

TRANSITIONAL PRINCIPLES FOR IMPLEMENTING THE MODEL WHS ACT

BACKGROUND

1. Safe Work Australia has developed transitional principles that set out how arrangements under existing work health and safety (WHS) legislation are intended to transition to the new system. This will ensure a co-ordinated approach is taken to implementation following commencement of the model WHS Act, and that so far as possible all jurisdictions adopt harmonised transitional arrangements.
2. Safe Work Australia agreed to these transitional principles on 2 December 2010.
3. The transitional principles will be used to guide development of drafting instructions for transitional provisions.
4. For simplicity, this paper uses generic terminology such as 'health and safety representative', 'health and safety committee' and 'provisional improvement notice'. These are generally well-understood terms although variations have been adopted in some jurisdictions. These terms should be read as capturing all relevant variations.
5. These principles are intended to cover most areas that will require transitional arrangements to be put in place upon commencement of the model WHS Act, but are not intended to be exhaustive. Some issues unique to a particular jurisdiction may need separate consideration, e.g. funding arrangements.
6. These principles are not intended to prevent each jurisdiction from enacting additional transitional provisions as necessary, providing transitional arrangements are not materially inconsistent with these principles.
7. These principles cover transitional issues affecting the model WHS Act. It will be necessary to give further consideration to the proposed model WHS Regulations in due course.

PRINCIPLES

Repeal of existing WHS legislation

8. Existing WHS legislation (pre-harmonisation laws) in each jurisdiction should be repealed in total at the commencement of the model WHS Act.
9. However, the transition legislation in each jurisdiction should preserve the operation of specified parts of the pre-harmonisation laws, as set out in this document.

Transitional principle A:

Pre-harmonisation laws in each jurisdiction will be repealed from the commencement of the model WHS Act and the transition legislation will preserve the operation of specified parts of the pre-harmonisation laws.

Duties

Current duties

10. All duties imposed under pre-harmonisation laws will cease to operate on the date the model WHS Act and regulations commence in each jurisdiction and the duties that apply under the model WHS Act will apply from that time.
11. It will still be possible however, to prosecute offences that occurred before the commencement date under pre-harmonisation laws.

New duties

12. Each jurisdiction will be required to identify:
 - (a) the new duties, if any, that will be introduced by the model WHS Act, and
 - (b) any existing duties that will be substantially modified by introduction of the model WHS Act.
13. Examples may include proposed duties for designers of substances and also duties in relation to the 'buildability' of structures.
14. No "grace period" will be provided for after commencement of the model WHS Act, i.e. a period where duty-holders are not bound by new or substantially modified duties which would otherwise be applicable. A grace period should not be necessary because:
 - at the time of the commencement of the model WHS laws, the national WHS harmonisation process will have been in train for a number of years and the subject of extensive consultation of different types and considerable media coverage
 - all duties under the model WHS Act, including any new or substantially modified duties, can be considered to express the WHS expectations of the Australian community
 - a grace period may unduly restrict regulators in their compliance and enforcement functions, and
 - a grace period would undermine the intent of harmonisation for the duration of the grace period.

Transitional principle B:

Duties under the model WHS Act will apply on and from the date of commencement of the model WHS Act.

Upstream duties

15. There are three broad ways of categorising the stages of progress of a particular upstream activity at the time the model WHS Act comes into force:

Stage	Activities				
	Design	Manufacturing e.g. when considered by manufacturing batch	Supply	Importing	Installing, constructing or commissioning
1	Not started	Not started	Not supplied – goods held by supplier in storage	Thing is outside of Australia and is not in transit	Not started
2	Started but incomplete	Started but incomplete	Not supplied – goods in transit to recipient	Thing not in the jurisdiction, but is in transit to the jurisdiction	Started but incomplete
3	Completed	Completed	Supplied – goods have changed hands	Thing is in the jurisdiction – regardless of whether the importer has custody or control of the thing	Completed

