due to an inspector's lack of power or their inability to resolve WHS issues in an acceptable timeframe. Option 3 recognises there is a need to clarify the underlying problem to identify appropriate options and undertake informed options analysis. Whilst this option may result in further delay to the resolution of the identified problem, the impact is expected to be minimal given there is limited evidence to suggest the problem is of significance for businesses and workers. Further, any impact arising from the delay in resolving the issue would be offset by the delivery of an evidenced based solution that effectively addresses the identified problem.

7. Recommendation 15: Remove 24-hour notice period for entry permit holders

Recommended option – Option 2

That WHS ministers agree to amend the model WHS Act to retain previous wording in s 117 of the model WHS Act, which did not require a 24-hour notice period for entry permit holders.

Objective

To maintain and strengthen the national harmonisation of laws relating to WHS and to facilitate a consistent national approach to WHS in the jurisdictions.

Current arrangements

Union officials have a right to enter a workplace in certain circumstances under Part 7 of the model WHS Act, including a right to enter a workplace to investigate a suspected contravention of WHS laws. Under s 117 of the model WHS Act, a union official must provide written notice of entry at least 24 hours, but not more than 14 days, before entering a workplace. The model WHS laws provide for the granting of an exemption from providing prior notice where the issuing authority reasonably believes there is a serious risk to health or safety.

The notice requirement was included in the model WHS laws in 2016 following the 2014 review of the model WHS laws.⁷⁶ The amendment was made, in part, to ensure the right of entry requirements under the model WHS Act were consistent with those in the FW Act.⁷⁷ However, this change has not been implemented in any jurisdiction.

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 when entering a workplace to inquire into a suspected contravention of WHS laws. The review found this problem is exacerbated by inconsistencies between the model WHS laws and those implemented in jurisdictions.

The 2018 Review made the following recommendation:

Amend the model WHS Act to retain previous wording in s 117 of the model WHS Act.

Extent of the problem

Submissions in response to the Consultation RIS provided further detail on the nature and scope of the problem identified in the 2018 Review.

Safe Work Australia's role includes developing nationally consistent guidance to support the model WHS laws and promote consistency across jurisdictions. As Safe Work Australia cannot issue guidance that is inconsistent with the model WHS laws any guidance issued must include the 24-hour notice requirement. 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 publication of guidance that is inconsistent with the jurisdictional laws.

Options

Option number	Description
1	Status quo
2	<i>2018 Review – Recommendation 15</i> Amend the model WHS Act to retain previous wording in s 117 of the model WHS Act, which did not require a 24-hour notice period for entry permit holders.

⁷⁶ *Improving the model Work Health and Safety laws Issue Paper and Consultation Regulation Impact Statement*, Safe Work Australia, 2014.

⁷⁷ Section 487(3) of the FW Act.

Overview of consultation findings

Right of entry is a contentious area of the model WHS laws and many of the submissions to the Consultation RIS contained strong and divergent views on right of entry and Recommendation 15 in particular. Employer and industry representatives strongly supported the status quo while unions strongly supported the removal of the 24-hour notice period.

Fifty-two submissions addressed this recommendation. While five submissions provided no preference and one suggested an alternate option, the responses were generally split between those who support right of entry in general and those who do not.

Generally, submissions focussed on the practical implications of requiring 24-hours' notice rather than the implications of the model WHS laws differing from jurisdictional laws.

Status quo

Employer and industry representatives strongly supported the status quo and the retention of the 24-hour notice period (25 submissions). These submissions were made in the context of general dissatisfaction among employer and industry representatives with the operation of right of entry laws, for example, the Chamber of Minerals and Energy of WA preferred the complete removal of the WHS entry pathway under the model WHS laws. The Chamber of Commerce and Industry WA's submission provided evidence about right of entry breaches stating that \$16.46 million in total penalties were awarded against the Construction Forestry Maritime Mining and Energy Union as a result of litigation bought by the Australian Building and Construction Commission for failure to meet its obligations.

While employer and industry representatives express concerns about right of entry more generally, their submissions also specifically refer to the 24-hour notice requirement. The Minerals Council of Australia suggest the lack of a notice provision can potentially lead to inappropriate access to workplaces and unexpected disruption to businesses.

The NSW Business Chamber's submission also discussed the 24-hour notice requirement with respect to right of entry under the FW Act. In its view, without a notice period in the model WHS Act, it is possible that entry under the model WHS Act may be used for other industrial purposes under the 'pretext' of a suspected contravention of the Act due to the ability to gain immediate entry. Employer and industry representatives consider that a notice requirement would act as additional protection against the abuse of entry rights and ensure that right of entry under the model WHS Act is not used for other industrial purposes.

Option 2

Comparatively, union submissions and families bereaved by a workplace death strongly support the removal of the 24-hour notice period. Submissions supporting Option 2 (21 submissions) considered it could lead to an improvement in the safety of workers. They suggested that workers would benefit from the timely provision of support and advice from union officials. The ACTU Safe at Work Survey⁷⁸ found that 90 per cent of survey respondents believed that unions should be able to immediately enter workplaces to investigate WHS breaches or suspected breaches when they occur, and should not be required to give 24 hours' notice.

Submissions supporting Option 2 contended that the threat of having worksites entered without notice would assist in identifying breaches and encourage businesses to ensure that worksites are compliant at all times. This is as opposed to the notice period which may afford sites 24-hours with which to 'cover-up' or remove evidence of any non-compliance.

Impact analysis

The costs and benefits of Option 2 are assessed against Option 1 - status quo.

Any adverse impacts of the status quo are provided above in the "Extent of the problem" section of this Chapter. There are no assumed incremental costs or benefits of Option 1.

⁷⁸ ACTU submission to the Consultation RIS, p 29.

Option 2 – Costs and benefits

Costs

The 24-hour notice period has been in the model WHS laws since 2016 but has not been implemented in any jurisdiction.⁷⁹ As such the adoption of Recommendation 15 would not result in any changes to existing jurisdictional WHS laws or any new costs to business. Therefore, **the costs outlined below are notional only.**

Compared to the status quo, costs associated with removing the 24-hour notice period would impact businesses if they incurred a loss in productivity from permit holders entering workplaces without notice. For example, if activities had to be stopped while the entry permit holder inspected an item of plant or consulted relevant workers. However, as an entry permit holder must reasonably suspect a contravention of WHS laws before they can exercise this right of entry it is unlikely to be a regularly occurring cost for compliant businesses and may reduce the likelihood of an accident occurring if the issue can be addressed without delay. Other costs may arise where permit holders without awareness of site-specific risks pose a safety hazard to themselves and others.

There is a risk that additional costs would arise if the provisions are misused for industrial purposes. However it is unclear why, given s 117 has not been implemented, there would be an increase in misuse of the provisions. To avoid this, guidance material should clarify arrangements for protection of businesses from misuse of the right of entry provisions.

While this would involve an inconsistency between right of entry under the model WHS Act and the FW Act, this is not in itself problematic as the two laws are intended to achieve different policy purposes. A suspected contravention of the WHS laws arguably requires a more immediate response in the interests of health and safety.

Benefits

The Commonwealth, states and territories have not implemented the 24-hour notice requirement in the model WHS laws. As such, Option 2 would deliver benefits through increased harmonisation across jurisdictions. The model WHS laws are the main tool to harmonise WHS laws of the Commonwealth, states and territories. However if the model WHS laws are not maintained and updated as needed, jurisdictions may independently change their laws. This would erode harmonisation and its benefits.

Harmonisation benefits include reduced costs to businesses and unions as a result of having consistent laws rather than different approaches that they have to understand and implement. Aligning the model WHS laws and jurisdictions' laws would also provide a benefit through reduced confusion of stakeholders.

In 2011, based on analysis of a number of surveyed companies operating across multiple states, harmonisation of WHS regulations and codes of practice was estimated to reduce their compliance costs by \$22.20 per worker and achieved safety benefits of \$38.35 per worker per year. The primary benefits were realised through productivity improvements including a 2.3 per cent increase in the output of surveyed businesses translated to savings of \$4,285 per worker per year, or \$14.1 billion a year, nationally.⁸⁰ Harmonising right of entry notice periods would be expected to result in a reduction in compliance costs. However, the impact of harmonising this small part of the model WHS laws is likely to contribute only a small amount to the total productivity benefits of overall harmonisation.

⁷⁹ Safe Work Australia is not aware of an intention of any jurisdiction to implement the 24-hour notice period.

⁸⁰ *Decision Regulation Impact Statement for National Harmonisation of Work Health and Safety Regulations and Codes of Practice*, Safe Work Australia, November 2011, p 259.

Safe Work Australia publishes national guidance to support the model WHS laws. Currently, 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. It can be reasonably assumed that this adversely affects businesses, particularly small and medium sized businesses, and workers who would benefit from guidance concerning right of entry. Lack of clarity can lead to increased compliance costs, for example, time spent by businesses and unions educating themselves about right of entry or seeking legal advice. Harmonisation of jurisdictional and model WHS laws would allow Safe Work Australia to provide clear guidance on the issue of notice for right of entry. This will provide ongoing benefit in supporting businesses to understand and implement the laws.

Beyond benefits of harmonisation and issuing national guidance, the benefits of removing the 24-hour notice provision are notional only, as this change to the model WHS laws would reflect laws currently implemented in jurisdictions.

Enabling right of entry without prior notice has the potential benefit of enabling union officials to investigate suspected contraventions without the PCBU being able to 'prepare'. It may also encourage businesses to ensure that worksites are compliant at all times leading to strong health and safety benefits. WHS inspectors have the ability to enter a workplace under s 163 of the model WHS Act without any prior notification to the PCBU, but the benefit would arise from additional persons having scope to do so and therefore increasing the likelihood of this occurring.

The size of this potential benefit to health and safety is difficult to assess because of the lack of data about the extent to which the 24-hour notice period acts as a barrier to gaining access to a worksite when there is a risk to health and safety. The ability to be granted an exemption from providing prior notice where the issuing authority reasonably believes there is a serious risk to health or safety does partly address this problem. In any case, these **health and safety benefits are theoretical in nature** and would not occur in practice because s 117 has not actually been implemented in any jurisdiction.

Option 2 - Summary of impact analysis

Assumptions of analysis

That no jurisdiction will implement s 117 of the model WHS Act as currently drafted.

Key costs	Key benefits
	Remove inconsistency between the model WHS Act and jurisdictional WHS Acts with respect to s 117. This would allow Safe Work Australia to issue nationally agreed guidance on right of entry.
	Reduce the risk of eroding harmonisation and in doing so reduce the potential for increased compliance costs for businesses.
Theoretical costs	Theoretical benefits ⁸¹
Compared to the status quo, costs associated with removing the 24-hour notice period would be imposed on businesses who face loss of productivity from permit holders entering workplaces unexpectedly.	Reduced WHS risk as WHS entry permit holders are able to immediately identify and intervene in unsafe practices.

⁸¹These costs and benefits would only occur in practice if s 117 had been implemented in a jurisdiction.

Option with greatest net benefit

Option 2 is recommended as the option likely to provide the highest net benefit.

Option 2 is assessed as providing the highest net benefit due to the reduction of the inconsistency between the model WHS Act and jurisdictional WHS Acts. This benefit relates to:

- reduced risk of eroding harmonisation by ensuring the model WHS laws meet the needs of jurisdictions
- reduced confusion from conflicting information in the model WHS Act and jurisdictional WHS Acts and,
- Safe Work Australia publishing clear national guidance on right of entry requirements.

However, this benefit is likely to be small and any improvement in health and safety outcomes is likely to be negligible.

8. Recommendation 17: Inspectors' powers

Recommended option – Option 2

That WHS ministers agree to amend s 171 of the model WHS Act to provide that an inspector can require the production of documents and answers to questions within 30 days of any inspector's entry to that workplace, provided that the request is related to the reason for the entry.

Objective

- To secure compliance with the model WHS Act through effective and appropriate compliance and enforcement measures.
- To ensure that inspectors have appropriate powers to undertake efficient and effective investigations.

Current arrangements

Inspector powers are an important aspect of an effective and appropriate enforcement and compliance framework as they help inspectors to identify breaches of WHS duties, to identify risks and hazards that may result in fatalities or injuries and illnesses in the workplace and help inform education and enforcement activities.

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.⁸² The model WHS Act currently requires an inspector to enter the workplace each time they require the production of a document or answers to questions for the purposes of their investigation.⁸³ WHS regulators also have the power to require information. However, before exercising this power the WHS regulator must 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 WHS regulator to monitor or enforce compliance.⁸⁴

2018 Review findings

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 WHS regulator's power to obtain information from a person to overcome this problem. Given this, an inspector may need to re-enter a workplace multiple times to obtain relevant information, where their initial visit does not provide sufficient evidence for the WHS regulator to exercise its information gathering powers.

The 2018 Review made the following recommendation:

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.

Extent of the problem

Very few submissions commented on the extent of this issue. However the NSW WHS Regulators confirmed the problem identified in the 2018 Review and stated that the issue affects the ability of WHS regulators to complete investigations and may affect decisions to take enforcement action.⁸⁵ The 2018 Senate Inquiry report *'They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia'* (Industrial Deaths Senate Inquiry) found prolonged investigations may cause families and work colleagues of victims, additional unnecessary stress.

⁸² Section 171 of the model WHS Act.

⁸³ Section 171 of the model WHS Act.

⁸⁴ Section 155 of the model WHS Act.

⁸⁵ NSW WHS Regulators submission to the Consultation RIS, p 14.

A small number of submissions stated that they are not affected by this issue as it is their practice to comply with inspector's requests for additional documents or answers to questions regardless of whether they are required to under the law. That is, regardless of whether the inspector is physically at the workplace.

Options

Option number	Description
1	Status quo
2	<p><i>2018 Review – Recommendation 17</i></p> <p>Amend s 171 of the model WHS Act to provide that an inspector can require production of documents and answers to questions within 30 days of any inspector's entry to that workplace, <i>provided that the request is related to the reason for the entry.</i></p>

Overview of consultation findings

Forty-three submissions to the Consultation RIS addressed this recommendation, however, most did not provide supporting evidence. Many simply provided blanket statements of support or anecdotal evidence.

Ten submissions supported Option 1. Twenty-four submissions supported Option 2, and a further three submissions gave conditional support to Option 2. Four submissions did not indicate a preference. Two submissions proposed alternative options.

Status quo

Submissions supporting the status quo stated that inspectors' current information gathering powers under ss 171 and 155 of the model WHS Act are sufficient, and include appropriate limitations.⁸⁶

Option 2

Mixed views were expressed in relation to Option 2.

NSW WHS Regulators supported Option 2. They stated that Option 2 would provide for a more efficient investigative process, particularly at the early stages of investigation, would assist with investigations in regional areas, and may assist work with cross-jurisdictional authorities. NSW introduced a Bill in November 2019 implementing this option.⁸⁷

Other submissions stated that Option 2 would improve the effectiveness of investigations. However, the Australian Chamber considered that it may reduce the quality of initial investigations and limit the efficiency and effectiveness of the investigation.⁸⁸ Some submissions suggested that Option 2 would save costs for PCBUs or have minimal cost impact, as it would remove the need for inspectors to re-enter the workplace, which is potentially disruptive and leads to a loss of productivity. However, some business groups opposed Option 2 on the basis that it would increase costs for PCBUs due to repeat requests for the same information or requests from multiple inspectors. Concerns were also expressed about the potential for additional powers to be abused, such as WHS regulators "fishing" for information⁸⁹ and the potential impact on business, especially small business, if no limitation is imposed on the volume of documents that can be requested.

⁸⁶ Submissions to the Consultation RIS from the Queensland Resource Council, p 2 of Attachment A; Australian Chamber, p 59; HIA, p 12.

⁸⁷ Work Health and Safety (Amendment) Review Bill 2019 (NSW).

⁸⁸ Australian Chamber submission to the Consultation RIS, p 58.

⁸⁹ Submissions to the Consultation RIS from HIA, p 12; Australian Institute of Health and Safety (AIHS), p 5.

The Consultation RIS asked whether Option 2 should limit an inspector's power to request further information under s 171 of the model WHS Act to information that is related to the reason for entry to the workplace. Ten submissions supported limiting Option 2 in this way. One submission provided conditional support of Option 2 on this basis. NSW did not expressly include this limitation in its Bill introduced in November 2019.⁹⁰

Two employer associations in the mining industry provided support for Option 2 only if additional safeguards were considered, including reasonable time to comply with the request for documents or answers, protection against multiple or duplicate requests and protection against incrimination. The NSW Minerals Council, who supported Option 2, also advocated for similar safeguards.⁹¹

Some submissions proposed alternative options similar to Option 2. These included:

- A maximum of 21 days to request additional documents or answers to questions, rather than 30 days.
- A maximum of seven days to request additional documents or answers to questions, rather than 30 days.
- Only one additional request for documents or answers to questions that must be made by the inspector who conducted the original visit.

While these alternatives may assist in limiting the volumes of information being requested by inspectors, they do not support the overall objective of making the investigation process more efficient and effective. When compared with Option 2, these alternatives do not provide the same benefits or sufficiently address the issues raised in Recommendation 17.

Two submissions suggested that there should be more training for inspectors to improve the efficiency of information and document acquisition.⁹² There is limited evidence that this would address the problem raised by the 2018 Review. However, it is open for WHS regulators to consider this at a jurisdictional level.

Impact analysis

Costs and benefits of Option 2 are assessed against Option 1 - status quo.

Any adverse impacts of the status quo are provided above in the "Extent of the problem" section of this Chapter. There are no assumed incremental costs or benefits of Option 1.

Option 2 – Costs and benefits

There is no information available to enable the quantification of benefits or costs. For example, the following information is unknown:

- the number of investigations each WHS regulator undertakes and the number of site visits per investigation
- location of site visits (e.g. urban, regional, rural) and distance travelled by investigators
- cost to business per site visit
- cost to businesses of providing information
- number of investigations that are delayed as a result of limitations in current information gathering powers, and
- length and costs of delays in investigation.

⁹⁰ Work Health and Safety Amendment (Review) Bill 2019 (NSW).

⁹¹ NSW Minerals Council submission to the Consultation RIS, p 16.

⁹² Submissions to the Consultation RIS from Department of Defence, p 5; Minerals Council of Australia, pp 12-13 and NSW Minerals Council, p 17.

Costs

Allowing inspectors to request information within 30 days of entry to the workplace could increase costs to affected businesses in the short-term if there is an increase in the number of requests. Industry groups and businesses argue that Option 2 will result in more information requests and substantial productivity losses as resources are diverted away from a business's general operations to address the greater number of requests.

Industry groups also suggest that Option 2 will result in increased administrative costs to businesses, particularly when they may be required to deal with multiple requests for information, and/or multiple inspectors seeking the same information.⁹³ Any such costs would be short-term and related to the particular investigation. Increased short-term costs may also arise where a person needs to attend a place other than a workplace to answer questions. As there is no information on the current number of investigations, site visits and the costs to business of providing information, it is not possible to estimate with any accuracy the potential cost to business. Those costs may also be offset by reduced costs as a result of fewer site visits.

Arguably, over the longer term, Option 2 could result in less efficient investigations if inspectors rely on their ability to request further information after site visits rather than ensuring they collect all relevant information that is available at the time of first entry.

While industry bodies also raised concerns about inspectors abusing their power and engaging in 'fishing expeditions,' this analysis assumes that WHS regulators would only make additional information requests that are necessary to enable effective investigations.

Benefits

Option 2 could immediately save time and costs for inspectors undertaking an investigation because they do not have to re-enter the site to obtain further information (assuming the same number of information requests but fewer site visits). This would likely reduce delays in the process of gathering information. More timely access to information could result in quicker investigations, and lead to health and safety risks being addressed sooner. Option 2 may also increase productivity for businesses, as they would not be required to facilitate multiple site visits by an inspector.

The power to request information after workplace entry may allow inspectors to obtain information that they would not have obtained under the current arrangements. Such information could be critical to supporting investigations, particularly in regional or remote areas, and may lead to improved health and safety outcomes.

Overall, Option 2 could result in an immediate reduction in investigation costs and improved investigation outcomes. Generally, more rigorous investigations also discourage non-compliance with WHS duties, leading to improved health and safety standards in the longer term.

Option 2 - Summary of impact analysis

Assumptions of analysis

The request for additional information after the site visit must be related to the reason for first entering the workplace.

⁹³ HIA submission to the Consultation RIS, p 12.

Key costs	Key benefits
Increased short-term administrative costs and productivity losses to businesses if there is a greater number of information requests from inspectors.	More rigorous investigations may discourage non-compliance leading to safer workplaces.
May reduce quality of inspector's initial investigations and affect their efficiency if inspectors do not seek to gather all relevant information when they first enter a workplace.	Businesses may have increased productivity as inspectors would not be required to re-enter workplaces to obtain further information.
Short-term costs arising where an individual may need to attend a place other than the workplace to answer questions.	Immediate decrease in costs to WHS regulators as result of not having to re-attend worksites to obtain further information.
	Improved WHS outcomes resulting from more effective investigations and enforcement, especially for regional workplaces.

Option with greatest net benefit

Option 2 is recommended as the option likely to provide the highest net benefit.

If additional information is required by an inspector it can be expected that inspectors will exercise the proposed powers in a reasonable manner. As such, it would be more cost effective for the WHS regulator and the business if the information was sought via an information request rather than a site visit. To the extent that a request is made under s 171 when s 155 would also be available, there would be no additional impact.

Option 2 also has the potential to immediately improve the efficiency and effectiveness of investigations and reduce delays, particularly where the investigation involves regional or remote workplaces. Any administration costs to businesses would be outweighed by the overall improved efficiencies in investigations and the potential for improved health and safety outcomes.

9. Recommendation 23: The Category 1 offence and industrial manslaughter

Recommended option – Option 2

That WHS ministers agree to include gross negligence as a fault element in the Category 1 offence.

Objective

- To secure compliance with the model WHS Act through effective and appropriate compliance and enforcement measures.
- To maintain and strengthen the national harmonisation of laws relating to WHS in the jurisdictions.

Current arrangements

The Category 1 offence in the model WHS Act currently attracts the highest penalty in the offences framework. A person commits a Category 1 offence by recklessly engaging in conduct, without reasonable excuse, that exposes an individual to whom a duty is owed to a risk of death or serious injury or illness. There does not need to be a death or serious injury for the offence to be committed – what is relevant is the risk that a duty holder exposes an individual to – however, Category 1 can be relied on where there is a workplace death, if the other elements of the offence are met.

Under the model WHS Act, there are significant penalties for a Category 1 offence, with the maximum penalties currently being:

- \$300 000 or five years' imprisonment, or both, for an individual
- \$600 000 or five years' imprisonment, or both, for an individual as a PCBU or officer
- \$3 million for a body corporate (a body corporate cannot be sentenced to imprisonment).

In November 2019, NSW introduced a bill which, relevantly, seeks to introduce an additional fault element of 'gross recklessness' into the Category 1 offence.⁹⁴

A person commits a Category 2 offence when they fail to comply with their health and safety duty and in doing so expose an individual to a risk of death or serious injury or illness. Like Category 1, there does not need to be a death or serious injury for the offence to be committed. Grossly negligent behaviour, and even recklessness, can be captured by the Category 2 offence, but due to the manner in which the offence is drafted (strict liability) the fault element itself need not be proven. The penalties for Category 2 are lower than Category 1 and do not include imprisonment.

NCEP

The NCEP promotes a nationally consistent approach to compliance and enforcement of WHS laws.⁹⁵ Some WHS regulators have adopted the NCEP in full, while others have incorporated elements of the NCEP into their own compliance and enforcement policies. The NCEP promotes a graduated approach to enforcement. Lower level enforcement actions, such as providing advice and information, are applied more frequently and often in combination with other tools, to assist duty holders to achieve compliance. Higher level actions, such as criminal proceedings and enforceable undertakings, are applied less frequently. WHS regulators will not always use the lowest level of enforcement actions first; it will depend on the individual circumstances. Where a serious injury occurs a WHS regulator may commence legal proceedings rather than provide information and guidance.

⁹⁴ Work Health and Safety (Amendment) Review Bill 2019 (NSW).

⁹⁵ The NCEP sets out the principles endorsed by the WRMC that underpin the approach WHS regulators will take to monitoring and enforcing compliance with WHS laws. The NCEP is available on Safe Work Australia's website at https://www.safeworkaustralia.gov.au/system/files/documents/1702/national_compliance_and_enforcement_policy.pdf.