16. In general, the following principles should apply at each stage.
17. If the activity is at **stage 1** when the model WHS Act commences, the relevant duty in the model WHS Act should apply to the activity. This includes obligations associated with the duty, such as an obligation to provide adequate information.
18. The relevant upstream duty and any associated obligations under the model WHS Act should not apply when the activity is at **stages 2 or 3**. In other words, the relevant duty, if any, under the pre-harmonisation laws in the jurisdiction should continue to apply to the activity. Paragraph 20 below contains a limited exception to this general principle relating to stage 2.
19. However, the ongoing application of pre-harmonisation laws to an activity at **stage 2** should be subject to a “sunset clause”. That is, after a certain period of time, if the activity remains at stage 2, the relevant duty and any associated obligations under the model WHS Act will apply to the activity at stage 2 from that time.
20. Generally speaking, the upstream activities can vary dramatically in their lead-in/completion times. For example, supply of certain goods may be completed in a very short period of time but the construction of a structure may take comparatively much longer. To minimise compliance difficulties and costs to upstream duty-holders associated with mid-activity changes to the relevant WHS requirements “sunset clauses” will differ depending on the activity.
21. Certain upstream duties incorporate a requirement to give adequate information to certain persons. For example, subclause 22(4) of the model WHS Act imposes a requirement on a designer to give adequate information (as specified in paragraphs (a)–(c)) to each person who is provided with the design for the purpose of giving effect to the design. Such requirements to ‘give adequate information’ about plant, a substance or a structure will not apply retrospectively, i.e. to activities at stages 2 or 3.
22. However, changes to the state of knowledge about plant, a substance or a structure may arise as a result of related requirement for upstream duty-holders, e.g. a requirement to carry out tests, examinations, calculations etc. For example, see subclause 22(3) of the

model WHS Act regarding designers which is expressly cross-referenced in paragraph 22(4) (b). If such testing, examination etc is carried out at any time—regardless of the stage the activity is at—this should trigger any related requirement to give adequate information under the model WHS Act.

Transitional principle C:

Upstream duties will apply to duty holders as follows:

- (a) Activities at stage 1 will be subject to the relevant model WHS Act duty on and from the commencement of the model WHS Act
- (b) Activities at stage 2 will continue to be subject to the relevant duty under pre-harmonised legislation, if any, for the following period of time after commencement of the model WHS Act:
 - (i) Design, installation and construction: 2 years
 - (ii) All other upstream activities: 1 year

After that period of time, the activity will be subject to the relevant duty in the model WHS Act, and

- (c) Activities at stage 3 will be subject only to the relevant duty under pre-harmonised legislation, if any.

Appointments and elected positions

- 23. Some appointments and elected positions currently existing under pre-harmonisation laws will be continued under the model WHS Act subject to the transitional arrangements outlined below, including appointments/elections to the following positions: inspector; health and safety representative (HSR); deputy HSR; health and safety committee (HSC) member; and WHS entry permit holder.
- 24. Other appointments or elected positions for which no equivalent provision is made under the model WHS Act will lapse.
- 25. However some appointments and elected positions may continue under provisions in pre-harmonisation laws that are drafted consistently with jurisdictional notes, e.g. appointments to local tri-partite advisory bodies.
- 26. Each jurisdiction will be required to determine:
 - (a) pre-harmonisation appointments and elected positions that must be continued under the model WHS Act, and
 - (b) pre-harmonisation appointments and elected positions that will lapse,after considering whether comparable pre- and post-harmonisation appointment/election requirements are similar enough to justify the continuance of pre-harmonisation appointments after commencement of the model WHS Act.

General principles

- 27. As a general principle, pre-harmonisation appointments or elected positions should be continued if:
 - (a) provision is made for a comparable appointment or elected position under the model WHS Act, and

- (b) the criteria for the appointment or election are not substantially different so as to undermine the objects or policy underpinning the model WHS Act. Whether the criteria are substantially different is a test to be determined on a case-by-case basis by the relevant jurisdiction.

Appointments and elections in progress

- 28. Some appointment or election processes may only be partly complete at the time the model WHS Act commences. For example, elections for HSRs or deputy HSRs at a workplace may have been conducted but not finalised; a person may have applied to be appointed as a WHS permit holder.
- 29. As a general principle, these kinds of partly-completed appointment or election processes should be preserved and recognised under the model WHS Act i.e. the appointment/election process should continue until completion in accordance with the process set out in the pre-harmonisation laws, and that process should be recognised as if it had been conducted under the model WHS Act.