Criminal laws

Jurisdictional criminal laws set out offences for circumstances where an individual suffers serious injury, illness or dies as a result of grossly negligent conduct. The maximum penalty for criminal manslaughter can vary depending on the jurisdiction, but is generally between 20 years to life imprisonment.⁹⁶ Some jurisdictions also include a fine,⁹⁷ or the ability for the court to replace a sentence of imprisonment with a fine. However, the fine available may vary in its reflection of the term of imprisonment. For example, in the ACT a maximum penalty of 1,500 penalty units can be imposed on a body corporate for an offence for which the penalty is 10 or more years of imprisonment.⁹⁸ In NSW, the maximum penalty for a body corporate that has been found guilty of an offence for which the penalty is imprisonment is 2,000 penalty units.⁹⁹ In Queensland there is no cap on the amount a court may impose where the term of imprisonment is more than two years.¹⁰⁰

Generally, jurisdictional criminal laws do not include an express offence of industrial manslaughter (the ACT is an exception).

Industrial manslaughter laws

An industrial manslaughter offence is a specific manslaughter offence for circumstances where a death occurs in or in connection with a workplace.

The absence of an industrial manslaughter offence in the model WHS laws was intentional. The 2008 National Review concluded that outcome-based offences, such as an industrial manslaughter offence, should not be included in the model WHS laws. Rather, the 2008 National Review preferred an approach where sanctions relate to the culpability of the offender and not solely to the outcome of the non-compliance. Hence, the Category 1-3 offences in the model WHS laws relate to the exposure of individuals to risk by a duty holder, regardless of the outcome. Under this approach, it is not necessary to wait for a serious incident or fatality before a duty holder can be prosecuted.

Two Australian jurisdictions currently have an offence of industrial manslaughter. These are the ACT and Queensland:

- The ACT introduced an industrial manslaughter offence in 2004, prior to the introduction of the model WHS laws. That offence is in the *Crimes Act 1900* (ACT) and not its WHS laws. The offence applies where employers or senior officers recklessly or negligently cause the death of a worker by their conduct. The maximum penalty is 2,000 penalty units (equivalent to \$320,000 for an individual and \$1.62 million for a corporation) and/or 20 years imprisonment. Although there have been workplace fatalities in the ACT, no successful prosecutions have been brought under this industrial manslaughter offence to date.¹⁰¹

⁹⁶For example, *Crimes Act 1900* (NSW) s 24, manslaughter has a maximum penalty of 25 years; *Criminal Code 1899* (QLD) s 310, manslaughter has a maximum of life imprisonment; *Crimes Act 1958* (Vic) s 5, manslaughter has a maximum of 20 years imprisonment.

⁹⁷ For example, *Criminal Law Consolidation Act 1935* (SA) s 13(1), manslaughter has a maximum penalty of life imprisonment or such fine as the Court awards or both a fine and imprisonment.

⁹⁸ *Legislation Act 2001* (ACT) s 161.

⁹⁹ Section 16 of the *Crimes (Sentencing Procedure) Act 1992* (NSW). The maximum penalty of 2,000 penalty units applies in the case of the Supreme Court, the Court of Criminal Appeal, the Land and Environment Court, the Industrial Relations Commission and the District Court. In all other cases the maximum penalty is 100 penalty units.

¹⁰⁰ *Penalties and Sentences Act 1992* (Qld) s 181A.

¹⁰¹ In its submission to the Industrial Deaths Senate Inquiry, the ACT expressly preferred the inclusion of an industrial manslaughter offence in the model WHS Act over its 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. The offence applies to PCBUs and senior officers negligently causing death of a worker. It carries a maximum penalty of 20 years' imprisonment for an individual or for a body corporate, 100,000 penalty units (equivalent to \$13.345 million). Interestingly, it would not be possible to prosecute in relation to the DreamWorld incident under this provision, which was one of the main reasons for introducing the offence, because it does not apply to the death of 'other persons'.¹⁰² There has now been a prosecution brought under this provision.¹⁰³ Queensland has also maintained the Category 1 offence in its WHS Act with the fault element of recklessness.

Currently, two jurisdictions have passed legislative amendments to introduce an industrial manslaughter offence:

- The Northern Territory introduced a bill in September 2019 to insert an industrial manslaughter offence in its *Work Health and Safety (National Uniform Legislation) Act 2011*. The offence applies to a person who has a WHS duty and intentionally engages in reckless or negligent conduct that constitutes a breach of their duty and causes a fatality. The maximum penalty for a body corporate is 65,000 penalty units (\$10.205 million) and the maximum penalty for an individual is life imprisonment.¹⁰⁴ This Bill was passed on 27 November 2019.
- Victoria introduced a bill in October 2019 to insert an industrial manslaughter offence in its *Occupational Health and Safety Act 2004*. The bill makes it an offence for employers and other duty holders as well as their officers¹⁰⁵ to engage in negligent conduct that constitutes a breach of their duties and causes the death of a person. The maximum penalty for a body corporate is 100,000 penalty units (\$16.522 million) and the maximum penalty for an individual is 20 years imprisonment.¹⁰⁶ This Bill was passed on 26 November 2019 and received Royal Assent on 3 December 2019.

On 27 November 2019, Western Australia introduced the Work Health and Safety Bill 2019, which includes an industrial manslaughter offence. The bill includes two tiered industrial manslaughter offences with the highest tiered offence including a maximum penalty of 20 years imprisonment and \$5 million fine for an individual or a \$10 million fine for a body corporate.

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 2018 Review stated 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.¹⁰⁷

¹⁰² Second Reading to the Work Health and Safety and Other Legislation Amendment Bill (Qld), October 2017.

¹⁰³ On 25 October 2019, the Queensland Work Health and Safety Prosecutor announced it had commenced prosecution against Brisbane Auto Recycling Pty Ltd in relation to an incident in May 2019 when a worker was killed after being struck by a reversing forklift. Separate charges have also been laid against the company directors for engaging in reckless conduct that resulted in the death of a worker. *Media Statement: First Prosecution under Queensland's pioneering industrial manslaughter laws*, The Queensland Cabinet and Ministerial Directory, 25 October 2019.

¹⁰⁴ Work Health and Safety (National Uniform Legislation) Amendment Bill 2019 (NT).

¹⁰⁵ An officer is defined by reference to section 9 of the *Corporations Act 2001* (Cth). See 'Definitions' in the *Occupational Health and Safety Act 2004* (Vic).

¹⁰⁶ Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Bill 2019 (Vic).

¹⁰⁷ *WRMC Response to Recommendations of the 2008 National Review*, 18 May 2009, response to recommendation 55, p 13.

The 2018 Review made the following recommendation:

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.

In considering the offences framework, the 2018 Review also identified that it is a problem that the model WHS laws do not have an express offence of industrial manslaughter. Although not expressly discussed, it seems that this is considered a problem for a number of reasons. First, the 2018 Review found that there is an increasing community expectation that there be an industrial manslaughter offence in the model WHS laws. This is based on the perceived deterrence effect of an industrial manslaughter provision and the desire for duty holders to be subject to serious penalties including imprisonment where there is a workplace death.

Second, the 2018 Review considered an industrial manslaughter offence is required as there are limitations to prosecuting workplace fatalities under the model WHS laws as discussed above, and the general criminal manslaughter laws in each jurisdiction. The 2018 Review asserted that whilst some jurisdictions have addressed the issue of how to sanction a corporation for manslaughter by enabling courts to issue a fine, not all jurisdictions have done so.¹⁰⁸ There are also issues in relation to attribution and aggregation of criminal conduct to a corporation, particularly in larger organisations, which varies between jurisdictions. That these issues make it difficult to successfully prosecute corporations for general manslaughter following a workplace death is supported by the limited case law on this issue.¹⁰⁹

Third, the 2018 Review considered that it would be preferable for the model WHS laws to include an industrial manslaughter offence to promote harmonisation. The 2018 Review noted there is potential for inconsistency in the implementation of the model WHS laws across jurisdictions, as jurisdictions successively introduce industrial manslaughter offences and amendments to Category 1 into their own WHS laws.

The 2018 Review made the following recommendation:

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*

The Agency 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).

¹⁰⁸ For example, under the Victorian *Crimes Act 1900*, the maximum penalty for manslaughter is 20 years imprisonment. However, due to the nature of this penalty, it can only apply to a natural person, not a company. See Victorian Government Submission to Senate Standing Committees on Education and Employment framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia, 2018, p 12. Victoria has not implemented the model WHS laws.

¹⁰⁹ In *R v A.C. Hatrick Chemicals Pty Ltd* (1995) 140 IR 243 (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.

Extent of the problem

The Agency is aware of one Category 1 conviction prior to 2019¹¹⁰ and three Category 1 prosecutions in 2019, one of which was overturned and found not guilty at retrial.¹¹¹ Submissions to the Consultation RIS identified the same prosecutions. Of these four Category 1 prosecutions, only two related to fatalities. However, there have been a significant number of prosecutions for other WHS offences each year.¹¹²

The low number of Category 1 prosecutions - whether that be for matters in which a person has been exposed to a serious risk, or has been injured or has died - is concerning, particularly when compared to the number of workplace fatalities. Submissions to the 2018 Review and the Consultation RIS indicate the low number of Category 1 prosecutions is a problem as it means duty holders who engage in egregious conduct are not necessarily being prosecuted at the highest tier.

There is limited evidence to identify why there have been so few Category 1 prosecutions. The 2018 Review found that it may be due in part to the difficulties associated with proving the fault element of recklessness. The ACT industrial manslaughter offence, however, relies on a fault element of recklessness **or** gross negligence and that jurisdiction has not had a successful industrial manslaughter prosecution.¹¹³ There are a range of additional reasons that may contribute to a lack of successful prosecutions, including evidentiary issues, litigation strategies and budgetary constraints. It is also possible that there has been a lag between the WHS laws coming into effect in 2011, their subsequent implantation into each of the harmonised jurisdictions and the commencement and finalisation of Category 1 prosecutions.

Since implementation, legal and regulatory professionals, duty holders and the broader community have developed a better understanding of, and greater familiarity with, the model WHS laws. There are now more Category 1 prosecutions on foot than ever before.¹¹⁴ It also takes time (sometimes years) for a matter to be finalised through the court system, meaning that convictions may only be starting to be reported.

¹¹⁰ *Stephen James Orr v Cudal Lime Products Pty Ltd; Stephen James Orr v Simon Shannon* [2018] NSWDC 27. This was resolved through a guilty plea and the offending company was penalised \$900,000.

¹¹¹ *Campbell v Chenoweth* [2019] SAET 181 (28 August 2019) and *Campbell v Rowe* [2019] SAET 104: Both cases relate to two workers squirting and then igniting flammable liquid on an apprentice's clothes and shoes. Chenoweth the more active participant was fined \$21,000 and Row was fined \$12,000. The PCBU Tad-Mar is expected to be sentenced in late 2019. *R v Lavin* [2019] QCA 109: The Supreme Court of Qld have set aside the Category 1 conviction against Mr Lavin, for breaching s 27 of the Qld WHS Act for failing to exercise due diligence in his capacity as an "officer". In this case a worker fell to his death from a roof with no safety railing along the edge of the roof. The case was ordered for a retrial where Lavin was found not guilty.

¹¹² In 2016-2017 there were a total of 133 finalised legal proceedings in harmonised jurisdictions. See *Comparative Performance Monitoring report: Part two – Work Health and Safety Compliant and Enforcement Activities* (20th Edition), Safe Work Australia, December 2018, p 16.

¹¹³ The ACT Government has also acknowledged that its model is not sufficiently 'contemporary' and is working to reform its approach to align with the Queensland model. See *Submission to the inquiry into the prevention, investigation and prosecution of industrial deaths in Australia*, ACT Government, June 2018.

¹¹⁴ Tas: OHS Alert, 'Meatworks operator denies recklessness after worker sustains burns', 12 June 2019. The company is charged with a Category 1 offence after a worker fell into a tub of scorching hot water and sustained second and third degree burns to his leg. ACT: *Media release: 'Manslaughter and other charges laid following fatal worksite incident'*, ACT Government, 19 April 2019. 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. QLD: OHS Alert, 'Another Director faces jail for reckless conduct in Queensland', 22 March 2019. A company and its director have been committed to stand trial for a Category 1 prosecution after Oil Tech employee Matthew O'Brien was burnt to death in an explosion at the company's waste recycling plant in Yatala, in November 2015.

Statistics on the number of workplace fatalities were cited in submissions to the Consultation RIS to point to the need, or lack thereof, for an industrial manslaughter offence.¹¹⁵ There has been a downtrend in workplace fatalities¹¹⁶ since 2007, when the fatality rate was double the rate in 2017.¹¹⁷ In 2012, with the commencement of the model WHS laws, the fatality rate was 2.0 deaths per 100,000 workers, while in 2017 that rate had lowered to 1.5 deaths per 100,000 workers. Preliminary figures from 2018 show that around 144 workers were killed in the workplace, 46 less than in 2017.¹¹⁸ However, there is still a significant number of workplace fatalities each year and this remains a problem that needs to be addressed – one workplace fatality is one too many.

Fatalities in the workplace are multi-faceted issues. Most workplace fatalities are isolated events, not a recurring issue and arise due to the individual circumstances that exist in that workplace.

Submissions supporting industrial manslaughter stated the offence would provide greater deterrence and tougher penalties as well as create a perception of justice being served. What is not clear however, is the extent to which the broader community understands that duty holders are already subject to serious penalties, including imprisonment, under the existing model WHS laws and criminal laws. There may also be little understanding of the impact of legal and evidentiary challenges of bringing a successful prosecution. Further, no evidence has been provided that demonstrates that an industrial manslaughter offence is required in order for, or that it would result in, continued or increased deterrence of WHS breaches.

Whist the 2018 Review stated that an industrial manslaughter offence would promote harmonisation, inconsistency will likely remain. Even though a number of jurisdictions are currently considering the introduction of an industrial manslaughter offence,¹¹⁹ it is highly unlikely that all jurisdictions will implement a model industrial manslaughter provision even if one was included in the model WHS laws. For example, New South Wales has made clear that it would not include industrial manslaughter in its WHS laws.¹²⁰ It is also unclear whether those jurisdictions that have already introduced an industrial manslaughter offence would amend their provisions to ensure consistency with the model WHS laws.

Generally, no submission to the 2018 Review or the Consultation RIS clearly defined the extent of the problem or provided sufficient evidence to assess the adequacy or otherwise of the current offences and penalties or the advantages or disadvantages of other approaches. Of those who supported an industrial manslaughter offence, no submission provided evidence to demonstrate why:

- an outcome based offence such as industrial manslaughter would result in better health and safety outcomes and therefore reduce the number of workplace fatalities, as compared to the current framework under which serious breaches of WHS laws can be prosecuted whether or not a death has occurred, or

¹¹⁵ For example, submissions to the Consultation RIS from Chamber of Commerce and Industry WA para 42; ACTU pp 31-32.

¹¹⁶ Workplace fatalities refers to people who die each year from injuries caused by work-related activity. It includes fatalities that result from an injury sustained in the course of a work activity (worker fatality) and as a result of someone else's work activity (bystander fatality). It excludes iatrogenic injuries (death due to medical intervention), death due to natural causes (except where a work-related injury was the direct cause of the natural cause) death as a result of diseases and self-inflicted injuries (suicide).

¹¹⁷ *Work-related Traumatic Injury Fatalities, Australia*, Safe Work Australia, 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.

¹¹⁸ *Work-related Traumatic Injury Fatalities, Australia*, Safe Work Australia, 2017. In 2017, 190 workers were killed in the workplace.

¹¹⁹ NT: The NT introduced a bill in September 2019 to insert an industrial offence (Work Health and Safety (National Uniform Legislation) Amendment Bill 2019). WA: In August 2019, WA announced it will introduce industrial manslaughter laws this year. VIC: In October 2019, the Victorian Government introduced the Workplace Safety Legislation Amendment (Workplace Manslaughter and Other) Bill 2019. The Bill proposes that employers who negligently cause a workplace death will face penalties of up to \$16.5 million and up to 20 years' jail for individuals.

¹²⁰ NSW has stated it will amend Category 1 to make it easier to prosecute offences but has rejected the case for introducing an industrial manslaughter offence. See OHS Alert, 'WHS amendments to increase prosecutions in NSW', 24 September 2019; Sydney Morning Herald, 'NSW rejects industrial manslaughter laws as little more than a catchy title', 13 October 2019.

- there would be more successful prosecutions under an industrial manslaughter provision in relation to workplace deaths, or that in relation to past cases, it would have been more likely that there would have been more successful prosecutions if there was an industrial manslaughter provision. Evidence of this nature may be difficult to produce given the complexity in identifying how these changes could have affected decisions by WHS regulators, prosecutors or courts.

Options

Option number	Description
1	Status quo
2	<i>2018 Review – Recommendation 23a</i> Include gross negligence as a fault element in the Category 1 offence.
3	<i>2018 Review – Recommendation 23b</i> Introduce an offence of industrial manslaughter in the model WHS Act.
4	<i>2018 Review – Recommendation 23a and 23b</i> Include gross negligence as a fault element in the Category 1 offence, and introduce an offence of industrial manslaughter in the model WHS Act.

Option 2

Option 2 would amend the Category 1 offence in the model WHS laws to include gross negligence as a fault element in addition to recklessness.

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.

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.

Both the statutory and common law test for recklessness implies a high degree of culpability, because the person engages in the reckless conduct even though they are subjectively aware of the risk or possibility of harm.

In comparison, gross negligence involves an objective test. That is, the conduct involves such 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.

This option would amend the Category 1 offence to provide that a person commits a Category 1 offence if the duty holder is reckless or 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 Act.

It is noted that under Option 2, it would still be open to prosecute a person under a jurisdiction's general criminal manslaughter laws where appropriate.

Option 3

Option 3 would introduce an industrial manslaughter offence. The 2018 Review recommended that the new offence of industrial manslaughter should provide penalties for gross negligence causing death and include the following elements:

- 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. This would include other persons at the workplace.

This option would not implement Recommendation 23b to include the fault element of gross negligence in the Category 1 offence. It would result in the industrial manslaughter offence including gross negligence as the fault element, whereas the fault element for the Category 1 offence would still be recklessness. Imposing a higher penalty 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 approach may be 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.

Option 4

This option would amend the Category 1 offence in the model WHS Act to include gross negligence as a fault element and introduce an offence of industrial manslaughter, effectively combining Options 2 and 3.

Overview of consultation findings

In response to the Consultation RIS, sixty-six submissions commented on Recommendations 23a and 23b.

Status quo

Twenty six submissions supported the status quo. The main assertions were:

- There is no evidence that implementation of Options 2, 3 or 4 will reduce workplace deaths, act as a deterrent or improve health and safety outcomes.¹²¹
- Existing criminal laws are sufficient for individuals to be prosecuted for criminal negligence and such offences should stay within the criminal code.¹²² The Minerals Council of Australia referred to two recent Category 1 prosecutions and two recent criminal manslaughter convictions against company directors to demonstrate that the bar is not set too high for the most serious WHS offences and that WHS regulators are successfully obtaining convictions.¹²³

¹²¹ Submissions to the Consultation RIS from the Australian Chamber, p 26; Australian Institute of Company Directors, pp 3-4; South Australian Wine Industry Association, p 4; Chamber of Minerals and Energy of WA, p 9; Chamber of Commerce and Industry of WA, p 10; the AiG, p 6; WHS regulator response to additional questions.

¹²² Submissions to the Consultation RIS from Chamber of Minerals and Energy of WA, p 10; In confidence submission; Queensland Resource Council, p 4; Minerals Council of Australia, p 17; AMMA, p 58; Australian Institute of Company Directors pp 3-4, 19; HIA p 13; Master Electricians Australia p 6; Queensland Law Society p 3; anonymous submission 2064194 p 17; NSW Work Health and Safety Regulators pp 15-16.

¹²³ Minerals Council of Australia submission to the Consultation RIS, p 15. Cases referred to include *Stephen James Orr v Cudal Lime Products Pty Ltd*; *Stephen James Orr v Simon Shannon* [2018] NSWDC 27; *Martyn Campbell v Jeffery Rowe* [2019] SAET 109. Whilst the submission did not provide citations for the manslaughter cases, from the description provided the submission appears to be referring to *R v Colbert* [2017] SASCFC 29 and an unreported judgement concerning the death of Jason Garrels.

- An industrial manslaughter offence is punitive and unnecessary.¹²⁴ It was stated that the focus on punitive measures diminishes an organisations' safety culture and is detrimental to safety as there is a shift away from a proactive risk based approach towards an approach that seeks to attribute blame for an outcome.¹²⁵ It will foster a culture of 'tick box' compliance and a focus on defensive litigious strategies rather than leadership and collaboration.¹²⁶ The focus should instead be on preventative measures.¹²⁷ No sufficient evidence was provided to support these assertions.
- A number of submissions pointed to the South Australia Coroner's report into the death of Mr Castillo-Riffo in which the Coroner referred to the increase in litigious defence strategies and commented that the introduction of industrial manslaughter would exacerbate these tendencies.¹²⁸
- Some submissions did not agree with the argument that introducing a new industrial manslaughter offence would create consistency among harmonised jurisdictions.¹²⁹ It is noted that Queensland and the ACT have implemented industrial manslaughter laws and in September 2019 the Northern Territory introduced a bill to implement the offence. In any case, the Australian Chamber is of the view that harmonisation was not a sound reason to introduce a new offence provision.¹³⁰
- There is no evidence of the extent of community expectation that can be used to justify the introduction of an industrial manslaughter offence.¹³¹

Option 2

Six submissions supported amending the Category 1 offence only. The NSW WHS Regulators anticipate that there may be considerable benefit in reducing the threshold to 'gross negligence' to capture significant offending behaviour. Its submission noted that this option aligns with the risk-based framework of the WHS Act.¹³²

Option 3

Seven submissions supported the introduction of an industrial manslaughter offence but no change to the Category 1 offence. These submissions simply provided a blanket statement of support for Option 3 without any rationale. NSW WHS Regulators raised concerns with Option 3, stating that it would result in additional costs to WHS regulators.

Option 4

Twenty three submissions supported the implementation of both recommendations 23a and 23b as proposed by Option 4. Submissions in support of Option 4 stated that an industrial manslaughter provision will change workplace culture for the better and send a message that duty holders will be held accountable for breaching their duties.¹³³ Maurice Blackburn Lawyers stated that the introduction of industrial manslaughter offences in QLD and the ACT and future considerations in Victoria and the Northern Territory reflect a national appetite for change.¹³⁴

¹²⁴ Submissions to the Consultation RIS from Australian Mines and Metals Association (AMMA), para 63; Chamber of Minerals and Energy of WA.

¹²⁵ Submissions to the Consultation RIS from AMMA, para 58 and 63; NSW Minerals Council.

¹²⁶ Submissions to the Consultation RIS from Chamber of Commerce and Industry WA, p10; Chamber of Minerals and Energy of WA, p9; AMMA, para 66.

¹²⁷ Submissions to the Consultation RIS from Australian Petroleum Production and Exploration Association, p3; HIA, p 13.

¹²⁸ Submissions to the Consultation RIS from Queensland Resources Council; AIHS, p 21.

¹²⁹ NSW Business Chamber submission to the Consultation RIS, p 5.

¹³⁰ Australian Chamber submission to the Consultation RIS, p 38.

¹³¹ NSW Business Chamber submission to the Consultation RIS, p3: See also Australian Chamber submission to the Consultation RIS who stated it will not improve safety, p 26.

¹³² NSW WHS Regulators submission to the Consultation RIS, p 15.

¹³³ Submissions to the Consultation RIS from Australian Services Union, pp 31-32; AMWU, p 23.

¹³⁴ Maurice Blackburn Lawyers submission to the Consultation RIS, p 15.

Submissions also asserted that current laws are not an effective deterrent or an incentive for better practices but did not provide sufficient evidence to substantiate these assertions.¹³⁵ Submissions from family members impacted by a workplace death assert that current penalties are not adequate. The ACTU also stated that the current criminal law is limited in its ability to respond effectively to workplace deaths, in particular those involving large companies.

No preference

Four submissions did not clearly provide an express preference. Of these, one submission indicated there is not enough detail to form an opinion.

Impact analysis

The costs and benefits of Options 2, 3 and 4 are assessed against Option 1 - status quo. There are no incremental costs or benefits of Option 1.

The extent to which the benefits and costs of these options can be objectively compared is limited as the following information is not clear:

- Number of workplace incidents that would warrant prosecution under the proposed arrangements.
- Fatalities that could be avoided.
- Evidence about the adequacy of current offences and penalties as a deterrent.

Option 2 – Costs and benefits

Costs

Amending the fault element for Category 1 would not increase regulatory burden as it would not impose additional duties. However, in practice, businesses may incur short-term costs where they do not meet existing duties. This includes legal expenditure for prosecution, which may be more than what businesses may have incurred if they were defending a Category 2 offence depending on court in which the matter is heard and complexity of the proceedings. The extent of this difference is unclear and an estimation cannot be made given the different nature of each prosecution.

Businesses which are compliant with WHS standards may face a potential increase in ongoing administrative costs and short-term capital costs if they feel the need to implement additional measures to reassure themselves of their compliance. For example, businesses may restructure, seek additional legal advice and implement extra internal staff training to mitigate potential liability for a Category 1 offence. Businesses may also introduce internal assurance processes to ensure they are not inadvertently exposing themselves to a liability or conversely, are over-complying with WHS obligations. If a business over-complies by being risk averse or overestimating the requirements of the general duties they may incur unnecessary costs. The magnitude of the cost to mitigate potential liability and the cost of over-compliance is difficult to estimate.

Businesses will consider the new fault element for Category 1 in their risk assessments, and for some businesses (for example, those that are marginally profitable or in high risk industries), this may be a factor in them deciding to exit the market. However, there is no evidence to determine whether this would actually occur.

WHS regulators may incur one off costs associated with providing education and assistance to duty holders about the new threshold. WHS regulators and the courts may also incur additional ongoing operational costs if there is an increase in the number of Category 1 prosecutions as opposed to Category 2 prosecutions. The extent of this increase cannot be estimated, however, it is not expected to be extensive – duty holders should already be aware of the gross negligence concept as engaging in such conduct can already be prosecuted under Category 2 and under existing manslaughter laws. Such costs will ultimately be borne by government.

¹³⁵ ACTU submission to the Consultation RIS p 33. See also submissions from Australian Nursing and Midwifery Federation, p 6 and Mr Greg Zappelli, p 2 who supported Option 3.

Benefits

The inclusion of 'gross negligence' in the Category 1 offence is considered to lower the threshold for conviction under the model WHS laws. Prosecutors would no longer have to prove the offender had a subjective awareness that their conduct posed a substantial risk of serious injury but engaged in such conduct regardless. While it is difficult to estimate, the amendment may increase the number of Category 1 prosecutions brought in response to the offending behaviour, which would address the problem identified above regarding the lower number of successful Category 1 prosecutions. This may mean that more individuals and corporations will be held to account for the full extent of their actions. Individuals would face the prospect of imprisonment and more corporations face the prospect of higher fines, where their actions meet the requirement of the amended offence. NSW WHS Regulators observed that a reduced threshold would enable WHS regulators to capture significant offending behaviour that generates a serious risk to health and safety.¹³⁶

The increased risk of conviction for a Category 1 offence may also act as a greater deterrent for businesses to comply with WHS requirements and provide duty holders with a greater incentive to prioritise health and safety. The changes to Category 1 may also improve community awareness and understanding of existing WHS duties to manage risk in the workplace. These changes could result in health and safety improvements.

If the increased risk of conviction results in a decrease in unsafe practices, it could result in a reduction in the cost of dealing with health and safety incidents. This represents a cost saving for business, although noting it only applies to businesses that are currently non-compliant, and will be offset by costs of making improvements to WHS.

There are also cost savings associated with the harmonisation of the Category 1 offence for businesses operating across jurisdictions. Those businesses may experience ongoing cost savings by reducing resources dedicated to understanding the offences framework across harmonised jurisdictions.

Option 2 is also consistent with the risk-based approach of the offences framework, which allows the prosecution of an offender where they expose an individual, to whom a duty is owed, to a risk of death or serious injury or illness. Unlike industrial manslaughter offence, there does not need to be a death for the offence to be committed.

While there is no reliable data to suggest the number of fatalities will be lowered by the amendments to the Category 1 offence, if there is a consequential reduction in fatalities, each life saved would have a financial and economic benefit to the community of \$850,000.¹³⁷ There is also an unquantifiable benefit to their families and community at large.

Option 2 – Summary of impact analysis

Assumptions of analysis

Any costs associated with this Option are costs of non-compliance. There is no increase in regulatory burden.

Key costs	Key benefits
Short-term costs to businesses where they are not currently meeting their duties – for example, legal expenditure, reputational costs and penalties.	Make it easier for prosecutors to utilise the highest offence to prosecute the most egregious WHS breaches.
WHS regulators and courts may incur an increase in ongoing operational costs.	Potential increase in safety standards.

¹³⁶ NSW WHS Regulators submission to the Consultation RIS, p 15.

¹³⁷ *The Industry Commission inquiry report, Work, Health and Safety*, Productivity Commission, 1995. Based on this report, Deloitte Access Economics estimates the total cost to the economy of a workplace fatality in 2018 is approximately \$850,000.

Key costs	Key benefits
Businesses may incur both short-term and ongoing costs to mitigate potential liability and avoid over-compliance.	Greater deterrent to duty-holders for non-compliance with WHS laws due to higher perceived threat of prosecution.
The new fault element may be an incentive factor in some businesses deciding to exit the market	

Option 3 – Costs and benefits

Costs

The introduction of an industrial manslaughter offence will not increase regulatory burden as it does not impose additional WHS duties on a business.

Similar to amending the Category 1 offence, in practice a business may incur short-term costs where they do not comply with those existing duties. This includes legal costs in defending an industrial manslaughter prosecution. These costs may be more than what a business may have incurred if they were defending a prosecution of an existing WHS offence. However, the extent of this difference is unclear and cannot be estimated given the different nature of each prosecution.

Businesses who are compliant may face a potential increase in ongoing administrative costs and short-term capital costs if they feel the need to implement additional measures to reassure of their compliance. Businesses may restructure, seek additional legal advice and implement extra internal staff training to mitigate potential liability for an industrial manslaughter offence. Businesses may also introduce internal assurance processes to ensure they are not inadvertently exposing themselves to a liability or conversely, are over-complying with WHS obligations. If a business over-complies by being risk averse or overestimating the requirements of the general duties, they may incur unnecessary costs. The magnitude of the cost to safeguard against potential liability and the cost of over-compliance is difficult to estimate.

For some businesses, such as those that are marginally profitable or in high risk industries, the introduction of an industrial manslaughter offence may be a factor in them deciding to exit the market. However, there is no evidence to determine whether this would actually occur.

Whilst difficult to quantify, WHS regulators may incur one off costs relating to the implementation of the new offence including an education campaign for the public and the development of protocols in responding to, investigating and prosecuting fatalities. WHS regulators may also see an increase in ongoing investigative costs if businesses 'lawyer up' when an incident has occurred and become defensive in order to protect their legal interests. However, the cost increase is unlikely to be significant if WHS regulators already incur these barriers when investigating businesses under existing WHS offences.

An industrial manslaughter offence has potential to create further inconsistency in the implementation of the offences framework under the model WHS Act. It is highly unlikely that all jurisdictions would implement a model industrial manslaughter provision. It is also unclear whether those jurisdictions who have or are intending to implement an industrial manslaughter offence would amend their provisions to ensure consistency with the model WHS laws.

Benefits

A new industrial manslaughter offence may remove some barriers to bringing a charge of general criminal manslaughter against a company, as it may address issues relating to the attribution and aggregation of conduct to a corporation under general manslaughter offences. This is one of the reasons why Queensland and the ACT introduced industrial manslaughter provisions.¹³⁸ However, it is open to jurisdictions to address this issue by amending their general criminal laws.

¹³⁸ Presentation Speech to the Crimes (Industrial Manslaughter) Bill 2002 (ACT), December 2002, p 4382; Explanatory Speech to the Work Health and Safety and Other Legislation Amendments Bill 2017 (Qld), p 2293; See also, Lyons, T *Best Practice Review of Workplace Health and Safety Queensland: Final Report*, Workplace Health and Safety Queensland, pp 111-112.

The introduction of an industrial manslaughter offence may increase deterrence and provide duty holders with a greater incentive to prioritise health and safety. Currently there is a perception that WHS provisions are ‘quasi-criminal’¹³⁹ and are technical in nature as they impose offences for exposure of a worker to risk rather than for a specific harm caused. The introduction of an industrial manslaughter offence may improve community awareness and understanding of existing WHS duties to manage risk in the workplace.

While there is no reliable data to suggest the number of fatalities will be lowered by the introduction of an industrial manslaughter offence, if there is a consequential reduction in fatalities, each life saved would have a financial and economic benefit to the community of \$850,000.¹⁴⁰

The introduction of an industrial manslaughter offence will address the expectation that the model WHS laws should contain an industrial manslaughter offence. However, as identified above it is not clear whether the broader community understands that duty holders are already subject to serious penalties, including imprisonment, under the existing model WHS and criminal laws.

Option 3 – Summary of impact analysis

Assumptions of analysis

Any costs associated with this Option are costs of non-compliance. There is no increase in regulatory burden.

Key costs	Key benefits
Short-term costs to businesses where they are not currently meeting their duties – for example, legal expenditure, reputational costs and penalties.	Address some barriers to prosecution under general manslaughter laws.
WHS regulators and courts may incur an increase in ongoing operational costs.	Greater deterrent to duty-holders for unsafe work conditions/practice due to threat of conviction for manslaughter.
Businesses may incur both short-term and ongoing costs to mitigate potential liability and avoid over-compliance.	Reduction in health and safety costs due to potential increase in safety standards.
The new offence may be a factor in some businesses deciding to exit the market.	Address community expectations to introduce an industrial manslaughter offence.

Option 4 – Costs and benefits

Costs

The costs for Options 2 and 3 outlined above also apply in relation to Option 4.

Benefits

The benefits for Options 2 and 3 outlined above also apply in relation to Option 4.

¹³⁹ ‘Quasi-criminal’ in that there is no requirement to prove mens rea (except Category 1 which requires proof of recklessness). The 2008 National Review stated that there should be no doubt that WHS offences are real offences. See 2008 National Review, 2008, p 93.

¹⁴⁰ *The Industry Commission inquiry report, Work, Health and Safety*, Productivity Commission, 1995. Based on this report, Deloitte Access Economics estimates the total cost to the economy of a workplace fatality in 2018 is approximately \$850,000.

Option 4 – Summary of impact analysis

Assumptions of analysis

Any costs associated with this Option are costs of non-compliance. There is no increase in regulatory burden.

Key costs	Key benefits
Costs to businesses where they are not currently meeting their duties – for example, legal expenditure, reputational costs and penalties.	Address some barriers to prosecution under general manslaughter laws.
WHS regulators and courts may incur an increase in operational costs.	Greater deterrent to duty-holders for unsafe work conditions/practice sends strong message on the importance of safety.
Businesses may feel compelled to over comply with existing duties to avoid prosecution.	Reduction in health and safety costs due to potential increase in safety standards.
	May strengthen harmonisation of WHS laws across Australia.

Option with greatest net benefit

Option 2 is recommended as the option likely to provide the greatest net benefit.

No submission to the 2018 Review or Consultation RIS provided sufficient evidence to determine the adequacy or otherwise of the current offences and penalties (the status quo) or why, compared to the current offences framework, an outcome-based offence of industrial manslaughter would result in better health and safety outcomes and therefore decrease workplace fatalities. It is highly unlikely that one factor, whether that be an industrial manslaughter offence or even the current offences framework in the model WHS Act, would of itself decrease the number of workplace fatalities, injuries and illnesses. It is widely accepted that reducing workplace fatalities requires a multi-faceted approach. This includes reducing exposure to hazards and risks, improving controls and supporting improved WHS infrastructure.

While the impact analysis shows that both Options 2 and 3 are likely to reduce some of the barriers preventing the successful prosecution of workplace fatalities, barriers such as evidentiary issues, litigation strategies and budgetary constraints are likely to remain. Option 2 will lower the threshold for conviction under Category 1 whilst Option 3 will address issues of attribution and aggregation in general criminal laws, making it easier to bring a charge against a company. However, jurisdictions may be able to address these issues by amending their general criminal laws without necessarily having to introduce an industrial manslaughter offence. An industrial manslaughter offence is also restricted to workplace fatalities and would not reduce barriers for matters involving serious injury or illness or exposing a person to a serious risk of death or serious injury or illness.

Low number of prosecutions

As outlined above, the problem is the low number of prosecutions at the highest tier for the most serious WHS breaches. There is a limited benefit in implementing both an amended Category 1 offence and an industrial manslaughter offence to address this problem, as recommended under Option 4. Each offence encompasses similar elements and both could be used in the event of a workplace fatality.

No submission to the 2018 Review or the Consultation RIS provided sufficient evidence that Option 3 would lead to more prosecutions for serious breaches of WHS laws compared to the current model WHS framework. The UK experience indicates that there is no evidence an industrial manslaughter offence results in a higher number of prosecutions. A 10-year review of a corporate manslaughter offence under the relevant UK WHS Act found there has only been 25 convictions and a handful of acquittals and dismissals. This is far below the expectations of 10-13 corporate manslaughter prosecutions per year as estimated in the regulatory impact statement.¹⁴¹ The review concluded that an organisation involved in a fatality is statistically unlikely to be charged with corporate manslaughter.¹⁴²

Further, Option 3 would not necessarily lead to more prosecutions of serious breaches of WHS laws compared to Option 2. In considering an industrial manslaughter offence WHS regulators would use the same principles that guide them when deciding to bring a WHS offence, including an amended Category 1 offence. It would also not be the case that for every workplace death there would be a successful prosecution simply because there is an industrial manslaughter offence. However drafted, there would still need to be a causal link between the actions or omissions of the duty holder and the workplace death of an individual. This causal link will not always be easy to prove, regardless of what an offence provision looks like.

Option 2 on the other hand has the *greatest potential* to increase the number of prosecutions at the highest tier for all serious WHS breaches, as it has a much broader application than an industrial manslaughter offence. A Category 1 offence relates to the exposure of individuals to risk by a duty holder. This means it is not necessary to wait for a serious incident or fatality to occur before a duty holder can be prosecuted under a Category 1 offence. Category 1 could also be relied on, however, in the tragic circumstance that there is a workplace fatality. In comparison, an industrial manslaughter offence is restricted to workplace fatalities which means a fatality must occur before a duty holder may be prosecuted under the offence. Option 2 is more squarely aimed at prevention of workplace death and improvement in WHS practices in workplaces.

Community expectations

Option 2 also addresses community expectations. As stated above, community expectations for an industrial manslaughter offence are based on the perceived deterrence effect of such a provision and the desire for duty holders to be subject to serious penalties including imprisonment where there is a workplace death. However, there is no evidence that an industrial manslaughter offence would have a greater deterrence effect. Indeed, an amended Category 1 offence should be more of a deterrent because it expands the type of conduct that can be prosecuted and is a much broader offence. Strengthening the deterrence effect of the Category 1 offence may improve duty holders' compliance with the model WHS laws and potentially reduce the number of WHS breaches. It should also address community concerns for greater accountability of duty holders, as it would allow for prosecution of duty holders who put workers and other persons' lives at risk, rather than only those who actually cause a worker or other person to lose their life.

The community also expects an increase in penalties. Penalties for industrial manslaughter provisions, particularly in the NT and Victorian bills, are significantly more than current penalties for Category 1. Implementing Recommendation 22 (increase penalties) and Recommendation 25 (implement sentencing guidelines) to increase penalties should address these expectations.¹⁴³ If WHS ministers agree to the approach for Recommendation 22, the penalty for the Category 1 offence would be more consistent with penalties for industrial manslaughter and general manslaughter offences in the jurisdictions.

¹⁴¹ Roper, V, The Corporate Manslaughter and Corporate Homicide Act 2007 – A 10 year Review, *The Journal of Criminal Law*, 2018 Vol 82(1), pp 53, 64. The report suggested that reasons for this low number include lack of expertise in investigatory teams, and a limited Crown Prosecution Services (CPS) budget and possibly the requirement for senior management involvement (p73). See also, Crown Prosecution Services, *Corporate manslaughter statistics: Freedom of Information Act 2000 Request*, Available at https://www.cps.gov.uk/sites/default/files/documents/publications/disclosure_6_1.pdf.

¹⁴² Roper, V, The Corporate Manslaughter and Corporate Homicide Act 2007 – A 10 year Review, *The Journal of Criminal Law*, 2018 Vol 82(1), p 74.

¹⁴³ These recommendations are discussed in Part 2.

It may also be beneficial to increase the community's awareness or understanding of those penalties, and the risk-based approach of the WHS framework – in particular, the emphasis under the model WHS laws on the prevention of risk and thus harm. Option 2 allows for the implementation of such a campaign without the need to explain a new outcome-based offence, which may cause confusion. Education and awareness is one of the factors in a multi-faceted approach to help reduce all workplace incidents, and therefore lead to improved health and safety outcomes.

Harmonisation

Option 2 will also promote harmonisation amongst jurisdictions that have implemented the model WHS laws. In November 2019, NSW introduced a bill to amend the Category 1 offence to include gross negligence, and other jurisdiction may do the same.¹⁴⁴ Unlike industrial manslaughter, there is a greater likelihood of harmonised jurisdictions adopting the amendments to Category 1. Assuming that all harmonised jurisdictions adopt Option 2, this would ensure that the elements of the offence under which a serious WHS breach is prosecuted is consistent regardless of whether or not a particular jurisdiction has an industrial manslaughter offence. This is because an amended Category 1 offence shares similar elements with an industrial manslaughter offence.

Implementation considerations

During the drafting process, the Agency will review sections in the model Act that address attribution and aggregation to ensure corporations are appropriately covered.¹⁴⁵ Further information on these issues will be provided to SWA Members and/or WHS ministers when the amendments are provided for consideration.

¹⁴⁴ Work Health and Safety Amendment (Review) Bill 2019 (NSW).

¹⁴⁵ See ss 241 and 251 of the model WHS Act.

10. Recommendation 26: Prohibit insurance for WHS fines

Recommended option – Option 2

That WHS ministers agree to 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.

Objective

- To secure compliance with the model WHS Act through effective and appropriate compliance and enforcement measures.
- To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisations or risks arising from work.

Current arrangements

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 WHS laws.

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 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 of 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 WHS 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 2018 Review noted the recommendation would not prevent the use of insurance to pay the costs of legal proceedings.

The 2018 Review made the following recommendation:

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.*

Extent of the problem

The evidence received from submissions to the Consultation RIS demonstrates that insurance products that cover WHS liabilities and penalties are available and are in use. However, the exact extent to which individuals or businesses use these products or arrangements is unclear.

A survey of 200 members by the Australian Chamber found:

- 29.7 per cent of respondents acknowledged that they have business insurance to cover statutory liabilities
- 62.3 per cent were unsure if they were covered by such an arrangement, and
- 7.9 per cent were of the view that their insurance did not cover WHS liabilities.¹⁴⁶

The Chamber of Minerals and Energy of WA provided that its members do not report seeking out or using such arrangements. One individual's submission stated that they do not have insurance or indemnity arrangements for WHS liabilities and in their experience this type of insurance is not common.¹⁴⁷ In contrast, NSW WHS Regulators state that they are aware that insurance is available and consider it to be commonly used.¹⁴⁸

It is not uncommon for legislation to prohibit insurance and indemnity arrangements for monetary penalties as demonstrated by s 29 of the New Zealand *Health and Safety at Work Act 2015*.¹⁴⁹ There are also examples of legislation that prohibits insurance for certain criminal penalties and offences in Australia under the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Corporations Act 2001* (Cth).

Options

Option number	Description
1	Status quo
2	<p><i>2018 Review – Recommendation 26</i></p> <p>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 indemnity.

Overview of consultation findings

Forty-eight submissions in response to the Consultation RIS commented on Recommendation 26, with the majority supporting Option 2. Six submissions provided no preference, 10 supported the status quo, 31 supported Option 2 (though two suggested amendments to Option 2) and one suggested an alternative option without providing a preference between the proposed options.

Status quo

Submissions supporting the status quo were of the view that courts should continue to determine the enforceability of insurance policies and indemnity arrangements applying the carefully balanced approach of common law.¹⁵⁰ Submissions also state that Option 2:

- would not have the desired effect of deterring non-compliance or improving health and safety outcomes and may have a negative impact on national productivity and income¹⁵¹

¹⁴⁶ Australian Chamber submission to the Consultation RIS, p 45.

¹⁴⁷ Anthony Bate submission to the Consultation RIS, pp 6-7.

¹⁴⁸ NSW WHS Regulators submission to the Consultation RIS, p 17.

¹⁴⁹ The *Health and Safety at Work Act 2015* (NZ) is based on the model WHS Act.

¹⁵⁰ Submissions to the Consultation RIS from the SA Wine Industry Association, p 5; Australian Institute of Company Directors, pp 5-6, Australian Chamber, p 46.

¹⁵¹ Submissions to the Consultation RIS from HIA, p 16, AIHS, p 6, Australian Chamber, p 45.

- would impede a business' ability to attract and retain highly qualified and experienced people for officer duties if they cannot indemnify them against penalties. Imprisonment, which remains a penalty option, is a sufficient incentive to comply with duties, and¹⁵²
- is inconsistent with existing and wide-spread insurance models for business risk. The question of whether insurance should be available for WHS liabilities is one for the insurance industry.¹⁵³

Option 2

The majority of submissions supporting Option 2 did not provide reasoning or a basis for doing so. Of those submissions that did, arguments put forward were consistent with the findings of the 2018 Review - the main assertions being that the availability of insurance policies or indemnity arrangements undermines the model WHS laws, undermines the effectiveness of a WHS penalty as a deterrent and dilutes both the perception of, and inherent accountability, of the duty holder.¹⁵⁴

Submissions also pointed to other inquiries that support prohibiting insurance including the Senate Inquiry *They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia* and the 2017 Qld Review.¹⁵⁵ The Finance Sector Union of Australia stated that Option 2 may refocus employers on the benefits of a safe and healthy workplace rather than simply managing risk.¹⁵⁶

A number of submissions noted that should Option 2 be implemented:

- there should still be access to insurance to fund legal proceedings in defending an alleged contravention of WHS laws,
- clarity is needed on whether an insurance policy can fund the cost of a WHS enforceable undertaking.¹⁵⁷

Alternative options

Maurice Blackburn Lawyers supported Option 2, but suggested a new legislative requirement for a duty holder to disclose any relevant insurance coverage, with the court having the option to impose higher fines or an alternative sentence where insurance could be relied on.

Another submission (which also supported Option 2) suggested personal payment orders as an alternative approach, whereby a convicted person must personally pay the penalty imposed on them. Under such an approach, no third party could pay the penalty on the person's behalf.¹⁵⁸

The AiG suggested a prohibition only on taking an indemnity, citing the risk that multinational businesses with global insurance policies which include WHS fines may inadvertently be in breach of a prohibition on taking out the policy.¹⁵⁹ However this seems to be an acceptable risk; businesses would be responsible for compliance with all laws in all of the jurisdictions that they operate in, and if necessary, could take out insurance policies in particular jurisdictions, rather than one applying to all operations. This would be necessary at present if those businesses operated in New Zealand.

The 2018 Review considered alternatives like those raised above, but ultimately concluded that these options would not address the problem as well as the recommendation. Given this, these alternative options are not explored further in this Decision RIS.

¹⁵² Submissions to the Consultation RIS from Bridgestone, pp 7-8; AIHS, p 6.

¹⁵³ Submissions to the Consultation RIS from Chamber of Minerals and Energy of WA, p 22; SA Wine Industry Association, p 5.

¹⁵⁴ Submissions to the Consultation RIS from Maurice Blackburn Lawyers, p 16; Anthony Bate, pp 6-7; Health Services Union, pp 12-13; NSW WHS Regulators, pp 17; ACTU, p 94.

¹⁵⁵ Maurice Blackburn Lawyers submission to the Consultation RIS, p 16.

¹⁵⁶ Finance Sector Union submission to the Consultation RIS, p 19.

¹⁵⁷ Submissions to the Consultation RIS from Queensland Resource Council, p 2 of Attachment A; Minerals Council of Australia, p 20.

¹⁵⁸ Confidential submission

¹⁵⁹ AiG submission to the Consultation RIS, p 11.

Impact analysis

The costs and benefits of Option 2 are assessed against Option 1 - status quo.

Any adverse impacts of the status quo are provided above in the “Extent of the problem” section of this Chapter. There are no assumed incremental costs or benefits of maintaining the status quo.

The analysis below considers the impact of prohibiting insurance for monetary penalties. The discussion is qualitative in nature, noting that amongst other things:

- It is not clear how many duty holders currently hold insurance for monetary penalties, or the frequency and amount of payouts.
- There does not appear to be any empirical data that demonstrates the link between improved health and safety outcomes and the prohibition of insurance.
- Any costs discussed are costs of non-compliance with existing obligations under the model WHS laws.

Option 2

Costs

The prohibition of indemnity against WHS penalties will not increase regulatory burden. The prohibition is designed to ensure that where a business does not comply with existing duties they will directly bear the burden of any financial penalty imposed by the court.

In practice, a small number of businesses may become insolvent or bankrupt, or engage in phoenixing behaviour, as a result of having to pay a financial penalty. However, courts usually consider financial capacity to pay when determining the appropriate sentence.¹⁶⁰ This means that only in circumstances of high culpability would a court impose a fine that would likely result in the bankruptcy of a business.¹⁶¹ The Australian Government has sought to address illegal phoenixing in the Treasury Laws Amendment (Combating Illegal Phoenixing) Bill 2019.