Transitional principle D:

The model WHS regime will recognise comparable appointments and elected positions made under pre-harmonised legislation to the positions of inspector, HSR, deputy HSR, HSC member and WHS entry permit holder, and appointment/election processes commenced under pre-harmonised legislation for those positions.

Inspectors

Continuation of inspectors

- 30. As a general principle, pre-harmonisation inspector appointments should be continued under the model WHS Act or the regulator should make re-appointments under the model WHS Act. Each jurisdiction will determine which option—continuation or reappointment—is appropriate in their jurisdiction. The outcome will be the same. In some cases, inspectors may need to hold dual appointments under pre-harmonisation/ transitional laws and the model WHS Act.
- 31. As a general principle, inspector identification cards issued under pre-harmonisation laws should be taken to have been issued under the model WHS Act. This means that current inspector identification cards will be phased out over time.

Functions and powers of inspectors

- 32. As a general principle, inspectors will be able to perform functions and exercise powers under the model WHS Act at all times after commencement of the model WHS Act, including in relation to investigations into alleged offences against pre-harmonisation laws.
- 33. For this purpose, the powers of an inspector under the model WHS Act and any limitations or conditions on those powers will apply on and after commencement as though:
 - (a) a reference in the model WHS Act to a contravention of a provision of the legislation includes a reference to a contravention of the pre-harmonisation laws, and
 - (b) a reference in the model WHS Act to an offence against the legislation includes a reference to an offence against the pre-harmonisation laws that occurred prior to those laws being repealed.

Transitional principle E:

The model WHS transitional regime will permit inspectors to exercise powers under the model WHS Act on and from the commencement of that Act including in relation to matters which occurred prior to the commencement of that Act.

HSRsContinuation of HSRs

34. If pre-harmonisation HSRs or deputy HSRs are to continue in those roles following commencement of the model WHS Act, then as a general principle the person will continue to hold that appointment as if it had been made under the model WHS Act and the model WHS Act will apply accordingly.
35. The three-year term of an HSR as provided under the model WHS Act will be held to have started when the HSR was appointed under the pre-harmonisation laws.

Training requirements substantially the same

36. Most jurisdictions currently set out entitlements for HSR training. Approved HSR training courses across the country vary by content and, in some cases, by duration.
37. The model WHS Act will require HSRs and deputy HSRs to complete HSR training before exercising certain powers, including the power to issue provisional improvement notices and to direct that unsafe work cease.
38. In some jurisdictions, HSRs have never had these kinds of powers, so HSR training courses would not have covered this issue.
39. As a general principle and subject to the principle set out at paragraph 40 below, an HSR or deputy HSR should be treated as having completed training for purposes of the model WHS Act if they have completed approved initial HSR training under pre-harmonisation laws.
40. As a general principle, training that is provided under pre-harmonisation laws is taken to have been provided under comparable provisions of the model WHS Act.

Training requirements substantially different

41. If it is determined that the training requirements under pre-harmonisation laws are substantially different to those under the model WHS Act as determined by the jurisdiction on a case-by-case basis, the jurisdiction will be able to choose between one of two transitional options taking into account matters such as whether:
 - (a) those powers are currently available to HSRs within the jurisdiction, or
 - (b) current HSR training covers matters relating to the ceasing of unsafe work and the issuing of provisional improvement notices regardless of whether the HSR has undertaken the training.