Businesses that currently acquire insurance but are prohibited from doing so in the future may be inclined to become ‘over-compliant’ to avoid having to pay a penalty. This may result in higher short-term administrative and compliance costs, however, the magnitude of such costs is difficult to estimate.

A business may incur an increase in its short term recruitment costs if the new prohibition is a factor in an individual’s consideration to become or continue to be an officer in a business.

Governments may incur one off implementation costs including educating duty holders about the new prohibition. Governments may also incur some long-term cost in investigating and enforcing the prohibition. However, it is likely that the insurance sector would be aware of the prohibition if implemented and be expected not to provide these kinds of policies.

Insurance agencies would also incur a loss as the market for insurance against WHS penalties closes. However, this cost is likely to be short-term and as insurance businesses are typically large, the impact is not likely to have a material impact on their financial position. No insurance businesses made a submission to the Consultation RIS on this matter.

Benefits

Option 2 is likely to improve health and safety outcomes, as duty holders who would otherwise take out insurance would have a stronger incentive to comply with WHS requirements so to avoid financial penalties. The extent of any improvement to health and safety outcomes cannot be quantified as it would depend on the level of additional exposure a business has to greater financial penalties and the cost such exposure has on business.

¹⁶⁰ Section 6 of the *Fines Act 1996* (referred to in *SafeWork NSW v Williams Pressing and Packaging Services Pty Limited* [2018] NSWDC 409 at [102]); s 48 of the *Sentencing Act 2017* (SA) (referred to in *Steward v Mac Plant Pty Ltd* [2018] QDC 20 at [82]. See also *SafeWork NSW v Phong Warehouse & Distributor Pty Ltd* [2018] NSWDC 253 in which the Court took into account the offender’s financial position in imposing a lower penalty at [45],[47].

¹⁶¹ Recommendation 25 which relates to the development of sentencing guidelines, could impact on how courts assess the application of WHS penalties.

Option 2 also prevents insurance and indemnity arrangements from undermining WHS penalties as an effective deterrence. The ACTU cited Finch¹⁶² and Herzfeld¹⁶³ who both argue that the deterrent and punitive intention of criminal penalties in the model WHS laws are almost entirely diminished if insurance companies are allowed to pay fines, rather than those directly responsible. The court in *Hillman v Ferro Con (SA) Pty Ltd (in liq) and Anor* [2013] SAIRC 22 also expressed a similar concern. It stated that as the director of the relevant company had obtained indemnity under a company insurance policy for criminal fines, he was avoiding the majority of the penalty for a workplace fatality and diminishing the capacity of the court to deliver proportional justice.

The prohibition would also provide certainty on whether insurance and indemnity arrangements for WHS penalties are enforceable. Currently at common law, it is by no means clear when a court would enforce a contract (where a contractual dispute arises) allowing a person who is required to pay a penalty for breaching WHS laws to recover that penalty under insurance or indemnity arrangements.¹⁶⁴

Those businesses who do not incur penalties and who currently hold insurance to cover the cost of those penalties would achieve savings equal to the cost of their insurance policy.

Option 2 - Summary of impact analysis

Assumptions of analysis

Any costs associated with this Option are costs of non-compliance. There is no increase in regulatory burden.

Key costs	Key benefits
Those businesses who incur WHS penalties and currently hold insurance to cover the cost of those penalties would have to pay the penalty themselves.	Potential increase in safety standards.
Businesses could close or dissolve because they are unable to pay the fine.	Prevents insurance and indemnity arrangements undermining WHS penalties as an effective deterrent.
Businesses may feel compelled to over comply with existing duties to avoid prosecution.	Those businesses that do not incur fines and currently hold insurance to cover the cost of those penalties would achieve savings equal to the cost of their insurance policy.
WHS regulators and courts may incur an increase in long-term operational costs.	
There would be some short-term economic loss for insurance companies associated with the closure of the market for indemnity insurance.	

¹⁶² Finch, V, (1994). Personal Accountability and Corporate Control: The Role of Directors' and Officer' Liability Insurance. *The Modern Law Review*, 57(6): pp 880-915.

¹⁶³ Herzfeld, P. (2009). Still a troublesome area: legislative and common law restrictions on indemnity and insurance arrangements effected by companies on behalf of officers and employees. *Company and Securities Law Journal*, 27(5): pp 267-298.

¹⁶⁴ The courts have established that recovery under an insurance or indemnity arrangement is likely where the person has committed a strict liability offence or where the unlawful act was unintentional. However it is less clear that an insurance or indemnification arrangement would be unenforceable where the person intentionally acted *unlawfully*. The courts have found that it ultimately depends on whether the intentional act is of such grave character or so antisocial that it should decline to assist the insured to make a recovery under a contract of insurance or indemnity. This of course will depend on the circumstances of each policy. See *Fire and All Risks Insurance Co Ltd v Powell* [1966] VR 513, endorsed by *Australian Associated Motor Insurers Ltd v Wright* (1997) 70 SASR 110 and *Civil and Allied Technical Construction Pty Ltd v A1 Quality Concrete Tanks Pty Ltd* [2018] VSCA 157 at [95] and [119].

Option with greatest net benefit

Option 2 is recommended as the option likely to provide the highest net benefit.

Although there are costs in implementing Option 2, they are short-term costs for businesses or are costs related to non-compliance. Such costs ultimately would not outweigh the expected benefits. This includes an increase in compliance with existing duties and safeguarding the deterrent effect of WHS penalties. It is also contrary to public policy to allow an individual or business to claim insurance or indemnity for WHS penalties where their conduct has exposed a person to a risk of death or serious injury, or has actually resulted in a death or serious injury.

However, it is not possible to definitively determine the total benefits of Option 2 given the lack of data on the number of insurance or indemnity arrangements, the coverage of such arrangements and the extent to which a penalty may affect the financial viability of a business.

Implementation considerations

Should Option 2 be agreed, Safe Work Australia would need to consider:

- enforcement of the prohibition. One WHS regulator indicated that unless there was a disclosure requirement, WHS regulators would need to establish whether such a contract or indemnity existed before being able to enforce a prohibition. WHS regulators would also need to have the appropriate level of resourcing available to educate businesses about the prohibition.¹⁶⁵
- whether the provisions would have prospective effect only, in particular what would the effect of the prohibition be on arrangements entered into before the commencement of the prohibition.

¹⁶⁵ WHS regulator response to additional questions.

11. Recommendation 27: The risk management process

Recommended option – Option 3

That WHS ministers agree that Safe Work Australia further scope this issue to inform development of guidance, particularly for small business, on the risk management process and the application of the hierarchy of controls.

Objective

To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.

Current arrangements

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.

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.

The 2018 Review made the following recommendation:

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.

Extent of the problem

Overall, there was some support for a mandated process in the submissions to the Consultation RIS. However, submissions in favour of this option provided limited evidence as to how this would improve health and safety outcomes or risk management. Further, other submissions to the Consultation RIS highlighted that moving away from this flexible approach could have a negative impact on WHS outcomes.

In 2008, WHS ministers considered whether to include an express requirement to follow a risk management process. WHS ministers concluded that as risk management is implicit in the definition of reasonably practicable, incorporating an obligation into the model Act that mandates application of the risk management process may lead duty holders to believe they have met the duty simply by applying that process.

Submissions to the Consultation RIS supported the view that there is a lack of understanding regarding the risk management processes required to comply with the model WHS laws and how to implement them. The NSW WHS Regulators submitted that this lack of understanding was evident when providing advice to PCBUs, visiting workplaces and investigating a dispute or workplace incident.¹⁶⁶ The HIA also provided evidence that there is general confusion for duty holders in understanding what they have to do to comply with the model WHS laws, particularly from small business.¹⁶⁷ The ACTU cited the silicosis crisis as an example of the serious consequences of an industry-wide failure to apply risk management and implement controls appropriately.

The CPSU submitted that duty holders were incorrectly using lower order controls, but did not provide further explanation for the source of this confusion. However, this goes to the issue of how to properly apply the hierarchy of controls, rather than when the hierarchy of controls must be applied. Similarly, a number of submissions indicated that the problem appears to stem from the general nature of the hierarchy of controls and, more broadly, a lack of industry specific guidance and examples on the application of risk management processes.

Options

Option number	Description
1	Status quo
2	<i>2018 Review – Recommendation 27</i> 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 to the model WHS Regulations.
3	<i>Alternative option – proposed by the Agency in response to stakeholder consultation.</i> Safe Work Australia further scope this issue to inform development of guidance, particularly for small business, on the risk management process and the application of the hierarchy of controls.

Overview of consultation findings

Forty-three submissions commented on this recommendation. Of these, 14 submissions supported the status quo, 24 submissions supported Option 2, three submissions put forward alternative options and two submissions did not express a preference.

Status quo

Those that supported the status quo strongly objected to Option 2, cautioning that it would have a significant negative impact on businesses. A number of submissions, including from the AiG and Chamber of Minerals and Energy of WA noted Option 2 would have minimal benefit to businesses because the duty to ensure health and safety under the model WHS Act already requires a PCBU to do all that is reasonably practicable to eliminate or minimise risk.

Option 2

Submissions in support of Option 2 were the least supported by evidence. The CPSU submitted that Option 2 would prevent duty holders wrongly applying lower order controls which do not adequately eliminate or mitigate risk. No further evidence was provided in submissions in support of Option 2 as to how it would reduce confusion about the requirements to manage risk to comply with the model WHS laws.

¹⁶⁶ NSW WHS Regulators submission to the Consultation RIS, p 18.

¹⁶⁷ HIA submission to the Consultation RIS, p 16-18.

The AIHS supported moving the hierarchy of controls to the model WHS Act in order to deal with Recommendation 2 of the 2018 Review (concerning the management of psychosocial risks in the WHS Act), if it would “not require a major new paperwork exercise or undercut the generality of the primary duties”. It is not clear what is meant by preserving the generality of the primary duties, however Option 2 would remove the flexibility that businesses currently have in discharging their duties under the model WHS laws. Further, it is not clear how Option 2 would address the problems identified at Recommendation 2 - there is currently nothing to prevent a PCBU from applying the hierarchy of controls to manage psychosocial risks, as identified in the National Guide.¹⁶⁸

Submissions from businesses and industry groups stated that moving the hierarchy of controls to the model WHS Act would have a significant negative impact on business.¹⁶⁹ It was stated that this would increase focus on the risk management process, reduce flexibility, discourage consultation, and increase cost and administrative burden.¹⁷⁰ In particular, concern was raised that the hierarchy of controls do not neatly apply to every risk and that having a general risk management process would encourage businesses to focus on the process of managing risk, rather than the outcome. These same concerns were raised in the First Report of the 2008 Review as justification against the creation of a mandatory risk management process in the model WHS Act.¹⁷¹

Alternative options

Three submissions put forward alternative options for clarifying the risk management requirements in the model WHS laws. These alternative options below would not require legislative change:

- Service NSW recommended clarifying the risk management process through model Codes or guidance material to help PCBUs interpret and understand their obligations. They considered a Code would best suit the needs of NSW WHS Regulators and PCBUs.
- The HIA supported the status quo, preferring this issue be clarified through industry specific guidance. They noted that links could be drawn between the model Code - *How to Manage Work Health and Safety risks* and industry specific guidance such as the model Code - *Construction Work (Construction Code)*.
- Anthony Bate suggested case studies on applying the hierarchy of control in the model Code - *How to Manage Work Health and Safety risks*.

Submissions from the Australian Chamber and Service NSW supported the status quo and advised that there is a need for improvement in the general understanding of risk management processes and further guidance on how to manage risk using the hierarchy of controls. The Australian Chamber also submitted the hierarchy of controls is not the only effective risk management process. The new Western Australian Code - *Mentally healthy workplaces for fly-in fly-out workers in the resources and construction sectors* was highlighted as providing examples of other models that are available, used and promoted by WHS regulators.¹⁷² These statements also support the status quo.

One individual noted the model WHS Act and Regulations should include more express mandatory rules about what must occur in particular circumstances, rather than relying on PCBUs applying a risk assessment.¹⁷³ This is a broader issue that is beyond the scope of Recommendation 27 of the 2018 Review.

The Agency proposes Option 3 in response to stakeholder consultation that further guidance is needed to improve the general understanding of risk management processes. Further work is required to scope this issue and develop guidance particularly for small business on the risk management process and the application of the hierarchy of controls.

¹⁶⁸ The guide indicates that if an assessment has identified actual or potential harm from exposure to psychosocial hazards, the hierarchy of controls can be used to eliminate or minimise risks.

¹⁶⁹ Submissions to the Consultation RIS from Australian Chamber, p 39; the Australian Small Business and Family Enterprise Ombudsman, p 2.

¹⁷⁰ Submissions to the Consultation RIS from Service NSW, Australian Chamber, Department of Defence, RACP, Australian Small Business and Family Enterprise Ombudsman and a confidential submission.

¹⁷¹ 2008 National Review, October 2008, p 215-216.

¹⁷² Australian Chamber submission to the Consultation RIS, p 40.

¹⁷³ Pamela Gurner-Hall submission to the Consultation RIS, p 6.

Impact analysis

The costs and benefits of Option 2 are assessed against Option 1 - status quo.

Any adverse impacts of the status quo are provided above in the “Extent of the problem” section of this Chapter. There are no assumed incremental costs or benefits of Option 1.

Option 2 – Costs and benefits

The main cost of Option 2 is the administrative costs for businesses in implementing the hierarchy of controls for all WHS risks. For example, ongoing costs incurred to document compliance with the controls, staff training and education costs. However, it is difficult to determine whether these costs would be any greater than the current costs for businesses in managing WHS risks.

While Option 2 would assist PCBU's in knowing when to apply the hierarchy of controls (i.e. in relation to all risks), it would not address the confusion and uncertainty experienced by businesses, especially small businesses, about *how* to manage risks using the hierarchy of controls. Duty holders may still need to seek external legal and expert advice on an ongoing basis to understand how to apply the hierarchy of controls in their particular circumstances.

Submissions to the Consultation RIS suggest that implementing Option 2 may shift businesses focus away from health and safety outcomes to processes, such as completing standardised risk assessment forms. This could have a negative impact on WHS outcomes.

Mandating a general risk management process for all risks undermines necessary flexibility in the case of complex hazards. Hazards can often be unprecedented or their causes unknown, requiring the development of new strategies as they occur to resolve them. For example, the NSW WHS Regulators stated that the hierarchy of controls is not suitable to address a range of issues such as psychosocial risks, risks from working with animals, traffic accidents, or risks arising from fatigue. The current approach under the model WHS laws enables businesses to select the most appropriate approach to risk management for the particular risk, workplace, industry and so forth.

Option 3 – Costs and benefits

Given the nature of the problem, in particular that uncertainty about requirements for small businesses, Safe Work Australia could develop additional guidance to small businesses. Further research could also be undertaken to understand the elements of the WHS duties that duty holders have the most difficulty understanding and complying with.

This option would help to address uncertainty amongst duty holders, particularly small businesses, in regard to complying with their WHS duties. More specific, tailored guidance might also reduce ongoing business costs by reducing the need for businesses to seek external expert professional/technical advice. As identified in the First Report of the 2008 Review, outlining examples in guidance material is an important step for ensuring duty holders understand their risk management requirements, without departing from the approach to WHS risk management that was agreed by WHS ministers in 2008.¹⁷⁴

Option 2 - Summary of impact analysis

Assumptions of analysis

It is assumed that this option would amend the model WHS Act to introduce a hierarchy of controls that is applicable to all risks rather than only those identified in the model WHS Regulations.

Key costs	Key benefits
Reduced flexibility for businesses in how they manage WHS risks, including emerging risks, and increase in administration costs – the costs of documenting compliance to the hierarchy of controls, training and education required to be able to implement the hierarchy of controls.	Certainty that the hierarchy of controls apply to all WHS risks.

¹⁷⁴ 2008 National Review, October 2008, p 37.

Key costs	Key benefits
Initial additional costs to business to understand the new provisions.	
In the long term, potential increase in substantive compliance costs if businesses change their health and safety practices. May lead to an increased focus on process, rather than effective WHS management. This could have negative impacts on the health and safety of workers as a result of ineffective or inappropriate risk management practices.	

Option 3 - Summary of impact analysis

Assumptions of analysis

The costs and benefits have been assessed in terms of the impact of changes to the status quo.

Key costs	Key benefits
None identified.	Reduced uncertainty, leading to an ongoing reduction in costs to businesses and in the long term, improved health and safety outcomes.

Option with greatest net benefit

Option 3 is recommended as the option likely to provide the highest net benefit.

Submissions from business groups supported the analysis in the Consultation RIS that Option 2 would not necessarily address the identified problem. While Option 2 could improve understanding of when the hierarchy of controls must be applied, importantly, it would not go to the issue of how to properly apply the hierarchy of controls.

Industry groups put forward persuasive arguments that Option 2 could increase administrative costs, discourage consultation, reduce flexibility and lead to inappropriate or ineffective risk management processes. Effective risk management is an essential component of the model WHS laws that is best achieved through a flexible approach that caters to a broad range of WHS hazards, risks and work environments. As outlined in the First Report of the 2008 Review, risk management requirements should not be unnecessarily prescriptive nor inconsistent with the focus throughout the model WHS legislation on outcomes, rather than input or the means of achieving that outcome.¹⁷⁵

Nonetheless, it is clear from submissions that many businesses do not clearly understand what risk management approaches to employ in different circumstances. Option 3 would enable Safe Work Australia to further scope the issue and identify ways to clarify the risk management process, including the hierarchy of controls. This may result in further guidance or other materials.

¹⁷⁵ 2008 National Review, October 2008, p 214.

12. Recommendations 29a and 29b: SWMS

Recommended option – Option 3

That WHS ministers agree that Safe Work Australia develops an intuitive, interactive tool to support the completion of fit-for-purpose SWMS.

Objective

- To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.
- To ensure high risk construction work is carried out without risk to health and safety, through the clear communication of SWMS requirements to duty holders and other stakeholders.

Current arrangements

Under the model WHS Regulations, certain construction activities 'high risk construction work'. The model WHS Regulations require that a PCBU that carries out high risk construction work prepare, or ensure that another person prepares, a SWMS before the high risk construction work is carried out.¹⁷⁶

The Construction Code provides information on the content, preparation, implementation and review of SWMS. A SWMS template is provided in Appendix E of the Construction Code together with guidelines for completing the template, while Appendix F provides a sample of a completed SWMS.

To provide further information to duty holders to help them understand and comply with their obligations in relation to SWMS, Safe Work Australia has developed the *Safe Work Method Statement for High Risk Construction Work: Information Sheet*. WHS regulators have also published their own guidance on how to prepare SWMS.

2018 Review findings

The 2018 Review concluded that SWMS obligations is an area of the model WHS Regulations that is not operating as intended. This is because stakeholders are misunderstanding SWMS requirements in the model WHS Regulations.

In order to assist duty holders in the construction industry to understand the format and the type of information to be included in a SWMS, the 2018 Review made the following recommendations:

*Amend the model WHS Regulations to prescribe a SWMS template, and
Safe Work Australia develop an intuitive, interactive tool to assist in the effective and efficient completion of fit-for-purpose SWMS.*

Extent of the problem

Submissions to the Consultation RIS generally confirmed the findings of the 2018 Review. The majority of submissions share the view that greater education is needed regarding the purpose of SWMS, as well as what information must be included. There was also clear demand for tailored fit-for-purpose guidance to be developed to promote better WHS outcomes.

Concerns regarding a lack of SWMS education and awareness was consistent across submissions. Stakeholders were of the view that many PCBUs and workers are unaware that SWMS are only required for work defined as high risk construction work resulting in SWMS being developed when they are not legally required.

Submissions also suggested that SWMS are treated as a compliance exercise – a 'tick and flick' - rather than a tool to manage safety.¹⁷⁷ In practice, once completed, SWMS are often shelved and not reviewed, maintained or used on site.

¹⁷⁶ Regulation 299(2) of the model WHS Regulations.

¹⁷⁷ Department of Defence submission to the Consultation RIS p 8.

Due to a lack of understanding of their purpose, businesses completing SWMS sometimes reuse pre-prepared SWMS without a tailored consideration of the risks associated with an individual worksite, specific task,¹⁷⁸ or faced by a particular work group. Other businesses seek third party assistance to complete SWMS which can attract significant fees. These approaches can lead to crucial details being omitted which may negatively impact health and safety outcomes if risks specific to the business are not being identified and managed.

Submissions from large businesses with more sophisticated WHS management systems suggested they do not experience these problems as they have clear expectations and guidance for when and how they use SWMS, and a good understanding of the legal requirements.

Options

Option number	Description
1	Status quo
2	<i>2018 Review – Recommendation 29a</i> Add a SWMS template to the model WHS Regulations.
3	<i>2018 Review – Recommendation 29b</i> Develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS.
4	<i>2018 Review – Recommendations 29a and 29b</i> Implement both Option 2 and Option 3.

Overview of consultation findings

Forty three submissions commented on this recommendation. Seven submissions supported the status quo, 22 supported adding a template to the model WHS Regulations, 26 supported developing an intuitive interactive tool and seven expressed no view or suggested alternative options.

Status quo

Mostly business and their representatives supported the status quo. These submissions stated that the current regulatory approach is poorly designed and is not achieving the desired results but do not believe the recommendations of the 2018 Review would address their concerns. They suggested that prescribing a template in legislation would result in an administrative review of existing SWMS for negligible safety improvements. There were also concerns raised that the introduction of a template would reduce flexibility and eliminate the potential to consult workers on the SWMS format that is most suitable and effective for a work group.

Option 2

Just under half of the submissions supported adding a template to the model WHS Regulations (Options 2 or 4)¹⁷⁹, predominantly from unions, however there was also support from some industry representatives for this change. Submissions supporting a template in the model WHS Regulations suggested it would increase certainty and reduce confusion as well as improving quality and preventing the production of lengthy and sometimes costly SWMS. Submissions did not comment on the most effective way to prescribe a template in the model WHS Regulations or whether its use should be mandatory.

¹⁷⁸ HIA Submission to the Consultation RIS, p 18; Australian Chamber submission to the Consultation RIS, p 61.

¹⁷⁹ Four submissions preferred Option 2 and eighteen supported Option 4.

Option 3

Over half of the submissions supported developing an intuitive, interactive tool (Option 3 or 4)¹⁸⁰, with broad support from worker and industry representatives and from government. These submissions focused on the need to ensure SWMS are flexible, consultative and fit-for-purpose, while also ensuring consistency. The submission from the NSW WHS Regulators states that this option would best improve PCBU's understanding of the purpose and scope of SWMS¹⁸¹. However, some submissions noted there may be barriers for some businesses in accessing an online tool such as limited access to the internet or computers¹⁸².

Option 4

While some submissions supported Option 4 these have been discussed in relation to their support for Option 2 and Option 3 individually as these submissions did not discuss the combined impacts of implementing both Options.

Alternative options

Seven submissions either expressed no view or suggested alternative options. The alternative options generally captured similar concerns around a prescribed template and have been considered in the context of Option 2, or proposed out of scope changes to SWMS provisions more broadly which have not been considered further.

Impact analysis

Costs and benefits of Option 2 are assessed against Option 1 - status quo.

Any adverse impacts of the status quo are provided above in the "Extent of the problem" section of this Chapter. There are no assumed incremental costs or benefits of Option 1.

Option 2 – Costs and benefits

Costs

For those businesses which already have their own templates or pro-forma SWMS in place, Option 2 would involve short term costs associated with aligning to a prescribed template. The AiG estimates that this would impose many millions of dollars of costs on the construction industry as many PCBUs already have robust approaches to SWMS. Businesses may also incur additional one off costs if they seek third party advice and assistance when moving to the new template.

Similar to the concerns raised with the status quo and the current overuse of generic SWMS, the introduction of a singular prescriptive template could give rise to the same issues resulting in SWMS that are not sufficiently individualised or fit-for-purpose. It may exacerbate the issue of SWMS being treated as compliance exercises instead of as a tool to manage workplace risks. This may be compounded if businesses are confused over how to capture risks specific to a work group, site or particular task. It may also lead to businesses implementing additional processes if they find the template too inflexible or not fit-for-purpose. It may also discourage consultation on specific risks if businesses consider they would not be well captured or if workers do not find the resulting SWMS usable.

If a template is prescribed in the model WHS Regulations it is unclear whether this would address the problem. For example, it is unlikely to provide additional clarity if it simply restates the information already in the regulations. Other options could include prescribing a structure, or mandating a particular format or layout. However, the more prescriptive the template is, the less flexible it would be and the quicker it can become outdated.

One WHS regulator recommended that consideration be given to some flexibility in the template itself, with businesses permitted to make alterations. However, it is unclear how a prescribed template could be altered while adhering to mandated requirements.

¹⁸⁰ Seven submissions preferred Option 3 and eighteen supported Option 4.

¹⁸¹ NSW WHS Regulators submission to the Consultation RIS, p 19.

¹⁸² Submissions to the Consultation RIS from Department of Defence, p 8; Anthony Bate, p 8; Australian Chamber, p 61.

Safe Work Australia currently provides detailed and easy to find guidance on when and how to prepare a SWMS. The sample template provided by Safe Work Australia specifies the 19 categories of high risk construction work for which a SWMS is needed.

Benefits

It is anticipated that the benefit of prescribing a template would be minimal. As identified above, the model WHS Regulations already prescribe the information that must be included in a SWMS and a template SWMS is included in the Construction Code. This information is well understood by many businesses, particularly those with sophisticated WHS management systems. Combined with the availability of existing templates, it is unlikely that legislating a single template would help overcome the primary issues associated with them – knowledge barriers.

A mandated template could increase the quality of SWMS produced, for example, one submission noted that it could make SWMS simpler, easier to digest and more targeted. If this led to an increase in the effective use of SWMS for high risk construction work, it would likely lead to an improvement in health and safety outcomes. However, given that industry groups report that SWMS are not referred to in practice once complete, a prescribed template is unlikely to increase the actual use of SWMS in workplaces.

One submission to the Consultation RIS noted that a mandated template which included guidance would help to clarify the type of work for which a SWMS is required. This may also lead to small long term cost savings by reducing the number of organisations that unnecessarily produce a SWMS. It could also reduce costs of reviewing and applying the SWMS in practice and reduce the levels of non-compliance.

It is not possible to estimate the size of the benefits, because of a lack of data. For example, the extent to which high risk construction work is currently non-compliant with SWMS is not clear. Further, there is no available data on the SWMS that are being prepared when there is no legal requirement to do so.

Option 3 – Costs and benefits

Costs

As there are no additional regulatory requirements associated with this option, it is not expected to lead to increased compliance costs for business, workers or the community.

Businesses that currently develop and sell customised SWMS may incur a loss of income if the tool gains widespread use. This was an issue raised in the Consultation RIS, however submissions did not address this as a concern. It is expected this loss would be directly offset by the savings to businesses currently using those services.

Benefits

An interactive and intuitive design of a tool consistent with Option 3 is likely to provide enhanced guidance to businesses, especially small businesses, on when a PCBU is required to produce a SWMS as well as what information is to be provided. An interactive tool of this nature would likely generate ongoing savings through reduced administrative burden and productivity losses. A freely available tool is also likely to reduce consulting costs as businesses are able to develop SWMS more efficiently in-house rather than outsourcing the task.

The NSW WHS Regulators suggest that if appropriately designed, the tool could encourage businesses to place more consideration on hazards and risks on their own sites, thereby improving health and safety outcomes in the long-run. It may also help facilitate worker involvement in the development of SWMS leading to higher quality SWMS which are best suited for the work group and workplace.

While a tool cannot directly address the issues associated with SWMS not being used once completed it could include prompts to encourage businesses to review, maintain and use their completed SWMS. The interactive nature of the tool might also lead to stronger engagement and understanding by businesses with SWMS, resulting in increased use of the document and again, improved health and safety outcomes.

The tool and supporting guidance material should also assist WHS regulators in achieving a consistent approach to SWMS without the burden of enforcing a prescribed template. The tool and supporting guidance material would be developed through consultation with WHS regulators and should contribute to consistent enforcement by establishing a clear collective expectation in relation to SWMS. It would also avoid introducing any burden associated with enforcing a prescribed template, It would be undesirable for example for an inadvertent breach of the template requirements to result in enforcement action if the SWMS would otherwise fulfil the intent and requirements of the model WHS Regulations.

Option 4 – Costs and benefits

Costs

The costs of this option reflect those outlined in Options 2 and 3. However, if an interactive tool is operating as intended, businesses may not need to refer to a SWMS template in the model WHS Regulations.

Benefits

The benefits of this option reflect those outlined in Options 2 and 3, noting that an interactive tool to support the mandated template may assist businesses in complying with the template.

Option 2 - Summary of impact analysis

Assumptions of analysis

A legislated template would need to be mandatory and prescriptive.

Key costs	Key benefits
Short term administrative costs associated with transferring any existing generic SWMS material to a new template.	Improved quality SWMS may lead to improved health and safety outcomes.
Short term costs where businesses' current templates are more effective and efficient for the specific workplace or type of work than the new template. This may also include duplication costs where specific risks cannot be captured.	Some ongoing cost savings from reduced implementation and review costs.
Ongoing costs if businesses are unable to comment on their site-specific risks if the template is not tailored to the work or workplace.	Reduction in fines due to greater clarification of information required to produce a compliant SWMS.

Option 3 - Summary of impact analysis

Assumptions of analysis

N/A

Key costs	Key benefits
Some short term productivity costs may be incurred as a result of learning to use the tool.	Businesses will have more guidance and tools available to create fit-for-purpose SWMS.
Businesses which develop and sell customised SWMS may lose income in the short and long term if the tool becomes widely used.	Improved health and safety outcomes as the interactive tool brings greater awareness about high risk construction work.
WHS regulators may experience short term costs associated with providing expertise for the development, testing and implementation of a tool.	Ongoing reduction in cost to produce a SWMS (through access to free, interactive guide).

Key costs	Key benefits
	Improved WHS outcomes from higher quality SWMS.

Option 4 - Summary of impact analysis

Assumptions of analysis

A legislated template would need to be mandatory and prescriptive.

Key costs	Key benefits
See Options 2 and 3, noting that Option 2 may not be necessary if Option 3 addresses the issue.	See Options 2 and 3, noting benefits could be larger than these two options in isolation.

Option with greatest net benefit

Option 3 is recommended as the option is likely to provide the highest net benefit.

The recommendation would involve developing an intuitive, interactive tool to support the completion of fit-for-purpose SWMS without adding a prescriptive template to the model WHS Regulations.

If delivered, this option would streamline and simplify the SWMS process for stakeholders and would negate the need for a template SWMS in the model WHS Regulations (Option 2). An interactive tool would in effect operationalise SWMS legislative requirements in the model WHS Regulations as well as building on the SWMS template captured in the Construction Code.

Given the model WHS Regulations are already prescriptive in regards to when a SWMS must be developed and what it must contain, it is not obvious what would be the additional benefits of Option 2. Prescribing a SWMS template in the model WHS Regulations would not resolve stakeholder concerns that greater education is needed regarding the purpose of SWMS. In contrast, an interactive SWMS (Option 3) will self-direct or guide the user in relation to the need and content of a SWMS. It is anticipated that the use of the interactive tool will increase stakeholder understanding of SWMS resulting in improved health and safety outcomes.

There are no additional regulatory requirements associated with Option 3. Use of the tool and uptake would be entirely voluntary. It is expected businesses would only choose to use it where it is more efficient and effective than their current SWMS processes. However, for those who use the tool, it should assist in developing a fit-for-purpose SWMS, improve health and safety outcomes and reduce confusion around requirements.

Including a SWMS template in the model WHS Regulations, either in addition to a tool or alone (Option 2) is not expected to generate as large a benefit, in part because businesses may have existing templates that are more effective and efficient.

PART 2

Recommendations assessed as having nil or minor regulatory impact

13. About Part 2

This part includes the recommendations of the 2018 Review that are likely to have nil or minor regulatory impact on business, individuals or the community. As these options do not involve regulatory change or have nil or minor regulatory impact, they do not require a detailed regulatory impact assessment.

Approach of options

Each Chapter of this Decision RIS deals with a separate recommendation of the 2018 Review. Most Chapters will analyse two to three options. Broadly, the options are:

Option 1 – Maintain the status quo.

Option 2 – Implement the recommendation of the 2018 Review.

Option 3 – Implement an alternative option.

Recommendations that concerned multiple issues may be more options than those outlined above.

Recommended options

The purpose of this part is to provide WHS ministers with recommended options for progressing the recommendations of the 2018 Review that are assessed as having nil or minor regulatory impact.

WHS ministers have been asked to consider and decide on the recommended options provided for each recommendation in this part. Safe Work Australia would progress the recommendation agreed by WHS ministers under its usual tripartite arrangements.

Analysis of impacts

The recommendations in this part have been assessed as having nil or minor impact for the following reasons:

- there is no proposed regulatory change
- the recommended option clarifies intended operation of the model WHS laws
- there is a need for further consultation or review to understand the extent of the problem
- the identified regulatory costs are costs of non-compliance, or
- regulatory impact has been identified but its effect is negligible or minor.

Any outcomes from the recommendations for further work that generate a regulatory will be subject to a separate regulation impact assessment process.

Consultation RIS

Appendix A of the Consultation RIS sets out recommendations likely to have nil or minor impact. The Consultation RIS sought feedback on this assessment. Seven stakeholders to the Consultation RIS did not agree with this assessment of regulatory impact. Some disagreed with the assessment of regulatory impact without providing reasons, while others considered there was not sufficient information available to make an assessment of regulatory impact. Stakeholder concerns are addressed in the chapters of this Decision RIS to which they relate. No concerns required a Part 2 recommendation to move into Part 1.

Three submissions considered that the operational impact of Recommendation 20 – *review of incident notification provisions*, was assessed incorrectly. However, as Recommendation 20 is for further review and at this stage is not recommending regulatory change, it has a nil regulatory impact. If the review for Recommendation 20 (and the other recommendations that require further review) reveal the need for regulatory change that requires ministerial decision, that change will be subject to a separate regulation impact assessment process.

Further detail on stakeholder submissions is provided against individual recommendations.

Implementation

There are no significant issues identified with implementation for any of the below recommended options. Therefore, implementation issues have not been considered further in this part.

14. Recommendation 1: Model WHS Regulations and model Codes

Recommended option – Option 3

That WHS ministers agree to Safe Work Australia developing a tool to assist duty holders in priority industries to identify the regulations that may apply to their business or undertaking.

Objective

- To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.
- To ensure duty holders in priority industries are able to identify the health and safety regulations that might apply to their business or undertaking.

What is the problem?

The 2018 Review considered that businesses find it difficult to navigate through the three-tiered WHS framework to find the obligations that apply to their workplace. To address this, it recommended a broad review of the model WHS Regulations and model Codes.

The 2018 Review made the following recommendation:

Review the model WHS Regulations and model Codes against agreed criteria on the purpose and content of the second and third tiers of the model WHS laws as they relate to the seven priority industries in the Australian Work Health and Safety Strategy 2012-2022.

Consultation generated limited evidence that confirmed or elaborated on the nature or scope of the problem identified in the 2018 Review, with only two submissions to the Consultation RIS commenting on Recommendation 1. It is also not clear that the recommendation is an effective way to address the stated problem.

The feedback received did not show there are issues with the suitability of the obligations themselves, or identify gaps in the model WHS Regulations and model Codes. It did identify that some businesses are experiencing confusion about where to look in the model WHS laws to clarify obligations, and about the legal status of obligations contained in the model WHS Regulations, model Codes and guidance materials. More broadly, consultation revealed strong support for the current model WHS framework.

Analysis of options

Option 1- Status quo

Maintaining the status quo would not address the problem. Businesses would continue to experience confusion in identifying their WHS obligations, causing inadvertent non-compliance and reduced safety standards.

Option 2 –

Review the model WHS Regulations and model Codes against agreed criteria on the purpose and content of the second and third tiers of the model WHS laws as they relate to the seven priority industries in the Australian Work Health and Safety Strategy 2012-2022.

The current framework for the model WHS Regulations sets out detailed requirements that apply to specific work activities and hazards, with model Codes providing practical information on how the requirements of the model WHS laws may be met. Requirements are specific to activities and hazards, rather than industries.

Creating a revised framework for model WHS Regulations based on industry would have the potential to create a more rigid and siloed WHS framework with extensive duplication of regulation between industries, resulting in a significantly higher volume of regulation than currently exists. Variations in work activities between businesses in an industry, and innovative work practices adopting approaches from other industries, could also lead to gaps.

Reviewing the model WHS Regulations and model Codes by industry would be a significant undertaking. If legislative change was progressed to the extent of reshaping the model WHS Regulations and model Codes to align with priority industries, this change would represent extensive impacts to all stakeholders in understanding and implementing the changes.

Reducing confusion and providing clarity to PCBUs on their WHS obligations would support compliance and improve safety standards. However, it is not clear that Option 2 would effectively achieve this objective.

It is unlikely that reshaping the model WHS Regulations, and in turn creating significantly more regulation, would necessarily go towards reducing confusion for industry in understanding their obligations. Rather, it is likely that the existing requirements in the regulations would simply be presented in a different way, e.g. industry based chapters, without any change to the obligations or the guidance supporting those obligations themselves.

Option 2 is assessed as having nil regulatory impact, as it does not involve regulatory change at this time. One submission to the Consultation RIS suggested the regulatory impact of this option is not yet known, rather than it being nil or minor. As this recommendation was purely for a review, at this stage, the regulatory impact would be nil. If Option 2 is preferred and as an outcome of the review process, regulatory change is proposed, a further assessment of regulatory impacts will be conducted.

Option 3 –

Safe Work Australia develop a tool to assist duty holders in priority industries to identify the regulations that may apply to their business or undertaking.

Option 3 would involve Safe Work Australia developing a tool to assist duty holders, particularly in priority industries, to identify the model WHS Regulations that apply to their business or undertaking, and model Codes that support them in meeting their obligations. This tool could group obligations for priority industries in a clear and practical way, providing clarity on obligations, including how the model WHS Regulations and model Codes interact with the principles based model WHS Act.

This option would not involve any regulatory costs for business. Businesses could use the tool where they consider it would be of benefit through improved understanding of existing obligations. Further, Option 2 would not impose additional obligations with associated regulatory costs.

Reducing confusion and providing clarity to PCBUs on their WHS obligations would support compliance and improve safety standards.

This option would more effectively address concerns raised by stakeholders in response to the Consultation RIS than Option 2.

Option 3 is assessed as having nil regulatory impact, as it does not impose any regulatory requirements on business, individuals or the community.

Preferred option

Option 3 is recommended as it is expected to effectively address the problem without significant resource costs and legislative amendment. While both Options 2 and 3 may achieve the objective of providing clarity to PCBUs on their WHS obligations on an industry bases, Option 3 achieves this objective more efficiently.

15. Recommendation 3: New industries, hazards and working arrangements

Recommended option – Option 2

That WHS ministers agree to Safe Work Australia developing 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.

Objective

To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.

What is the problem?

The 2018 Review found that the model WHS laws contemplate non-traditional working relationships and are broad enough to deal with emerging business models. However, this needs to be continually tested to enhance certainty and clarity around WHS obligations and protections in various non-traditional working arrangements.

The 2018 Review made the following recommendation:

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.

Feedback from the Consultation RIS generated broad support for the 2018 Review's assessment of the problem, and proposed approach.

Analysis of options

Option 1 - Status quo

Maintaining the status quo would not address the risk that the model WHS laws fail to adequately cover emerging business models, industries and hazards.

No submissions to the Consultation RIS supported maintaining the status quo.

Option 2 –

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.

The implementation of Option 2 would be consistent with the key functions of Safe Work Australia to evaluate and improve the model WHS laws in Australia to ensure healthy, safe and productive workplaces across all traditional and non-traditional working arrangements and industries. Systematic review and evaluation is important for the effective and efficient operation of the laws and improving health and safety outcomes in a changing work environment.

The *Australian Work Health and Safety Strategy 2012-2022* already outlines Safe Work Australia's role in identifying and assessing new risks as a result of workplace changes as well as opportunities to improve work, health and safety. However, there is currently no set criteria around how this is undertaken.

Eight submissions to the Consultation RIS commented on this recommendation. Submissions from business and industry representatives, academia and union groups widely supported its implementation. No impact on business, workers or the community from the creation of 'assessment criteria' was identified.

Option 2 is assessed as having nil regulatory impact, as it does not impose any regulatory requirements on business, individuals or the community. Consultation did not generate any concerns with this assessment.

Preferred option

Option 2 is recommended as it is expected to effectively address the problem, without imposing costs on business, workers or the community.

To further support this recommendation, the enforcement approach to non-traditional arrangements could be reinforced through a review of the NCEP (see Recommendation 21). The practical application of principles applying to duties (ss 13-17) in non-traditional arrangements could be demonstrated through guidance (Recommendation 5).

16. Recommendation 4: Clarify that a person can be both a worker and a PCBU

Recommended option - Option 3

That WHS ministers agree that Safe Work Australia update existing guidance material to clarify the operation of the model WHS Act in a contractual chain.

Objective

To secure the health and safety of workers and workplaces by ensuring PCBUs and workers understand their duties.

What is the problem?

The 2018 Review found that the duties of care framework in the model WHS laws are generally understood and working well. The 2018 Review considered that, for the avoidance of doubt, there is merit in amending the definition of PCBU to clarify that a contractor or subcontractor can be both a worker and a PCBU.

This recommendation was based on a technical drafting issue identified by Professor Richard Johnstone and Michael Tooma.¹⁸³ Johnstone and Tooma considered the current drafting of s 5(4) of the model WHS Act does not clearly reflect the policy intention of the 2008 National Review, that an individual contractor or subcontractor in a contractual chain can be a worker and be owed a duty by a PCBU further up the supply chain, and at the same time be a PCBU and owe duties to those further down the supply chain.

The 2018 Review made the following recommendation:

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

The current drafting of the model WHS Act allows a person to be both a worker and a PCBU. There is no evidence, other than the commentary from Johnstone and Tooma, to support the view that legislative change is required. Section 5(4) of the model WHS Act only operates to preclude an individual from being taken to conduct a particular business or undertaking *to the extent* the individual is solely a worker or officer of *that* particular business or undertaking. Section 5(4) provides that where an individual is engaged by a principal contractor solely as a subcontractor, they cannot be considered to have jointly conducted the business or undertaking of the principal contractor just because they are carrying out their work.

The individual subcontractor will, however, still owe the duties of a PCBU in relation to the business or undertaking that the subcontractor conducts (that is, the business or undertaking that involves the subcontractor contracting their services to the principal contractor or to other PCBUs).¹⁸⁴ This interpretation is consistent with the broader legislative context of the model WHS Act, which specifically contemplates that a person may owe different duties by virtue of being in more than one class of duty holder (see ss 7 and 15 of the model WHS Act).

It appears likely that the issue derives from a lack of guidance on how the duties of care in the model WHS Act apply up and down the supply chain, rather than a problem with the drafting of the legislation.

¹⁸³ Johnstone, R and Tooma, M, *Work Health & Safety Regulation in Australia: The Model Act*, Federation Press, 2012, pp 57-58.

¹⁸⁴This interpretation applies even if 'worker' is taken to include a 'corporation providing services' to the principal as suggested by Richard Johnstone and Michael Tooma in *Work Health & Safety Regulation in Australia: The Model Act*, Federation Press, 2012, p 58.

Analysis of options

Option 1 - Status quo

Maintaining the status quo would not address the problem. However, submissions did not confirm the extent of the problem. No concern was raised in submissions to the Consultation RIS that the application of s 5(4) of the model WHS Act is unclear. There was also no evidence provided of issues occurring from this provision being misinterpreted.

Only four submissions to the Consultation RIS commented on this issue. This indicates that the concerns raised in the 2018 Review about the operation of s 5(4) are not widely shared by stakeholders. The Australian Chamber opposed the change and indicated that legislative change should not be the preferred response if a solution to the problem can be achieved through clearer guidance. Providing guidance material as a solution to the problem is considered at Option 3.

Option 2 –

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.

Option 2 would amend the model WHS laws to clarify that a person can be both a worker and a PCBU, depending on the circumstances. However, on a plain reading of the model WHS Act this is already the case.

No evidence was provided in submissions to the Consultation RIS to directly support the need for legislative amendment. The Queensland Law Society submission stated that there is a wider need to review the definition of PCBU to ensure it appropriately captures digital platforms (Recommendation 3 addresses this particular issue).¹⁸⁵ However, this is a different issue to what Recommendation 4 is seeking to address.

NSW introduced a Bill in November 2019 implementing this option by including a note to ss 5 and 7 stating that a person can be a PCBU and worker.¹⁸⁶

The benefit of this option would be to address any doubt or confusion about the operation of the duties of care in the model WHS Act in a contractual chain. There is not, however, evidence in support of this being necessary. There would be minimal, if any, regulatory costs associated with such an amendment as it would not be a change to the current operation of the Act and there is no evidence to support that stakeholders are confused about the scope of the Act. Conversely, it could be the case that there are negative regulatory impacts as business may be confused by such a legislative change when there is no perceived need for it. Further, an amendment to s 5(4) is likely to go unnoticed by these businesses and not have the desired effect of clarifying the scope of a PCBU.

Option 2 is assessed as having nil regulatory impact as the legislative change would only seek to clarify the existing operation of the model WHS Act. Consultation confirmed that stakeholders are not experiencing issues with the current operation of the model WHS Act, so any amendment is likely to have a minor or nil cost or benefit for businesses. There may be a minor cost output for businesses in ensuring they read and understand the amendments. Consultation did not generate any concerns with this assessment.

Option 3 –

Safe Work Australia update existing guidance material to clarify the operation of the model WHS Act in a contractual chain.

Consultation supported the view that the model WHS Act, including s 5(4), operates in a contractual chain as intended. However, there may be a general lack of clarity about how the model WHS Act operates in a contractual chain.

¹⁸⁵ See also Chamber of Minerals and Energy of WA submission to the Consultation RIS, p 13.

¹⁸⁶ Work Health and Safety (Amendment) Review Bill 2019 (NSW).

As discussed, the Australian Chamber suggested that clarification, if needed, could be achieved through clearer guidance. Updating existing guidance to clarify the operation of the Act in a contractual chain is likely to improve businesses' understanding of WHS laws, especially for small businesses. This may in turn lead to improved health and safety outcomes for workers. There may be a minor cost to business in understanding any new guidance material but such costs would likely be negated by the benefit of a greater understanding of the laws. It may also result in cost savings for regulators if there is a reduction in requests for advice.

A benefit of this option would be that guidance would be more readily accessible to small businesses including the self-employed. These businesses usually find it difficult to keep up with changes to the model WHS laws and may have knowledge gaps of their WHS responsibilities including how to apply duties to their own situation.¹⁸⁷

Option 3 is assessed as having minor to nil regulatory impact, as it only seeks to clarify the existing operation of the model WHS Act through guidance. There may be a minor cost output for businesses in ensuring they read and understand the amendments to the guidance material. However, the benefit of improved health and safety outcomes through greater understanding of contractual chains outweighs the initial cost output. Consultation did not generate any concerns with this assessment.

Preferred option

Option 3 is recommended as a problem has not been identified that warrants legislative change. However, Option 3 would revise guidance material to remove any remaining doubt on this issue. This would not generate regulatory costs and would avoid costs associated with legislative amendments.

¹⁸⁷ Safe Work Australia, 'Qualitative research for the 2018 Review of the Model Work Health and Safety Laws', report prepared by Instinct and Reason, unpublished, 2018.

17. Recommendation 5: New model Code on the Principles that apply to duties

Recommended option – Option 2

That WHS ministers agree that Safe Work Australia develop a new model Code or other practical guidance on how PCBUs can meet the obligations associated with the Principles), including examples of:

- 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).

Objective

- To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.
- To provide for fair and effective workplace representation, consultation, cooperation and issue resolution in relation to health and safety.

What is the problem?

The 2018 Review found the core principles underpinning the model WHS laws are difficult to apply in practice and there is confusion about the interaction of ss 13-17 of the model WHS Act, that is, the Principles, as well as the duty to consult, co-operate and co-ordinate under s 46 of the model WHS Act, particularly in non-traditional arrangements.

Submissions to the 2018 Review from business and industry representatives and unions consistently identified this as a well-known and prevalent issue that should be progressed as a matter of priority. This was highlighted in a submission to the Consultation RIS from Marie Boland who clarified her intention for Recommendation 5 and re-emphasised the importance of progressing this recommendation.

The 2018 Review made the following recommendation:

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:

- *the application of the Principles to labour hire, outsourcing, franchising, gig economy and other modern working arrangements, and*
- *processes for PCBUs to work cooperatively and cohesively to discharge their duties (in the context of the duty to consult, co-operate and co-ordinate with other duty holders—s 46 of the model WHS Act).*

Analysis of options

Option 1 – Status quo

Maintaining the status quo would not address the problem. If businesses do not understand their WHS requirements (specifically the Principles and s 46 of the WHS Act), this can lead to inadvertent non-compliance and reduced health and safety outcomes.

Option 2 –

Develop a new model Code or other practical guidance¹⁸⁸ on how PCBUs can meet the obligations associated with the Principles, including examples of:

¹⁸⁸ Recommendation 5 of the 2018 Review stated ‘Develop a model Code to provide practical guidance on how PCBUs can meet the obligations associated with the principles contained in ss 13-17.’ This has been amended to read ‘Develop a model Code or other practical guidance on ...’ other practical guidance’ to support Safe Work Australia drawing on research and further consultation to determine the most appropriate form for guidance materials.