<u>Option 1</u>	<u>Option 2</u>
<p>An HSR appointed under the pre-harmonisation laws must not be able to:</p> <p>(a) direct that unsafe work cease, or</p> <p>(b) issue provisional improvement notices,</p> <p>until the HSR completes additional training to satisfy the requirements in the model WHS Act (subclauses 85(5) and 90(4)).</p> <p>The HSR will be able to exercise all other powers of an HSR under the model WHS Act.</p>	<p>An HSR appointed under pre-harmonisation laws will be able to exercise all powers of an HSR under the model WHS Act for twelve months after the commencement of the model WHS Act.</p> <p>After those twelve months, if the HSR has not completed training to satisfy the requirements in the model WHS Act (subclauses 85(5) and 90(4)), the HSR's will not be able to exercise certain powers (e.g. issue PINs, direct unsafe work to cease).</p>

Transitional principle F:

From the commencement of the model WHS Act, the model WHS transitional regime will recognise existing HSR appointments for all purposes except where the model WHS Act training requirements are substantially different to the existing HSR training requirements. It will be determined by each jurisdiction whether training requirements are substantially different. If determined to be substantially different, the jurisdiction must legislate for one of the two options described in the table above.

Election process for HSR not completed under pre-harmonisation laws

42. Where the election process for a HSR or deputy HSR has commenced under pre-harmonisation laws but has not been completed before the commencement of the model WHS Act, the election process will be preserved and will be recognised by the model WHS Act. The appointment process should continue in accordance with the process set out in the pre-harmonisation laws, and that process should be recognised as if it had been conducted under the model WHS Act.
43. However, a “sunset clause” of three months should apply. That is, the election process must be completed within three months of commencement of the model WHS Act. If it is not completed in that time, the election process must start again under the process set out in the model WHS Act.

Eligibility to be elected as a HSR

44. A person disqualified from being a HSR under pre-harmonisation laws will be taken to have been disqualified under section 65 of the model WHS Act for the purposes of section 60 of the model WHS Act upon commencement. That means that they will not be eligible under section 60(b) of the model WHS Act to be elected as an HSR.

Continuation of HSCs

45. A HSC established under pre-harmonisation laws will be taken to be a HSC established under the model WHS Act upon commencement.
46. However, if the constitution of that HSC is inconsistent with the principles of clause 76 of the model WHS Act, adjustments must be made within one year of commencement of the model WHS Act to comply with the model WHS Act. If the constitution of the HSC has not been appropriately adjusted after this period, the PCBU or the workers who must agree to the constitution of the HSC under subclause 76(1) may ask the regulator to appoint an inspector to decide the matter.

Transitional principle G:

The model WHS regime will recognise existing HSCs, disqualifications from the position of HSR and, subject to a 3 month sunset period, election processes for appointment of HSRs.

Work groups

47. Work groups determined under pre-harmonisation laws will be taken to be determined under the model WHS Act upon commencement (unless the work groups do not comply with the WHS Act requirements—see paragraph 48). Work groups may be varied or re-determined from that time under the model WHS Act.
48. In some cases, work groups in existence prior to the commencement of the model WHS Act may not comply with the model WHS Act requirements, e.g. if the work group has not been determined by agreement between the PCBU and the workers: s 52(1). In this case, there will be a “sunset clause” on these work groups, whereby the existing work groups may continue for one year after the commencement of the model WHS Act. However, after that one year new work groups that comply with the model WHS Act requirements must be established if a request is made by a worker under section 50.

Transitional principle H:

The model WHS regime will recognise work groups established under pre-harmonisation legislation where those work groups comply with the requirements of the model WHS laws which may be amended in accordance with the procedures set out in the model WHS laws.

Where an existing work group does not comply with the requirements of the model WHS laws, the group may continue for up to one year after commencement of the model WHS Act. After that time, a new group which complies with the model WHS laws must be established if a request is made by a worker under section 50.

Agreed policies and procedures

49. As a general principle, procedures that have been agreed under pre-harmonisation laws are taken to have been agreed also for comparable provisions of the model WHS Act. This includes:
 - (a) procedures for consultation agreed between the person conducting the business or undertaking and workers,
 - (b) procedures for election of HSRs determined by workers in a work group.

50. This does not apply if the procedures fail to meet any minimum requirements prescribed in the model WHS Act or Regulations. In that case, the relevant parties will need to re-negotiate the relevant procedures within one year after commencement of the model WHS Act, and the issues resolution procedure under the model WHS Act will apply as necessary.

Transitional principle I:

The model WHS regime will recognise policies and procedures agreed under pre-harmonisation legislation where those policies and procedures comply with the requirements of the model WHS laws.