- *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).*

Option 2 would help facilitate businesses' understanding of WHS laws which may result in greater compliance and improved health and safety outcomes. There may be an initial output for businesses in reading and understanding new guidance. However, if businesses do not understand their WHS requirements, as may be the case under the status quo, this can put the safety of their workers at risk. The benefits of improving health and safety outcomes under Option 2 outweigh any potential costs to businesses.

Seven of the eight submissions received on this issue supported this recommendation. Consultation revealed some debate about the way that the arrangements should be clarified. For example, the Australian Chamber submitted that an additional model Code on principles would create confusion and likely compound the problem. This was the only submission that was opposed to Option 2. In recognition of this feedback, Option 2 has been amended to include either a model Code or other guidance materials to best achieve the objective of the recommendation. The approach taken would be a matter for Safe Work Australia under its usual tripartite arrangements.

Option 2 is assessed as having minor to nil regulatory impact, as it seeks to clarify, but not expand, existing duties. There may be a minor cost output for businesses in reading and understanding the guidance. However the benefit of improved health and safety outcomes through greater understanding of duties outweighs the initial cost output. Consultation did not generate any concerns with this assessment.

Preferred option

Option 2 is recommended as it is expected to effectively address the problem with minimal costs on business to understand the new guidance. The benefit of improved health and safety outcomes from a better understanding of WHS requirements is considered to outweigh these initial costs for business.

18. Recommendation 6: Consultation with workers

Recommended option – Option 2

That WHS ministers agree that Safe Work Australia update the model Code: *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.

Objective

To provide for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to WHS.

What is the problem?

The 2018 Review found genuine consultation, as prescribed by the model WHS Act, may not always occur. This is a problem as consultation requirements under the model WHS Act provide the opportunity for workers to raise safety issues as well as ensuring PCBUs can draw on the expertise of workers in managing risks.

The 2018 Review found the inclusion of more practical examples of consultation in the model Code: *Work health and safety consultation, co-operation and co-ordination* could assist workers and PCBUs in understanding what genuine consultation under the model WHS Act may look like.

The 2018 Review made the following recommendation:

Update the model Code: Work health and safety consultation, cooperation and co-ordination to include practical examples of how meaningful consultation with workers can occur in a range of traditional and non-traditional settings.

While consultation elicited minimal evidence regarding the extent of the problem identified by the 2018 Review, the feedback that was received supported the Review's recommendation.

Analysis of options

Option 1 – Status quo

Maintaining the status quo would not address the problem. Consultation requirements would continue to be misunderstood by PCBUs and workers and genuine consultations may not occur. This would likely result in reduced health and safety outcomes and potential non-compliance with the model WHS laws.

Option 2 –

Update the model Code: 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.

Option 2 may result in more effective consultation, particularly in small to medium businesses which have difficulty understanding requirements for effective consultation.

Five submissions to the Consultation RIS commented on this recommendation and there was general support for implementing Option 2. Three industry submissions expressed caution in adding practical examples to the model Code: *Work health and safety consultation, co-operation and co-ordination*, due to concerns that in practice this may result in reduced flexibility in how consultation occurs. The only worker representative to comment on this recommendation was the CPSU, which supported Option 2.

Option 2 is assessed as having minor to nil regulatory impact, as it only seeks to clarify existing duties through providing practical examples, rather than impose additional duties. There may be a minor cost output for businesses in ensuring they understand the practical examples. However, the benefit of improved health and safety outcomes through greater understanding of consultation outweighs the initial cost output. Consultation did not generate any concerns with this assessment.

Preferred option

Option 2 is recommended as it is expected to effectively address the problem with minimal costs on business to understand the new guidance. The benefit of improved health and safety outcomes from a better understanding of WHS requirements is considered to outweigh these initial costs for business.

19. Recommendation 7b: Negotiating work groups

Recommended option – Option 2

That WHS ministers agree to amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group.

Objective

To provide for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to WHS.

What is the problem?

The 2018 Review found there is a lack of clarity regarding which workers a PCBU is required to negotiate with in relation to the formation of work groups.

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 *NSW Fire Service v SafeWork NSW* [2016] NSWIRComm 4 (NSW Fire Service). In that case, it was noted it may be difficult for a PCBU to identify who they must negotiate with in the situation where the workers who are a party to the negotiations are also those that will form the work group.

The 2018 Review proposed that by amending s 52(1)(b) of the model WHS Act to align with the language in the Explanatory Memorandum to the model WHS Act, the perceived lack of clarity would be addressed. This would mean the model WHS Act would state that negotiations must be with workers *proposed* to form the work group.

The 2018 Review made the following recommendation:

Amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group.

Stakeholder consultations did not provide further evidence on the extent of the issue and it is not clear that this matter is causing widespread concern.

Analysis of options

Option 1 – Status quo

Maintaining the status quo would not address the problem. Confusion concerning negotiations to form work groups may continue, leading to potential delays and disputes during negotiations.

Option 2 –

Amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group.

Option 2 would clarify the existing intention of the model WHS Act and assist PCBUs to identify who they must negotiate with when forming a work group. This amendment would only impact PCBUs at workplaces where multiple work groups are formed.

Only three submissions to the Consultation RIS commented on this recommendation. All three submissions from the Australian Chamber, the Chamber of Minerals and Energy of WA and the Finance Sector Union of Australia supported Option 2.

Recommendation 7b is likely to reduce any confusion regarding s 52(1)(b) of the model WHS Act. However, the extent of this benefit would depend of the extent of the confusion currently experienced.

Option 2 is assessed as having nil regulatory impact as the legislative change would only seek to clarify the intended operation of the model WHS Act. Consultation did not generate any concerns with this assessment.

Preferred option

Option 2 is recommended as it is expected to address the issue identified in the NSW Fire Service case by clarifying the existing intention of s 52(1)(b) the model WHS Act.

20. Recommendation 11: HSC constitutions, agendas and minutes

Recommended option – Option 2

That WHS ministers agree that Safe Work Australia update the model Code: *Work health and safety consultation, cooperation and coordination*, and the Worker Representation and Participation Guide with examples of HSC constitutions, agendas and minutes.

Objective

To provide for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to WHS.

What is the problem?

Under the model WHS Act, the role of an HSC is to facilitate co-operation between the PCBU and workers in instigating, developing and carrying out measures designed to ensure the workers' health and safety. An HSC also has a role in assisting in developing standards, rules and procedures relating to health and safety that are to be followed or complied with at the workplace.

The 2018 Review found stakeholders including PCBUs and workers have issues with the administration of their HSCs. Some submissions to the 2018 Review noted that the problems with HSCs could be alleviated by providing examples or templates of documents relevant to HSCs in guidance material. The 2018 Review found that most issues related to the administration of HSCs, including the formation of an HSC and scheduling meetings (i.e. agendas and minute-taking).

The 2018 Review made the following recommendation:

Update the model Code and guidance with examples of HSC constitutions, agendas and minutes.

Submissions to the Consultation RIS did not provide further evidence on the nature and extent of the problem.

Analysis of options

Option 1 - Status quo

Maintaining the status quo would not address the problem. Business would continue to be confused about HSCs and find compliance excessively onerous. Workers may find it difficult to negotiate with PCBUs and have their views heard, leading to disputes with workers and their representatives.

Option 2 –

Update the model Code: Work health and safety consultation, cooperation and coordination, and the Worker representation and participation guide with examples of HSC constitutions, agendas and minutes.

Five submissions to the Consultation RIS commented on this recommendation. All submissions expressed general support for Option 2 to clarify the operation of HSCs. Guidance material was the preferred approach, with the Chamber of Minerals and Energy of WA indicating that the level of detail of this recommendation would not be suitable for inclusion in a model Code.

Option 2 would assist PCBUs and workers to meet HSC requirements. PCBUs would have a clearer understanding of how an HSC should function and may see a reduction in health and safety disputes, while workers would find it easier to consult with PCBUs and have health and safety issues addressed.

There may be a minor cost output for businesses in reading and understanding the guidance material. However, the lack of engagement on this recommendation indicates that the scope of this issue and in turn, the cost to business in understanding this change is likely to be very low.

Option 2 is assessed as having minor to nil regulatory impact as it would only seek to clarify existing duties through providing examples in the model Code and through guidance. There may be a minor cost output for businesses in ensuring they read and understand the examples. However the benefit of improved health and safety outcomes through greater understanding of HSC requirements is considered to outweigh the initial cost output. Consultation did not generate any concerns with this assessment.

Preferred option

Option 2 is recommended as it is expected to effectively address the problem, without imposing significant costs on business, workers or the community. Safe Work Australia will determine whether the examples are best placed in the model Code or guidance under its usual tripartite arrangements.

21. Recommendation 12: Issue resolution process and participants

Recommended option – Option 2

That WHS ministers agree that Safe Work Australia update the *Worker Representation and Participation Guide* to include:

- practical examples of how the issue resolution process works, and
- a list of the various representatives entitled to be parties in relation to s 80 of the model WHS Act (issues resolution) as well as ways of selecting a representative and informing the other parties of their involvement.

Objective

- To provide for fair and effective workplace representation, consultation, co-operation and issue resolution in relation to WHS.
- To assist duty holders and workers to apply the model WHS laws issue resolution process.

What is the problem?

The 2018 Review identified concerns that workers may not be currently accessing the range of representation that they are entitled to under the model WHS laws. The 2018 Review found stakeholders are confused about how to identify 'parties' to a WHS issue and have difficulties in understanding and applying the issue resolution process in the model WHS laws.

The 2018 Review made the following recommendation:

Update the Worker Representation and Participation Guide to include:

- *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.*

While the model WHS laws identify the relevant parties to an issue and specify that parties must be informed that there is an issue to be resolved, the laws do not prescribe who else those parties must inform about the dispute.

Consultation elicited minimal evidence regarding the extent of the problem identified by the 2018 Review.

Analysis of options

Option 1 – Status quo

Maintaining the status quo would not address the problem. Confusion would continue for stakeholders about the issue resolution process and worker representation under the model WHS Act.

Option 2 –

Update the Worker Representation and Participation Guide to include:

- *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 the involvement.*

Option 2 would provide clarity on the issue resolution process through an update to the *Worker Representation and Participation Guide*.

The concerns raised in the 2018 Review about the issue resolution process are not widely shared by stakeholders with only six submissions to the Consultation RIS commenting on Recommendation 11. However, all six submissions to the Consultation RIS that commented on this recommendation supported Option 2. Although not a widespread issue, additional guidance would address the concerns identified in the 2018 Review with minimal impact on business. It would provide clarity to workers and PCBUs on how the issue resolution process under the model WHS Act works and what representatives need to be involved. Greater clarity would result in greater compliance with the model WHS Act and improved health and safety outcomes for businesses.

Greater understanding may increase worker representation which may increase consultation costs for business where consultation is not currently meeting the requirements of the model WHS laws. However, improved consultation would also improve health and safety outcomes.

Option 2 is assessed as having minor to nil regulatory impact, as it would only seek to clarify the existing representation rights under the model WHS laws through guidance. Consultation did not generate any concerns with this assessment.

Preferred option

Option 2 is recommended as it is expected to effectively address the problem, without significant costs to industry, workers or the community.

22. Recommendation 14: Court powers for discriminatory or coercive conduct

Recommended option – Option 1

That WHS ministers agree to maintain the status quo.

Objective

To secure the health and safety of workers through effective and appropriate compliance and enforcement measures.

What is the problem?

The 2018 Review found that there is uncertainty as to whether courts and tribunals can issue declaratory orders for breaches of the discriminatory and coercive conduct provisions of the model WHS laws following *Thorburn v SafeWork SA* [2014] SAIRC 29 (Thorburn). In Thorburn, which related to a claim of discriminatory conduct in SA, the Court held that it can only make a declaratory order in discrimination proceedings if Parliament expressly conferred that power.

The 2018 Review made the following recommendation:

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.

Section 112 of the model WHS Act does not expressly confer a power to issue declaratory orders, however, it allows a court to make ‘any other order’ it considers appropriate. Arguably, this includes a declaratory order. The court’s interpretation of s 112 in Thorburn is considered to be confined to the individual circumstances of that case and has no broader impact on the interpretation of s 112. This is supported by the fact that Thorburn has not been confirmed by a court of higher authority, nor a court of similar status.

The evidence provided in the 2018 Review of this problem was anecdotal and submissions to the Consultation RIS did not provide any further evidence of the problem. As such, there is limited evidence of any uncertainty with respect to the interpretation of s 112 as not including the power for a court to make a declaratory order where it is considered appropriate to do so.

Analysis of options

Option 1 - Status quo

No concern was raised in submissions to the Consultation RIS that the application of s 112 of the model WHS Act is unclear. There was also no evidence provided of issues occurring from this provision being misinterpreted.

The model WHS Act already provides that a court can make a number of orders where a person is found to have assisted or engaged in discriminatory or coercive conduct, including orders for reinstatement or compensation or ‘any other order’ it considers appropriate (s 112(3)). This may include a declaratory order. In addition, should a court consider it is not appropriate to issue a declaratory order under s 112 of the WHS laws, a court could rely on individual jurisdictional legislation to issue a declaratory order where appropriate.¹⁸⁹

Option 2 –

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.

No comments were provided in submissions to the Consultation RIS regarding the effect of the Thorburn decision. There is also no evidence that this decision has caused uncertainty in practice.

It does not appear that amending the model WHS Act would generate any benefits for business, workers or the community as evidence does not support the view that there is a problem with the drafting or operation of the laws.

¹⁸⁹ Individual jurisdiction legislation may include the relevant court’s Act that confers its powers and functions.

Option 2 is assessed as having minor to nil regulatory impact as the WHS Act already provides for such declaratory orders to be made in appropriate circumstances. Consultation confirmed that stakeholders are not experiencing issues with the current operation of the model WHS Act, so any amendment is likely to have a minor or nil cost on businesses. An amendment to the model would not generate costs or benefits for businesses, workers or the community. Consultation did not generate any concerns with this assessment.

Preferred option

The status quo is recommended as there is no evidence that this is a problem that warrants legislative change and so it is not expected that Option 2 would result in any benefits.

23. Recommendation 16: Service of notices under the model WHS Act

Recommended option – Option 2

That WHS ministers agree to 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.

Objective

- To secure compliance with the model WHS Act through effective and appropriate compliance and enforcement measures.
- To facilitate a consistent national approach to WHS.

What is the problem?

The 2018 Review found that provisions in the model WHS laws dealing with the service of notices is inconsistent and therefore impractical. Additionally, submissions to the 2018 Review indicated that there has been confusion about whether a notice has to be issued in person.

The 2018 Review recommended that, to improve clarity, the provisions for the issuing and serving of a notice under s 155 (Powers of WHS regulator to obtain information) and s 171 (Power to require production of documents and answers to questions) should be aligned with those in s 209 (Issue and giving of notice) dealing with improvement, compliance and non-disturbance notices. Under s 209 a notice may be delivered in person, by fax or electronically. The notice may also be served at the person's last known address or workplace.

To address this, the 2018 Review made the following recommendation:

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.

This recommendation was also intended to improve consistency of approach across jurisdictions; the 2018 Review identified jurisdictions were interpreting the notice serving provisions of the model WHS Act differently.

Consultation revealed that this issue is having minimal impact on stakeholders with only two submissions received. However, while the impact may be negligible in practice, there is inconsistency between related provisions in the model WHS laws.

Analysis of options

Option 1 - Status quo

Although the extent of this problem appears to be minimal, maintaining the status quo would not address the problem. If the inconsistencies between ss 155 and 171 of the model WHS Act and s 209 of the model WHS Act are not addressed they may continue to cause issues for, and inconsistencies between, WHS regulators.

Option 2 –

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.

Option 2 would increase clarity for WHS regulators and support consistency in their approach for issuing and serving notices across harmonised jurisdictions. WHS regulators may incur a minimal cost in amending their processes, but this would be outweighed by the benefits. While the NSW WHS Regulators did not put forward a specific position on Recommendation 16, their submission noted that implementing the recommendation is “anticipated to be of benefit to WHS regulators by providing clarity and consistency”.

Two submissions to the Consultation RIS were received for this recommendation. Both submissions from the Chamber of Minerals and Energy of WA and Stan Ambrose supported Option 2.

While the impact of this problem may be negligible in practice, Option 2 would create consistency within the model WHS Act with minimal impact on businesses, workers or the community.

Option 2 is assessed as having minor regulatory impact. The service of notices issued under s 155 and s 171 in harmonised jurisdictions is currently similar to service of notices prescribed by s 209 of the model WHS Act. WHS regulators may incur very minor costs in adjusting their procedures to comply with the change. However, the benefits of clarity and certainty generated from this change are expected to outweigh those initial minimal costs to WHS regulators.

Preferred option

Option 2 is recommended as it is expected to reduce ambiguity, and foster a consistent interpretation and application of the model WHS Act by jurisdictions.

24. Recommendation 18: Extra-territorial application of regulators power to obtain information

Recommended option – Option 2

That WHS ministers agree to amend the model WHS Act to clarify that a WHS regulator's power to obtain information under s 155 has extra-territorial application.

Objective

- To secure compliance with the model WHS Act through effective and appropriate compliance and enforcement measures.
- To facilitate a consistent national approach to WHS.

What is the problem?

The 2018 Review found that co-operation between WHS regulators is restricted in cases where inspectors need to perform their functions in another jurisdiction, for example, where an incident occurs in the WHS regulator's jurisdiction that involves a company based 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 issue affects WHS regulators seeking information outside their industry or geographical jurisdiction.

The 2018 Review noted that a number of the issues reported were in relation to the lack of clarity over the extra-territorial reach of s 155 of the model WHS Act (the power to obtain information). Under s 155, WHS regulators can issue a notice to obtain information if they reasonably believe a person is capable of giving information, providing documents or giving evidence that relates to a possible contravention of the WHS Act or will assist in monitoring or enforcing compliance with the Act.

The 2018 Review made the following recommendation:

Amend the model WHS Act to clarify that a WHS regulator's power to obtain information under s 155 has extraterritorial application.

Consultation confirmed that the issues identified by the 2018 Review are causing confusion for stakeholders, including WHS regulators.

Analysis of options

Option 1 - Status quo

The status quo would not address the problem. There is a lack of clarity for WHS regulators about the extra-territorial reach of the power to obtain information. Maintaining the status quo would mean s 155 continues to be applied inconsistently across jurisdictions, causing issues for inspectors trying to obtain information.

One submission to the Consultation RIS indicated that there are already avenues for information sharing and drew attention to the existing memorandum of understanding between the Heads of Workplace Safety Authorities (HWSA)¹⁹⁰ and the exemptions to confidentiality requirements in s 271(3) of the model WHS Act. However, despite these available avenues, confusion still exists for WHS regulators.

Option 2 –

Amend the model WHS Act to clarify that the WHS regulator's power to obtain information under s 155 has extraterritorial application.

Option 2 would put beyond doubt that WHS regulators can exercise their power under s 155 extra-territorially. It also accords with the broader aim of the model WHS Act, which is to provide a nationally consistent approach to WHS compliance and enforcement.

¹⁹⁰ HWSA is made up of representatives from work health and safety regulators across Australia and New Zealand. They work together to promote and implement best practice in work health and safety in the areas of policy and legislative matters, education and enforcement. The Safe Work Australia CEO attends HWSA meetings as an observer.

Six of the eight submissions to the Consultation RIS for this recommendation expressly supported Option 2. NSW WHS Regulators noted that the NSW implementation of s 155A in the *Work Health and Safety Act 2011* (NSW) has been beneficial and would likely benefit other WHS regulators.¹⁹¹

Three submissions (the NSW Minerals Council, the Minerals Council of Australia and the Chamber of Minerals and Energy of WA) stated that any amendments would require careful consideration, particularly so that protections in other jurisdictions, such as the expanded right to protection against self-incrimination in SA, are not circumvented. This issue would be considered in the implementation of Option 2.

Mrs Kay Catanzariti's submission shared her personal experience of a cross-jurisdictional investigation into the death of her son, Ben, and the difficulties she observed in the WHS regulator seeking to obtain information from a business based in another jurisdiction.

Option 2 is assessed as having minor to nil regulatory impact because this amendment only seeks to clarify the intended operation of the model WHS Act. WHS regulators may incur an initial cost in amending their processes. However, the benefit of clarity and consistency across jurisdictions outweighs this cost.

Preferred option

Option 2 is recommended as it is expected to remove any doubt about the extra-territorial application of s 155 of the model WHS Act, improving clarity and fostering a consistent interpretation and application of the model WHS Act by jurisdictions.

¹⁹¹ Section 155A states that a notice under section 155 may be served on a person in respect of a matter even though the person is outside the State or the matter occurs or is located outside the State, so long as the matter relates to the administration of this Act (including, but not limited to, investigation of, or enforcement action relating to, offences against the Act).

25. Recommendation 19: Information sharing between WHS regulators

Recommended option – Option 2

That WHS ministers agree to amend the model WHS Act to include a specific power for WHS regulators to share information between jurisdictions in situations where it would aid them in performing their functions under the model WHS laws.

Objective

- To secure compliance with the model WHS Act through effective and appropriate compliance and enforcement measures.
- To maintain and strengthen the national harmonisation of laws relating to WHS and to facilitate a consistent national approach to WHS.
- To ensure efficient and appropriate sharing of information between WHS regulators in different jurisdictions.

What is the problem?

Section 152(g) of the model WHS Act already sets out information sharing with a corresponding WHS regulator as one of the functions of WHS regulators. As such, the recommendation intends to clarify, rather than change, the existing intention and operation of the model WHS Act.

The 2018 Review found WHS regulators are concerned that information sharing across jurisdictions is hindered by cumbersome processes and the confidentiality provisions in the model WHS Act.

The 2018 Review noted the confidentiality provisions in s 271 of the model WHS Act include a list of circumstances where the provisions do not apply and these enable the sharing of information between inspectors in different jurisdictions. This was also detailed in the Consultation RIS – the intention of the model WHS Act is for information sharing between WHS regulators to be captured within the exemptions to the confidentiality provisions of the model WHS Act.

The 2018 Review made the following recommendation:

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.

Submissions to the Consultation RIS confirmed that there is some confusion for stakeholders and WHS regulators about how the confidentiality provisions apply to information sharing between WHS regulators. This confusion may impede compliance and enforcement, and reduce harmonisation between jurisdictions due to different interpretations.

Analysis of options

Option 1 - Status quo

Maintaining the status quo would not address the problem. There is a lack of clarity for WHS regulators about their ability to share information to assist in investigations without breaching the confidentiality provisions in the model WHS Act. Maintaining the status quo would mean that there would continue to be ambiguity about this operation, resulting in inconsistent application across jurisdictions.

One submission to the Consultation RIS indicated that there are already avenues for information sharing and drew attention to the existing memorandum of understanding between the Heads of Workplace Safety Authorities and the exemptions to confidentiality requirements in s 271(3) of the model WHS Act. However, despite these available avenues, confusion still exists.

Option 2 –

Amend the model WHS Act to include a specific power enabling WHS regulators to share information between jurisdictions in situations where it would aid them in performing their functions in accordance with the model WHS laws.

Option 2 would provide clarity and reduce existing misconceptions about information sharing. Five of the eight submissions received to the Consultation RIS supported this recommendation, including some WHS regulators. Service NSW considered the recommendation would benefit WHS regulators in improving information sharing and supporting the efficient progress of investigations.

The Chamber of Minerals and Energy of WA supported the recommendation but noted that further consultation is required. Similarly the Minerals Council of Australia and the NSW Minerals Council stated that any amendments would require careful consideration to ensure they do not inadvertently circumvent self-incrimination protections in certain WHS laws. This issue would be considered as part of the implementation of Option 2.

Option 2 is assessed as having minor to nil regulatory impact because this amendment would only seek to clarify the intended operation of the model WHS Act. WHS regulators may incur an initial cost in amending their processes, however, the benefit of clarity and consistency across jurisdictions, and improved information sharing between WHS regulators, outweighs this initial cost.

Preferred option

Option 2 is the preferred option as it is expected to encourage greater information sharing among WHS regulators. Option 2 is also expected to result in more efficient investigations, assist WHS regulators to identify WHS trends and lead to joint WHS regulator operations or initiatives.

26. Recommendation 20: Incident Notification Provisions

Recommended option – Option 2

That WHS ministers agree that Safe Work Australia review notification provision in the model WHS Act with the objective of ensuring that:

- the incident notification provisions meet the intention outlined in the 2008 National Review
- the incident notification provisions capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements, and
- WHS regulators have appropriate visibility of work-related psychological injuries and illnesses.

Objective

To secure compliance with the model WHS Act through effective and appropriate compliance and enforcement measures.

What is the problem?

The 2018 Review found the mandatory incident notification provisions in the model WHS Act are not working as intended, cause confusion, are ambiguous and do not necessarily capture all relevant incidents. WHS regulators commented that requirements are often misunderstood by PCBUs, which leads to cases of both under-reporting and over-reporting.

The 2018 Review found that lack of notification or incorrect notification limits the ability of WHS regulators to investigate incidents and potential WHS breaches in a timely manner. A lack of appropriate notification also limits the ability of WHS regulators to identify trends and take appropriate action.

The 2018 Review also found that the provisions may not be operating as intended due to important principles outlined in the 2008 National Review being contained only in explanatory materials and not in the model WHS Act itself. These include that the test for serious injury or illness is objective and that incidents should be notified where there is a causal link to the work activity of the PCBU rather than the workplace.

Further, the 2018 Review identified a lack of notification triggers for psychological injury under s 35 of the model WHS Act (which defines a *notifiable incident*). This creates uncertainty about whether or when psychological health incidents need to be reported to WHS regulators. Further, the absence of either express incident notification triggers, or other notification requirements in the model WHS laws in relation to psychological injury limits WHS regulators' visibility of such injuries and potential breaches of WHS laws. Without this data WHS regulators are limited in their ability to identify trends and take appropriate action.

The 2018 Review made the following recommendation:

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.

Consultation confirmed that stakeholders have concerns with existing incident notification provisions, however there were a range of responses to Recommendation 20.

Analysis of options

Option 1 - Status quo

Maintaining the status quo would not address the problem. Feedback to the 2018 Review and the Consultation RIS has identified confusion and concern in relation to the incident notification provisions.

Option 2 –

Review notification provision in the model WHS Act with the objective of ensuring that:

- *the incident notification provisions meet the intention outlined in the 2008 National Review,*
- *the incident notification provisions capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements, and*
- *WHS regulators have appropriate visibility of work-related psychological injuries and illnesses.*¹⁹²

Of the 11 submissions to the Consultation RIS on this recommendation, most focused on the prospect of a notification obligation for psychological injuries. Union submissions supported a psychological injury notification requirement. Professionals Australia stated that there is an urgent need to evaluate whether the incident notification process is applicable to psychological injuries.

Given the concerns stakeholders have raised with the existing incident notification provisions, there is a need to further explore the extent of the problem and identify potential solutions. Further review of the incident notification provisions is likely to provide useful analysis on the appropriateness of a psychological injury notification trigger and its nature.

Some submissions specifically opposed a psychological injury notification. The Australian Chamber considered it would create unintended consequences such as further confusion and significant burden for WHS regulators and business. The AiG indicated that incident notification provisions are not designed to deal with types of situations such as psychological injuries that are not usually associated with an incident. The HIA stated it would be at odds with the policy intent of the incident notification provisions because of the distinct and subjective nature of psychological injuries. Other submissions such as the Minerals Council of Australia were cautious and stated that further assessment and analysis was required. To address these concerns, any review should consider the purpose of incident notification and where it is needed to support the WHS regulator to carry out its functions. Also any review should consider whether other notification mechanisms and triggers may be more appropriate in achieving the objective of ensuring that WHS regulators have appropriate visibility of work-related psychological injuries and illnesses.

Option 2 would provide an opportunity for the concerns raised through consultation to be analysed and appropriate solutions developed.

Option 2 is assessed as having minor to nil regulatory impact, as it would not involve regulatory change at this time. Three submissions to the Consultation RIS disagreed with the assessed regulatory impact of this option. As this recommendation was only for a review at this time, the regulatory impact is nil. If Option 2 is preferred and as an outcome of the review process, regulatory change is proposed, a further assessment of regulatory impacts would be conducted.

Preferred option

Option 2 is recommended as it is expected to provide an effective pathway to address the problem without imposing costs on business, workers or the community. It would provide the opportunity for further consultation to understand specific issues and identify appropriate solutions.

¹⁹² The wording of Option 2 has been amended to ensure that the scope of the review would allow consideration of whether the current incident notification framework is the most suitable method to ensure WHS regulators have appropriate visibility of work related psychological injuries and illnesses.

27. Recommendation 21: NCEP

Recommended option – Option 2

That WHS ministers agree that Safe Work Australia review the NCEP to include supporting decision-making frameworks relevant to the key functions and powers of the WHS regulator to promote a nationally consistent approach to compliance and enforcement.

Objective

- To provide a balanced and nationally consistent framework to secure the health and safety of workers and workplaces.
- To secure compliance with the model WHS Act through effective and appropriate compliance and enforcement measures.

What is the problem?

The 2018 Review found that WHS regulators do not have a consistent approach when performing their compliance and enforcement functions. This was supported by submissions from business, unions, HSRs and workers. The 2018 Review highlighted that this lack of consistency was impacting PCBU's ability to comply with their WHS duties.

The 2018 Review made the following recommendation:

Review the NCEP to include supporting decision-making frameworks relevant to the key functions and powers of the WHS regulator to promote a nationally consistent approach to compliance and enforcement.

The 2018 Review identified a number of topics that could be considered as part of the review of the NCEP. These included, how WHS regulators:

- approach new working arrangements, relationships, business models and technologies
- assess and identify duty holders and their related duties during investigations, and
- determine which compliance and enforcement tool is appropriate in the circumstances.

The 2018 Review noted WorkSafe New Zealand's Enforcement Decision-making Model provided a useful example for consideration as part of an NCEP review.

Consultation confirmed that stakeholders consider the NCEP could be more effective, particularly in ensuring consistent approaches by WHS regulators.

Analysis of options

Option 1 - Status quo

Maintaining the status quo would not address the problem. No submissions to the Consultation RIS supported maintaining the status quo.

Option 2 –

Review the NCEP to include supporting decision-making frameworks relevant to the key functions and powers of the WHS regulator to promote a nationally consistent approach to compliance and enforcement.

Option 2 would support a more transparent and consistent approach to compliance and enforcement. It would likely provide an effective means of addressing the problem identified. Option 2 would likely generate benefits for duty holders in understanding how to comply with the model WHS laws. It is also anticipated that a nationally consistent approach to enforcement and compliance would benefit industry, business, workers and the community. There may be initial compliance costs for industry and business however, it is anticipated these would be offset by subsequent safety improvements.

Conducting a review of the NCEP has broad support from stakeholders. Seven submissions to the Consultation RIS commented on this recommendation. All submissions that indicated a preference regarding Recommendation 21 supported Option 2.

The Chamber of Minerals and Energy of WA noted that any proposed decision-making framework would require careful assessment to ensure it is balanced and allows for the appropriate consideration of a range of enforcement options.

Option 2 is assessed as having minor regulatory impact, as it would not involve regulatory change. It would likely involve an initial output from WHS regulators in understanding and utilising the decision-making frameworks. However, the change is expected to provide assurance to the community that there is a consistent approach taken across jurisdictions.

Preferred option

Option 2 is recommended as it is expected to provide an effective pathway to a nationally consistent approach to compliance and enforcement.

28. Recommendation 22: Penalty levels

Recommended option – Option 2

That WHS ministers agree to increase penalty levels in the model WHS Act and to review penalty levels as part of future reviews of the model WHS Act.

Objective

To secure compliance with the model WHS Act through effective and appropriate compliance and enforcement measures.

What is the problem?

The 2018 Review found that penalty levels should be increased in order to retain their real value as a deterrent. The 2018 Review noted that as the model WHS laws set pecuniary penalties by monetary values rather than penalty units, it was clear that the intention was to regularly review those penalties and adjust them if necessary.¹⁹³

The Industrial Deaths Senate Inquiry also found that the 'low level of penalties' do not effectively deter organisations from non-compliance with WHS laws and similarly recommended a review of the monetary penalty levels in the model WHS laws (Recommendation 20).

The 2018 Review made the following recommendation:

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.

The 2018 Review also stated that the recommendation to increase penalties should be considered as part of a package with Recommendations 23a, 23b and 25, which relate to enhancing the Category 1 offence, introducing an offence of industrial manslaughter and introducing sentencing guidelines. The intention of these recommendations is to increase the severity of penalties and thereby enhance deterrence under the model WHS laws.

Consultation revealed broad support for this recommendation of the 2018 Review.

Analysis of options

Option 1 - Status quo

Maintaining the status quo would not address the problem. The value of the maximum penalties for non-compliance with WHS obligations would continue to decrease in real terms, due to inflation. Over time this would reduce the deterrent effect of penalties.

Two submissions supported the status quo. The submission from the Chamber of Minerals and Energy of WA stated that a further increase in penalties without justification is not in line with principles of good regulation.¹⁹⁴ The Australian Chamber's submission referred to studies that question the deterrent effects of fines and suggest that there is no mechanical effect of more severe sanctions leading to higher compliance.¹⁹⁵

Option 2 –

Increase penalty levels in the model WHS Act and to review penalty levels as part of future reviews of the model WHS Act

Option 2 would ensure that penalties under the WHS laws retain their real value as a deterrent. This would also allow for the maximum penalty for a Category 1 offence to be increased taking into account jurisdictional increases since the implementation of the model WHS laws, if any, and ensure, where appropriate, consistency with penalties for industrial manslaughter and general criminal manslaughter.

¹⁹³ The *Work Health and Safety Act 2011* (Qld) uses penalty units rather than a monetary value. However, the penalty units correspond to the monetary value set out in the model WHS Act.

¹⁹⁴ Chamber of Minerals and Energy of WA submission to the Consultation RIS, p 20.

¹⁹⁵ Australian Chamber submission to the Consultation RIS, p 25.

There has been broad support from stakeholders in favour of Option 2. Of the eight submissions received from the Consultation RIS, six stated that they supported increasing penalty levels. The AiG commented that the maintenance of the real value of penalties is appropriate.

Option 2 has been assessed as having minor regulatory impact. This is because any costs associated with this recommendation are costs of non-compliance.

Preferred option

Option 2 is recommended as it is expected to effectively address the problem. It also provides an opportunity to review the penalties for the Category 1 offence, including whether it should be amended in accordance with Recommendation 23.

29. Recommendation 24: WHS regulator accountability for investigations

Recommended option – Option 3

That WHS ministers agree to amend the model WHS Act to:

- extend the 12-month deadline for a person to request that a WHS regulator bring a prosecution in response to a Category 1 or Category 2 offence under s 231, for a period to be determined in consultation with jurisdictions, and
- require a WHS regulator to provide updates to the person who made the request until a decision is made on whether a prosecution will be brought.

Objective

To secure the health and safety of workers through effective and appropriate compliance and enforcement measures.

What is the problem?

The 2018 Review found the 12-month time limit to make a request to a WHS regulator to bring a prosecution often lapses before an investigation is complete. This may have negative consequences as any delay, inaction or indecision by a WHS regulator may result in a person not being able to request action be taken.

The 2018 Review made the following recommendation:

Amend the model WHS Act to remove the 12-month deadline for a request under s 231 that the WHS 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.

Where a request is made, a WHS regulator must advise the person making the request if the investigation is not complete within three months of receiving the request. However, there is no obligation on the WHS regulator to provide further updates to the person until such time it makes a decision on whether it will bring a prosecution.

The Consultative Committee for Workplace Fatalities and Serious Incidents stated where investigations take longer than 12 months, a family is unable to make an informed decision on whether or not to make a request for a prosecution, until the time limit has lapsed.¹⁹⁶

Consultation confirmed that there may be unintended consequences arising from the 12-month timeframe. However, it also suggested that removal of any deadline may impose an unreasonable record-keeping burden on WHS regulators.

Analysis of options

Option 1- Status quo

Maintaining the status quo would not address the problem. It would continue to be the case that a person may not be able to request that a prosecution be brought where an investigation is on foot for longer than 12-months. Concerns about the lack of information provided to a person requesting action would also not be addressed.

Option 2 –

Amend the model WHS Act to:

- *remove the 12-month deadline for a request under s 231 that the WHS regulator bring a prosecution in response to a Category 1 or Category 2 offence, and*
- *ensure ongoing accountability to the person who made the request until a decision is made on whether a prosecution will be brought.*

¹⁹⁶ Consultative Committee for Workplace Fatalities and Serious Incidents submission to the Consultation RIS, p 1.

Option 2 would amend the model WHS Act to remove the 12-month time limit to make a request and provide ongoing accountability to a person who made the request until a decision is made on whether a prosecution would be brought.

Option 2 would address concerns about the 12-month time limit lapsing before an investigation is complete. It would provide a benefit by supporting the ability of the community to consider the outcomes of investigations before making a decision on whether to request a prosecution. WHS regulators would also be held accountable for delay, inaction or indecision in cases where there has been a protracted investigation or significant delay in making a decision on prosecution.

Where a person's request for prosecution is denied on grounds that there is not enough evidence to make a determination, the person would still be kept informed of the investigation.

However, Option 2 may increase the administrative requirements on WHS regulators as they would be required to respond to requests and keep persons informed of investigations for longer periods of time. An unlimited time period may also be ineffective as there are limitation periods for prosecutions.¹⁹⁷

Option 2 has been assessed as having minor regulatory impact. WHS regulators are likely to incur additional resource costs in responding to requests and keeping persons informed of investigations.

Option 3 –

Amend the model WHS Act to

- extend the 12-month deadline for a person to request that a WHS regulator bring a prosecution in response to a Category 1 or Category 2 offence under s 231, for a period to be determined in consultation with jurisdictions, and*
- require a WHS regulator to provide updates to the person who made the request until a decision is made on whether a prosecution will be brought.*

Option 3 would provide the most comprehensive response to the concerns in this area. NSW WHS Regulators and the AiG suggested that it is more appropriate to implement a longer time limit rather than remove the time period completely. NSW has recently introduced a Bill that would extend the time limit to 18 months.¹⁹⁸ Under this option, the intention would be to extend the period, however, the length of the extension under the model WHS Act would be determined through further consultation.

As noted by the Australian Chamber, removing the time limit completely for a person to make a request for a prosecution to be brought under Option 2 could cause issues with the preservation of evidence, access to witnesses and memory recollection.¹⁹⁹ The impact of these issues would be reduced under Option 3 as the time period for making a request would still be limited.

Option 3 is assessed as having minor regulatory impact. As with Option 2, WHS regulators are likely to incur additional resource costs in responding to requests and keeping persons informed of investigations. However, these costs are likely to be less significant than those under Option 2 because the time period for allowing a person to make a request would be limited.

Preferred option

Option 3 is recommended as it would ensure the WHS regulator is held to account for any delay, inaction or indecision while limiting potential negative impacts on WHS regulator costs in responding to requests and keeping persons informed of investigations. It would also be necessary to consider whether to amend s 231 to provide an option for extending the time limit in which a person can make a request in circumstances where the completion of an investigation is delayed (e.g. due to a coronial inquest) and to consider whether the requirement on the WHS regulator to provide updates to the person who requested the prosecution is general or prescriptive.

Both Options 2 and 3 would provide a benefit to the community and individuals who may have a personal connection to an investigation or are interested in a particular matter. However, Option 3 provides a better outcome by balancing the needs of the community with the resources of the WHS regulator.

¹⁹⁷ For example, see s 232 of the model WHS Act.

¹⁹⁸ Work Health and Safety (Amendment) Review Bill 2019 (NSW).

¹⁹⁹ Australian Chamber submission to the Consultation RIS, p 69.

30. Recommendation 25: Sentencing

Recommended option – Option 2

Safe Work Australia, working with relevant experts, will undertake a review into the feasibility of developing national WHS sentencing guidelines.

Objective

To secure compliance with WHS laws by ensuring that sentencing of WHS offences is consistent across all Australian jurisdictions.

What is the problem?

The 2018 Review found that there is a perception from stakeholders that sentences for WHS offences are inconsistent across jurisdictions and generally inadequate. The 2018 Review found that sentencing guidelines that apply to general criminal offences can lead to significantly reduced sentences when applied to WHS matters. This may be having an unintentional negative impact on the credibility of WHS prosecutions to deliver strong, specific and general, deterrent outcomes.

The Industrial Deaths Senate Inquiry also recommended that national WHS sentencing guidelines be developed to ensure consistent and appropriate sentencing for serious WHS breaches across jurisdictions (Recommendation 20).

The 2018 Review proposed a number of options that might achieve improved consistency in sentencing options, such as:

- creating sentencing guidelines based on the guidelines currently used in the UK
- taking a policy-based sentencing guideline approach similar to the NCEP
- creating guidelines to be agreed by WHS regulators for the purposes of making submissions to the courts on sentencing, or
- allowing courts to take into account relevant decisions in other jurisdictions with harmonised WHS laws.

Ultimately, the 2018 Review made the following recommendation:

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.

The 2018 Review emphasised that Recommendation 25 was made in recognition of the importance of consistent sentencing to achieving the objects of the model WHS Act and of the potential for individual jurisdictions' criminal and procedure laws to be impacting adversely on WHS law sentencing. It does not express a definitive view on the relative merits of the above options for addressing these concerns. Instead it is recognised that experts are needed to develop an appropriate approach given the complexities involved.

Few submissions were made to the Consultation RIS on the topic of sentencing guidelines. While the majority of those received were supportive of introducing guidelines, none of the submissions provided evidence or discussed the problem in detail.

Analysis of options

Option 1- Status quo

Maintaining the status quo would not address the problem. The stakeholder perception of inconsistent and inadequate sentencing for WHS offences would continue without these concerns being investigated or addressed.

Only one submission to the Consultation RIS supported maintaining the status quo. The NSW Minerals Council opposed introducing sentencing guidelines on the basis that they are unnecessary and that the judiciary is well-equipped to determine the appropriate penalties on a case-by-case basis.²⁰⁰ While this is certainly true, the aim of sentencing guidelines would not be to undermine the independence of the judiciary, but to support and promote consistency across jurisdictions, where it is appropriate.

Option 2 –

Safe Work Australia, working with relevant experts, will undertake a review into the feasibility of developing national WHS sentencing guidelines.

Option 2 would be a preliminary step in response to the recommendation to determine the nature and extent of any problem with sentencing in relation to WHS offences. The findings of this review would be used to formulate next steps in this area.

Seven submissions expressed support for the scoping or development of sentencing guidelines. The ACTU submitted that current laws do not provide an effective deterrent against non-compliance, and that inconsistencies across jurisdictions creates confusion and inequality.²⁰¹ This submission was supported by the NSW Nurses and Midwives' Association and the Shop, Distributive and Allied Employees' Association. The Chamber of Minerals and Energy of WA proposed that scoping sentencing guidelines should be undertaken as a priority and that no action should be taken on Recommendations 23a and 23b (amendments to the Category 1 offence and introduction of industrial manslaughter) until it is completed.²⁰² Similarly, the Australian Resources and Energy Group submitted that the development of sentencing guidelines is more sensible than amending the Category 1 offence or introducing an industrial manslaughter offence.

Option 2 is assessed as having nil regulatory impact, as it would not impose any regulatory requirements on business, individuals or the community. Consultation did not generate any concerns with this assessment.

Preferred option

Option 2 is recommended as it is expected to provide an effective pathway to address the problem without imposing costs on business, workers or the community. It would provide the opportunity for further consultation to consider the consistency of sentencing across jurisdictions for WHS offences and identify appropriate solutions on how WHS and criminal laws interact.

Option 2 would involve Safe Work Australia working with relevant experts to undertake a review into the feasibility of developing national WHS sentencing guidelines. Should this feasibility study demonstrate that sentencing guidelines should be developed, then a further assessment of the regulatory impact of those guidelines, if any, will be conducted.

²⁰⁰ NSW Minerals Council submission to the Consultation RIS, p 6.

²⁰¹ ACTU submission to the Consultation RIS, p 33.

²⁰² Chamber of Minerals and Energy WA submission to the Consultation RIS, p 21.

31. Recommendation 28: Amusement device infringements and operator training

Recommended option – Option 2

That WHS ministers agree to 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.

Objective

To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.

What is the problem?

The model WHS Regulations impose a number of requirements on the person with management or control of an amusement device. The requirements include keeping records²⁰³ and additional requirements to record information such as tests, inspections and maintenance²⁰⁴.

The 2018 Review considered that the recording requirements for log books for amusement devices may not provide sufficient information for a third party to assess whether a ride is safe, and that the operator is competent to operate it.

The safety of amusement devices was brought into focus by fatalities on amusement devices at the Royal Adelaide Show in 2014 and Dreamworld in 2016. In response to these incidents, SA and Queensland made, or are working towards making, changes to their requirements for amusement devices. The 2018 Review noted that Safe Work Australia would consider the findings of the Queensland Coroner's Inquest into the 2016 Dreamworld River Rapids Fatalities when the coroner's findings are available. However, the 2018 Review also recommended that specific amendments to the model WHS Regulations should proceed regardless of the findings of the Queensland Coroner²⁰⁵.

The 2018 Review made the following recommendation:

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.

While consultation elicited minimal evidence regarding the extent of the problem identified by the 2018 Review, the feedback received supported the Review's recommendation.

Analysis of options

Option 1- Status quo

Maintaining the status quo would not address the problem. It would continue to be the case that log books for amusement devices may not provide sufficient information for third parties to assess whether a ride is safe, and the operator is competent to operate it.

Option 2 –

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.

Option 2 would involve expanding the list of the content requirements for log books so that the person with management or control of an amusement device at a workplace must additionally ensure that statutory notices issued by any WHS regulator, and evidence of operator training and instruction are included in the log book.

²⁰³ Regulation 237 of the model WHS Regulations.

²⁰⁴ Regulation 242 of the model WHS Regulations.

²⁰⁵ The findings are not available as at 5 December 2019.

While there is already a requirement to make relevant information available to a WHS regulator on request,²⁰⁶ including the information outlined in Option 2 in the device's log book would ensure this information is always readily available to third parties.

This recommendation is in line with the steps being taken by SA and Queensland and is directed towards ensuring log books have sufficient information in them so a third party can ensure a ride is safe and the operator is competent to operate it.

Option 2 would generate minor costs to business not already recording details of statutory notices issued by any WHS regulator, and evidence of operator training and instruction in device log books.

Option 2 would provide a health and safety benefit, by providing relevant information to third parties to assess whether a ride is 'safe' and the operator is competent to operate it. Requiring additional information in a log book would also assist WHS regulators assess whether an amusement device is safe and whether the device operator is competent. This would provide particular benefit to WHS regulators when the device moves within and between jurisdictions.

The two submissions which commented on this recommendation supported the amendment. Safe Work NSW commented that amending regulation 242 is anticipated to result in some improvement in health and safety outcomes and warrants further evaluation.

Option 2 is assessed as having minor regulatory impact. This amendment may result in a minor cost to PCBUs not already recording this information in device log books. This cost would likely be offset by the benefit of increased availability of safety information and improved health and safety outcomes. Consultation did not generate any concerns with this assessment.

Preferred option

Option 2 is recommended as it is expected to effectively address the problem with minimal costs to PCBUs not already recording this information. This cost would be offset by the health and safety benefits of this information being readily available.

²⁰⁶ Section 155 of the model WHS Act.

32. Recommendation 30: Photographic ID on White Cards

Recommended option- Option 3

That WHS ministers agree to Safe Work Australia undertaking additional work to gain a greater understanding of the nature and scope of the problems identified in the 2018 Review and determine whether the recommendation is the most appropriate mechanism to treat them.

Objective

- To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.
- To ensure compliance through effective and appropriate compliance and enforcement measures.

What is the problem?

The 2018 Review found that some industry stakeholders have a lack of confidence in the quality of general construction induction training (White Card training) in preparing a worker to work safely in the construction industry. Submissions to the 2018 Review identified a combination of factors contributing to these concerns. These included quality and integrity issues in the vocational education sector as well as inconsistencies in different types of identification required on work sites.

The 2018 Review made the following recommendation:

Amend the model WHS Regulations to require photographic ID on White Cards consistent with HRW licences.

White Card vocational training

While out of scope for Safe Work Australia, efforts are being made by WHS regulators and the vocational education sector to address concerns about the construction induction vocational training course underpinning the White Card. For example, some state and territory WHS regulators have recently put in place arrangements designed to bolster the integrity of White Card training through measures such as requiring face-to-face rather than online training.

The Australian Skills Quality Authority (ASQA) has also identified the White Card training course (*CPCCWHS1001 Prepare to work safely in the construction industry*) as a 'training product of concern' in its *Regulatory Strategy 2019-2021*²⁰⁷. Consequently, ASQA will actively monitor providers that intend to deliver or currently deliver this training product.

Identification issues

One submission to the 2018 Review raised concerns about inconsistent photographic identification (photo ID) requirements between different types of safety licences. The submission by Unions NSW considered it confusing that HRW licences require photo ID, while White Cards do not. However, the 2018 Review suggested that adding photo ID to White Cards would be a more consistent approach and give greater confidence to a PCBU or WHS inspector that a White Card is legitimate.