If existing policies and procedures do not comply with the requirements of the model WHS laws, the transitional laws will allow the continuation of those agreed policies and procedures for up to one year after commencement of the model WHS laws.

Authorisations

51. Authorisations, e.g. licenses, registrations, etc., issued under pre-harmonisation laws will continue to operate until the term of the authorisation expires.
52. Specific authorisations, determined by each jurisdiction, could be excluded from this principle if it is determined that it is necessary, in the interests of health and safety, that new authorisations be applied for, and granted, under the model WHS Act.

Applications made under pre-harmonisation laws

53. Each jurisdiction may determine how to deal with applications for authorisations made but not finalised before commencement of the model WHS Act, i.e. where the regulator has not made a decision on the application before commencement. This determination should be made taking into account individual hardships, e.g., application for renewal of a licence and applications where there are substantial differences in the training requirements.
54. If a person applies for an authorisation under pre-harmonisation laws and the application is rejected after the commencement of the model WHS Act, the person must reapply under the model WHS Act.

Existing mutual recognition will apply to those issued before commencement

55. In order to not disrupt mutual recognition arrangements that exist under pre-harmonisation laws, those arrangements will continue under the model WHS Act after commencement. For example, a licence to perform high risk work issued in one state prior to commencement of the model WHS Act should be recognised in another state if the licence would have permitted the person to carry out that work in another state under the pre-harmonisation laws.

Transitional principle J:

As a general principle, authorisations such as licenses, registrations, etc., issued under pre-harmonisation laws will be recognised by the model WHS regime until the term of the authorisation expires. Any relevant mutual recognition principles will also be recognised on the same basis.

Incident notification

56. There will be not be any transitional principles around incident notification requirements. The date of an incident will determine whether the pre-harmonisation laws or model WHS Act incident notification requirements must be complied with. Of course, each regulator has discretion to determine if they are satisfied with notification on a case-by-case basis.

Transitional principle K:

There will no transitional principles dealing with incident notification requirements.

Enforcement and complianceContraventions of pre-harmonisation laws

57. As a general principle, alleged offences against pre-harmonisation laws must be prosecuted under those laws, even if an investigation into them first started after commencement of the model WHS Act.

Improvement notices, provisional improvement notices and prohibition notices

58. The provisions of pre-harmonisation laws will continue to apply to an improvement notice, provisional improvement notice or prohibition notice issued under those laws, until the notice is addressed, expires or otherwise becomes defunct under those laws.

Enforceable undertakings

59. Each jurisdiction will be responsible for determining how they deal with enforceable undertakings made under pre-harmonisation laws on a case-by-case basis.

Legal proceedings

60. As a general principle, legal proceedings will be governed by the laws that prosecutions are brought under.

61. As a general principle 'use of code' provisions in pre-harmonisation laws will continue to apply to prosecutions brought under those laws as relevant.

Review of decisions

62. As a general principle, review provisions under pre-harmonisation laws will continue to apply to reviewable decisions made before commencement of the model WHS Act.

Use of codes of practice in proceedings

63. It may be necessary to continue application of a pre-harmonisation code of practice as necessary to prevent regulatory 'gaps', e.g. if a code is not finalised in time for commencement of the model WHS Act. However, the application of such codes of practice will continue only until they are replaced or repealed.

Transitional principle L:

As a general rule, the applicable enforcement and compliance provisions will be those contained the WHS legislation applicable at the time of the alleged breach.

Exemptions

64. As a general principle, exemptions granted under pre-harmonisation laws which relate to matters which would ordinarily also need to be the subject of an exemption under the model WHS laws will be recognised for up to 12 months after the commencement of the model WHS laws.
65. If the pre-harmonisation exemption was subject to a time limit that expires before the end of the 12 month period mentioned in the previous paragraph, the existing time limit will continue to apply i.e. the exemption will expire before the 12 month maximum.

Next Steps

66. As existing legislation differs significantly between jurisdictions, it is not feasible to develop “model transitional WHS legislation”. Accordingly, each jurisdiction will be responsible for drafting its own transitional legislation based on the agreed principles.
67. The Agency will monitor and review transitional legislation in the jurisdictions with a view to maximising harmonisation in this area.