Generally, submissions to the Consultation RIS did not confirm that the lack of photo ID on White Cards is causing issues for PCBUs or inspectors. It also did not provide insight into whether the recommendation of the 2018 Review would have an impact in addressing the broader issues with White Card training.

Analysis of options

Option 1- Status quo

Maintaining the status quo would not address the problems relating to the lack of confidence in the quality of White Card training. However, the nature and extent of the problem with respect to issues that are within the remit of WHS laws and policy responsibilities has not been well established.

²⁰⁷ ASQA, *Regulatory Strategy 2019-2021*, Australian Government, p 15.

The status quo was supported by a submission which noted concerns about financial costs resulting from the transition to photographic licences and that general concerns about training, assessment and identification which were highlighted in the 2018 Review were not being addressed.²⁰⁸

Option 2 –

Amend the model WHS Regulations to require photo identification on White Cards consistent with HRW licences.

Option 2 is unlikely to provide a benefit as it is not clear that including photo ID on White Cards would address the problems identified by the 2018 Review. Consultation did not provide insight into the extent of confusion being experienced by stakeholders from the inconsistencies between HRW licences and White Cards.

For example, if there is a concern that tests are being sat by a person other than the worker trying to obtain a White Card, this could be addressed by a requirement that the person sitting the exam provide photo ID, such as a passport or drivers' licence, establishing who they are (if this does not already occur). Further, if a PCBU was not confident a White Card belonged to a worker, the identity of the worker could also be confirmed with other photo ID.

NSW WHS Regulators noted that there are already differences between a White Card and HRW licence which undermines the argument that photo ID is necessary for consistency and to reduce confusion. This is because White Cards are issued only once, after a worker has completed their introductory training whereas a HRW licence must be re-issued every five years. This would also mean that if photo ID was required on a White Card, the value of the picture may diminish over time as a holder ages or modifies their appearance.

There are also a significant number of White Cards currently in circulation (2.1 million White Cards were issued in NSW alone since 2004)²⁰⁹. Assuming Option 2 would not operate retrospectively, given that White Cards are issued once and remain valid, there would be a significant transitional period where White Cards without photo ID would remain in circulation.

The Chamber of Minerals and Energy of WA, Unions NSW and an individual respondent provided general support for the recommendation. Service NSW acknowledged that the recommendation may assist, but that further consideration of the costs and benefits of this recommendation was needed.

Option 2 has been assessed as having minor regulatory impact. As noted by the NSW WHS Regulators submission to the Consultation RIS, it may involve additional cost for WHS regulators to change their processes. It may also result in confusion for businesses and workers while White Cards without photo ID remain in circulation.

Option 3 –

Additional work to be undertaken to gain a greater understanding of the nature and scope of the problems identified in the 2018 Review and determine whether the recommendation is the most appropriate mechanism to treat them.

Option 3 would support further investigation of the nature and extent of the problem. It would seek further evidence on whether concerns about fraud in obtaining and/or presenting White Cards can be quantified and the nature of fraud, if it exists. This would allow tailored and effective solutions to be developed.

This option would also provide a solid evidence base for any proposed regulatory change and avoid unnecessary costs.

As outlined above, it is not clear from consultation that Option 2 will address the problems identified in the 2018 Review. To ensure any amendment to the model WHS laws achieves its intended purpose, further work on the nature and extent of the problems is required.

Option 3 is assessed as having nil regulatory impact, as it does not involve regulatory change at this time. If regulatory change is proposed in the future, a further assessment of regulatory impacts would be conducted.

²⁰⁸ Confidential submission.

²⁰⁹ NSW WHS Regulators submission to the Consultation RIS, p 22.

Preferred option

Option 3 is preferred as this would allow further work to be undertaken to understand the extent and impact of any problems that exist, and whether the inclusion of photo ID on White Cards is the most appropriate way to address those problems.

33. Recommendations 31a and 31b: Referring to, and compliance with, Standards

Recommended options- Options 2a and 2b

That WHS ministers agree:

- that Safe Work Australia review the references to Standards in the model WHS laws with a view to their removal and replacement with the relevant obligations prescribed in the model WHS Regulations, and
- to 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.

Objective

- To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.
- To secure compliance through effective and appropriate compliance and enforcement measures.

What is the problem?

Standards are documents that provide guidance and set out procedures and specifications for goods, services and systems to ensure safety, reliability and consistency. The 2018 Review identified stakeholder concerns with the use of Standards in the model WHS laws, primarily the currency of referenced Standards, the cost of accessing Standards and uncertainty about whether compliance with a Standard is mandatory.

In the 2018 Review concerns about the cost of ensuring compliance with required Standards were raised by multiple stakeholders, particularly small businesses.

In addition to the 15 Standards referenced in the model WHS Regulations, the model Codes reference approximately 160 different Standards to provide additional guidance for PCBUs on how to meet their obligations under the model WHS laws.

While compliance with the Standards referenced in the model Codes is not mandatory, they may be relied on by a court to determine what is reasonably practicable in particular circumstances.

The 2018 Review made the following recommendations:

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.

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.

Submissions to the Consultation RIS did not provide evidence about the extent of the problem.

Analysis of options

Option 1- Status quo

Maintaining the status quo would not address the problem. Businesses would continue to experience uncertainty as to what their obligations are in relation to Standards and the obligations flowing from the Standards would not be reviewed.

Option 2 –

- a) *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 (Recommendation 31a).*

Option 2a would involve reviewing the references to the Standards and identifying where they can be replaced with a prescribed duty in the model WHS Regulations or model Codes.

Five submissions commented on this recommendation. Two submissions supported a review being conducted. The Chamber of Minerals and Energy of WA and the HIA support a review of the references to Standards in the model WHS laws. HIA supported removing all references to Standards in the model WHS Regulations and model Codes.

It is likely that Option 2a would mean it is easier for duty holders to understand their duties under the relevant the model WHS Regulations, as all of the duties would be located in the one place. This in turn may lead to improved health and safety outcomes.

Option 2a is assessed as having nil regulatory impact, as it does not involve regulatory change at this time. If, as an outcome of the review process, regulatory change is proposed, a further assessment of regulatory impacts would be conducted. Consultation did not generate any concerns with this assessment.

- b) Amend regulation 15 of the model WHS Regulations (Reference to Standards) to make clear that compliance with Standards is not mandatory under the model WHS laws unless this is specifically stated (Recommendation 31b).*

Option 2b would involve clarifying the existing legal status of Standards, by amending regulation 15 to make clear that compliance with Standards is not mandatory under the model WHS laws unless it is specifically stated.

All Standards referenced in the model WHS Regulations are already mandatory so this would be a clarification rather than a change. The Safe Work Australia information sheet – *Australian and other Standards* currently outlines the application of Standards referenced in the model WHS laws.

Three submissions discussed Recommendation 31b. The submission from the Australian Chamber supported the recommendation in principle but raised further concerns about the effect of references to Standards in model Codes. The submission from HIA expressed similar concerns to the Australian Chamber about the status of Standards in model Codes. HIA are of the view that it should be made clear that compliance with a Standard referenced in a model Codes is optional.

This option would likely have the benefit of increasing clarity as to existing obligations that would improve compliance and therefore safety.

Option 2b is assessed as having nil regulatory impact because this amendment only seeks to clarify the intended operation of the model WHS Act. Consultation did not generate any concerns with this assessment.

Preferred option

Options 2a and 2b are recommended as they are expected to directly address the problems without regulatory impact as they do not impose any new obligations.

34. Recommendation 32: MHF regulations

Recommended option - Option 2

That WHS ministers agree that Safe Work Australia review the model WHS Regulations dealing with MHF, with a focus on administrative or technical amendments to ensure they meet the intended policy objective.

Objective

- To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.
- To maintain and strengthen the national harmonisation of laws relating to WHS,
- To facilitate a consistent national approach to WHS.

What is the problem?

The 2018 Review found inconsistencies in the application of jurisdictional WHS Regulations for MHFs, with impacts especially experienced by businesses operating across multiple jurisdictions.

The 2018 Review made the following recommendation, noting the difficulties in achieving national consistency in MHF regulation (which often overlap with explosives and mining laws):

Review the model WHS Regulations dealing with MHFs, with a focus on administrative or technical amendments to ensure they meet the intended policy objective.

The extent of the problem was not clarified by submissions to the Consultation RIS.

Analysis of options

Option 1- Status quo

Maintaining the status quo would not address the problem. Although the extent of the problem is not clear, business may continue to experience confusion and compliance difficulties due to inconsistencies in MHF regulations across jurisdictions.

Option 2 –

Review the model WHS Regulations dealing with MHF, with a focus on administrative or technical amendments to ensure they meet the intended policy objective.

Option 2 would involve reviewing the MHF Chapter in the model WHS Regulations with a focus on administrative or technical amendments to improve usability, without negatively impacting other industries or regulatory schemes.

Three submissions to the Consultation RIS commented on this recommendation. Two submissions were provided by peak bodies (the Chamber of Minerals and Energy of WA and the Australian Chamber) and one submission was provided by the Department of Defence. The submissions supported the recommendation but did not provide substantive evidence on the extent of the problem. Some issues of concern raised by these stakeholders are out of the scope of the WHS legislation and may not be able to be addressed by Safe Work Australia, such as jurisdictional differences in fees and perceived regulatory overlap and duplication with other regulations including mining, explosives, dangerous goods and environmental legislation.

The submissions to the 2018 Review and the Consultation RIS do not provide sufficient evidence on the specific concerns (or the extent of those concerns), and how amendments to the model WHS Regulations would be relevant. To address this, the first step of Option 2 would be consult further with stakeholders on the nature and extent of the model WHS Regulations on MHFs. The review could also consider whether identified issues could be addressed by Safe Work Australia.

Option 2 is assessed as having nil regulatory impact, as it would not impose any new regulatory requirements on business, individuals or the community. If, as an outcome of the review process, regulatory change is proposed, a further assessment of regulatory impacts, if any, would be conducted. Consultation did not generate any concerns with this assessment.

Preferred option

Option 2 is recommended as consultation has confirmed that further work is needed to understand the nature and extent of the problem, and whether there is a problem that Safe Work Australia can appropriately address.

35. Recommendation 33: Crane licence classes

Recommended option – Option 2

That WHS ministers agree that Safe Work Australia review the HRW licence classes for cranes to ensure they remain relevant to contemporary work practices and equipment.

Objective

- To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.
- To provide a framework for continuous improvement and progressively higher standards of WHS.

What is the problem?

The 2018 Review found that HRW licences for cranes may not be relevant to contemporary work practices and equipment, based on concerns raised by the Crane Industry Council of Australia (CICA).

The 2018 Review made the following recommendation:

Review the HRW licence classes for cranes to ensure that they remain relevant to contemporary work practices and equipment.

The extent of the problem was not clarified by submissions to the Consultation RIS.

Analysis of options

Option 1- Status quo

Maintaining the status quo would not address the problem. The concerns of CICA that HRW licences for cranes may not be keeping up with modern requirements would not be addressed.

Option 2 –

Review the HRW licence classes for cranes to ensure they remain relevant to contemporary work practices and equipment.

Only three submissions to the Consultation RIS commented on this recommendation with the Chamber of Minerals and Energy of WA providing in principle support to a review. CICA recommended reviewing the HRW licence classes in Schedule 3 to the model WHS Regulations, however it did not provide substantial evidence as to why this is required. The feedback provided by stakeholders in response to the Consultation RIS did not include supported, or challenge, CICA's claims.

Given the lack of information provided, it is not clear that there is a problem with HRW licences that needs to be addressed. However, whether there is a problem cannot be fully understood unless an initial review of the HRW licence classes for cranes is undertaken.

Option 2 would therefore involve an initial review by Safe Work Australia of the HRW license classes for cranes in consultation with stakeholders and drawing on appropriate expertise. The review would enable the extent of the problem to be assessed and an appropriate response, if any, to be determined.

Option 2 is assessed as having nil regulatory impact, as it would not involve regulatory change at this time. One submission to the Consultation did not agree with the impact assessment in the Consultation RIS. As this option is for a review, at this stage, the regulatory impact would be nil. If Option 2 is preferred, a further assessment of regulatory impacts would be conducted.

Preferred option

Option 2 is recommended as consultation has confirmed that further work is needed to understand the nature and extent of the problem and whether there is a problem that Safe Work Australia can appropriately address.

36. Recommendations 34a and 34b: Asbestos registers and competent persons

Recommended options - Option 3 and Option 4

That WHS ministers agree to:

- publish additional guidance to improve asbestos register quality (Option 3), and
- 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 (Option 4).

Objective

To protect workers and other persons against harm to their health, safety and welfare through the elimination or minimisation of risks arising from work.

What is the problem?

Quality of asbestos registers

The model WHS Regulations require that a person with management or control of a workplace ensure that an asbestos register is prepared and kept at the workplace.²¹⁰ The model WHS Regulations do not provide restrictions on who may prepare an asbestos register. This is different to other types of asbestos work where the model WHS Regulations restrict the work to certain people with specific qualifications.²¹¹ One class of persons who may perform asbestos related work, such as asbestos identification, sampling and air monitoring, are “competent persons” who unless otherwise defined by the model WHS Regulations are ‘a person who has acquired through training, qualification or experience the knowledge and skills to carry out the task’.²¹²

Stakeholders are of the view that there are inconsistencies in the quality and nature of information provided in asbestos registers, which can affect asbestos management plans and workers’ ability to know the location and condition of asbestos. The 2018 Review considered that these inconsistencies may be occurring because the people preparing the asbestos registers do not have the appropriate skills or experience to do so.

To address this, the 2018 Review made the following recommendation:

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

It was not clear from the 2018 Review or submissions to the Consultation RIS whether there is a widespread issue around the quality and information provided in asbestos registers.

Competent persons for asbestos-related work

As specified above, under the model WHS Regulations, there are certain types of asbestos related work that can be done by a “competent person” as defined in regulation 5 of the model WHS Regulations. The 2018 Review found that some stakeholders consider the term “competent person” for asbestos-related work is too broad, making it unclear as to who should or must perform certain asbestos-related tasks and exactly what skills and experience a “competent person” should hold.

²¹⁰ Regulation 425(1) of the model WHS Regulations

²¹¹ For example under regulation 482 of the model WHS Regulations, a PCBU must ensure that a “competent person” carries out air monitoring of a work area where asbestos-related work is being carried out if there is uncertainty as to whether the exposure standard is likely to be exceeded.

²¹² Regulation 5 of the model WHS Regulations.

To address this, the 2018 Review made the following recommendation:

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.

Consultation did not provide further insight into the extent of the ambiguity relating to “competent persons”.

Analysis of options

Option 1- Status quo

Maintaining the status quo would not address the problems. Stakeholders’ views that there are inconsistencies in the quality of asbestos registers and ambiguity around who is a “competent person” for asbestos-related work would not be addressed.

Option 2 –

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 (Recommendation 34a)

Option 2 would aim to ensure asbestos registers are created by persons with the appropriate skills and experience, which may lead to improved quality and more consistent information on the condition and location of asbestos at the workplace.

Seven submissions to the Consultation RIS commented on Recommendations 34a and 34b. Stakeholders were generally supportive of the recommendation. However, there is insufficient evidence of the nature and extent of the problem to assess whether there is a widespread issue around the quality of and information provided in asbestos registers, or whether a legislative amendment to require a “competent person” to carry out this task would improve address that problem.

Given stakeholders also raised concerns around the meaning of “competent person” for asbestos-related work (see Option 3), requiring the same “competent person” to prepare asbestos registers is likely to add to any existing confusion about the requirements for asbestos registers.

Option 2 has been assessed as having minor regulatory impact. Requiring competent persons to complete the asbestos register may have a minor cost to PCBUs but these costs may be offset by health and safety improvements. Consultation did not generate any concerns with this assessment.

Option 3 –

Publish additional guidance to improve asbestos register quality

Option 3 would involve Safe Work Australia publishing additional guidance aimed at improving asbestos register quality. This would better inform PCBUs of their obligations in relation to asbestos registers and may provide safety benefits as a result of registers being improved and appropriately maintained.

Option 3 would be progressed as an interim measure to assist PCBUs with their asbestos registers, while further work is done on the issues raised by the 2018 Review on the term “competent person” in relation to asbestos-related work (see Option 4). The outcomes of this work would provide evidence on the nature and extent of the problem and inform future consideration of whether changes to the model WHS Regulations and model Codes would lead to health and safety benefits.

Option 3 is assessed as having nil regulatory impact, as it would not involve regulatory change at this time. Option 3 would only seek to clarify existing duties through guidance.

Option 4 –

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 (Recommendation 34b)

Option 4 would involve conducting a review of the existing requirements for competent persons for asbestos-related work, including whether amendments are required to the model WHS laws to impose specific competencies for asbestos work, or whether the existing approach should be maintained with guidance clarifying the skills and experiences required to be a competent person for asbestos work.

Two stakeholders (the Asbestos Safety and Eradication Agency and the AMWU) were concerned with the use of “competent persons” in relation to asbestos work in the 2018 Review. However, no submissions provided evidence about the extent of the issues or the benefits of amending the regulatory requirements for “competent persons”. For example, no issues were raised around the specific skills that competent persons are lacking, whether different classes of competent persons are required for different tasks, the quality of training and guidance material currently available, or potential costs and benefits to business.

Consultation did not reveal the full extent of the problem, or whether amendments to the model WHS Regulations are necessary. As such, a first step of Option 4 would be to conduct further consultation with stakeholders to understand the nature and extent of the problem.

Option 4 is assessed as having nil regulatory impact, as it would not involve regulatory change at this time. If, as an outcome of the review process, regulatory change is proposed, a further assessment of regulatory impacts would be conducted. Consultation did not generate any concerns with this assessment.

Preferred options

Options 3 and 4 are recommended as it is expected they would effectively address the problems. Option 3 would provide an interim solution by clarifying the ambiguity surrounding asbestos register requirements through guidance material. Option 4 will then allow for evidence to be gathered so an informed decision can be made on whether amendments to the model WHS laws regarding “competent person” requirements in relation to asbestos, including asbestos registers, is necessary.

37. Next steps

This Decision RIS has been provided to WHS ministers for consideration when deciding whether and how to implement measures to address problems identified by the 2018 Review.

Implementation and Review

Amendments to the model WHS laws, model Codes and guidance material

Amendments to the model WHS laws that are agreed by WHS ministers will be referred to Safe Work Australia to progress in collaboration with the Australian Parliamentary Counsel's Committee.

Development of recommended model Codes and additional guidance material and tools, or variation of existing materials, will also be undertaken by Safe Work Australia.

Recommendations that require further work

Safe Work Australia will progress options for further review or consultation.

Any options arising from the further work that require ministerial decision may be subject to a new regulation impact assessment process.

Further review of the model WHS laws

The 2008 National Review recommended the model WHS laws be subject to review "...at least once in each 5 year period". The then WRMC (now WHS ministers) agreed in-principle to this recommendation, subject to additional comments on practical arrangements such as the scope and approving authority.²¹³

²¹³ WRMC Response to 2008 National Review, 18 May 2009, response to recommendation 232, p 59.

Appendix A – Glossary

Term	Description
2008 National Review	National Review into model Occupational Health and Safety Laws (2008) first and second reports
2017 Qld Review	Best Practice Review of Workplace Health and Safety Queensland (2017)
2018 Review	<i>Review of the model work health and safety laws (2018) by independent reviewer Ms Marie Boland</i>
Agency	The Commonwealth agency supporting Safe Work Australia
Australian Chamber	Australian Chamber of Commerce and Industry
ACTU	Australian Council of Trade Unions
AiG	Australian Industry Group
AIHS	Australian Institute of Health and Safety
AMMA	Australian Mines and Metals Association
AMWU	Australian Manufacturing Workers' Union
ASQA	Australian Skills Quality Authority
Bridgestone	Bridgestone Australia Ltd
CICA	Crane Industry Council of Australia
COAG	Council of Australian Governments
COAG Guidelines	<i>Best practice regulation: A guide for ministerial councils and national standard setting bodies</i>
Construction Code	Model Code: <i>Construction work</i>
Consultation RIS	Consultation Regulation Impact Statement
CPSU	Community and Public Sector Union
Decision RIS	Decision Regulation Impact Statement
ETU	Electrical Trades Union of Australia

Term	Description
Final report	Review of the model Work Health and Safety laws: Final report (2018)
FW Act	<i>Fair Work Act 2009</i> (Cth)
HIA	Housing Industry Association
HRW licence	High risk work licence
HSR	Health and safety representative (see Part 5, Division 3 of the model WHS Act)
HSC	Health and safety committee (see Part 5, Division 4 of the model WHS Act)
Industrial Deaths Senate Inquiry	Senate Inquiry report - <i>They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia</i> (2018)
MHF	Major Hazard Facility
model Codes	model Codes of Practice
model WHS Act	model Work Health and Safety Bill
model WHS Regulations	model Work Health and Safety Regulations
National Guide	<i>National Guide: Work-related psychological health and safety: A systematic approach to meeting your duties</i>
OBPR	Office of Best Practice Regulation
PCBU	Person conducting a business or undertaking (see s 5 of the model WHS Act)
PIN	Provisional Improvement Notice (see Part 5, Division 7 of the model WHS Act)
RACP	Royal Australasian College of Physicians
SIG-WHS	Strategic Issues Group on WHS
SWA Members	Safe Work Australia Members (see Part 3 of the <i>Safe Work Australia Act 2008</i>)
SWMS	Safe Work Method Statement
TWU	Transport Workers Union

Term	Description
White Card	General construction induction training card (see regulations 5 and Part 6.5 of the model WHS Regulations)
WHS	Work health and safety
WHS ministers	The Minister of the Commonwealth, and the Minister of each state and territory, who is responsible, or primarily responsible, for administration of WHS or occupational health and safety laws.
WHS regulators	Commonwealth, state and territory government agencies with regulatory responsibility for WHS under WHS or occupational health and safety laws.

Appendix B – Submissions to the Consultation RIS

Safe Work Australia received 102 written submissions in response to the Consultation RIS on recommendations of the 2018 Review. Permission was granted to publish the following 88 submissions:

Australian Council of Trade Unions	Chamber of Commerce and Industry Queensland
Australian Helicopter Industry Association	Comcare
Australian Manufacturing Workers' Union	Community and Public Sector Union - PSU group
Andrew Cashin	Consult Australia
Anonymous (Submission 19062601)	Consultative Committee for Workplace Fatalities and Serious Incidents
Anonymous (submission 19080507)	Department of Defence
Anonymous (Submission 2036896)	Dr Lana Cormie
Anonymous (Submission 2059617)	Dr Rachael Potter and Professor Maureen Dollard
Anonymous (Submission 2063378)	Electrical Trade Union Australia
Anonymous (Submission 2063598)	Finance Sector Union of Australia
Anonymous (submission 2064194)	Grant Russell
Anonymous (submission 2064391)	Health Services Union
Anonymous (submission 2064394)	Housing Industry Association
Anonymous (submission 2064714)	Human Factors and Ergonomics Society of Australia
Anthony Bate	Kay Catanzariti
Anthony D. LaMontagne	Ken F
Asbestos Safety and Eradication Agency	Linda Moussa
Ashlea Cunico & Debra Cunico	Marie Boland
Australasian Fire & Safety	Mark and Janice Murrie
Australian Chamber of Commerce and Industry	Master Electricians Australia
Australian Education Union NSW Teachers Federation Branch	Matthew Paull, Australian Petroleum Production and Exploration Association
Australian Industry Group	Maurice Blackburn Lawyers
Australian Institute of Company Directors	Mr Greg Zappelli
Australian Institute of Health and Safety	NSW Business Chamber
Australian Nursing and Midwifery Federation	NSW Minerals Council
Australian Psychological Society	NSW Nurses & Midwives' Association
Australian Resources & Energy Group AMMA	NSW WHS Regulators
Australian Services Union	Occupational Health Society of Australia WA Branch Inc
Australian Small Business and Family Enterprise Ombudsman	Pamela Gurner-Hall
Bernard Corden	Patrick Farrell
Beyond Blue	Police Association of NSW
Bridgestone Australia Ltd	Professionals Australia
Chamber of Commerce and Industry of WA	

Queensland Law Society
Robyn Colson
Samantha Mary Wood
Shop, Distributive and Allied Employees
Association
Shauna Branford
South Australian Wine Industry Association
Stan Ambrose
Suicide Prevention Australia
The Chamber of Minerals and Energy of
Western Australia
The Minerals Council of Australia
The Queensland Resources Council

The Royal Australasian College of Physicians
Tony Hampton
Tony Vane
Transport Workers' Union of New South Wales
Troy Williams
Union Aid Abroad - APHEDA
Unions NSW
United Firefighters Union of Australia
United Voice
Victorian Workplace Fatalities and Serious
Incidents Reference Group
Women's Health Victoria
Woodside Energy