



On 20 May 2021, Ministers responsible for work health and safety (**WHS**) from the Federal and each State and Territory Government met to finalise the response to the Boland Review. A Decision Regulation Impact Statement (**DRIS**) was prepared by Safe Work Australia (**SWA**) on the Boland Review and, in some cases, recommended alternative reforms to the Boland Review's recommendations (**DRIS Recommendation**).

The DRIS reflected an assessment of the feedback considered during the Consultation Regulation Impact Statement process and was considered by WHS Ministers in finalising their response to the Boland Review. The following table outlines, with respect to each Boland Review recommendation:

- the agreed response by the WHS Ministers. Notably, decisions required support of at least a two-thirds majority of Ministers;
- whether the Boland Recommendation or DRIS Recommendation has been implemented into the Model Law; and
- which Australian jurisdictions have implemented either the Boland or DRIS recommendation (or a version of it) to date.

Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<i>Agreed and implemented changes to the Model Laws</i>			
<p>Recommendation 2: Make regulations dealing with psychological health</p> <p>Amend the model WHS Regulations to deal with how to identify the psychosocial risks associated with psychological injury and the appropriate control measures to manage those risks.</p>	<p>Implement the Boland Review recommendation.</p>	<p style="text-align: center;">✓</p> <p>The model WHS Regulations have been amended to deal with psychosocial risks.</p> <p>New provisions define psychosocial hazards. Regulations 55A-55D clarify duties in relation to psychosocial hazards, including requiring PCBUs to have regard to all relevant matters when determining the control measures to implement to manage psychosocial hazards.</p>	<p>Vic has introduced proposed regulations which deal with psychological health. If passed, these are expected to commence in July 2022.</p> <p>NSW and WA have each introduced a Code of Practice on Managing Psychosocial Hazards at Work.</p>
<p>Recommendation 4: Clarify that a person can be both a worker and a PCBU</p> <p>Amend s 5(4) of the model WHS Act to make clear that a person can be both a worker and a PCBU, depending on the circumstances.</p>	<p><i>DRIS Recommendation:</i> SWA update existing guidance material to clarify the operation of the model WHS Act in a contractual chain.</p>	<p style="text-align: center;">✓</p> <p>In April 2022, Safe Work Australia published a new factsheet regarding WHS duties in a contractual chain to assist workers and PCBUs to understand</p>	<p>NSW has added a note to its definition of 'worker' to make clear that a person can be both a worker and a PCBU.</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
		<p>their duties arising under the model WHS laws and examples of how contractual relationships fit within the model WHS framework.</p>	
<p>Recommendation 6: Provide practical examples of how to consult with workers</p> <p>Update the model Code of Practice: Work health and safety consultation, co-operation and co-ordination to include practical examples of how meaningful consultation with workers can occur in a range of traditional and non-traditional settings.</p>	<p>Implement the Boland Review recommendation.</p>	<p style="text-align: center;">✓</p> <p>The varied model Code Work health and safety consultation, cooperation and coordination was published in March 2022.</p>	<p>NSW, ACT, Qld, SA, Tas and NT each rely on or have implemented a Code of Practice based on the previous version of the Model Code of Practice developed by SafeWork Australia and so have <i>not</i> yet implemented this recommendation.</p>
<p>Recommendation 7a: New arrangements for HSRs and work groups in small businesses</p> <p>Amend the model WHS Act to provide that, where the operations of a business or undertaking ordinarily involves 15 workers or fewer and an HSR is requested as per the requirements of the model WHS laws, the PCBU will only be required to form one work group for all workers represented by one HSR and a deputy HSR unless otherwise agreed between the workers and the PCBU.</p>	<p><i>DRIS Recommendation:</i> 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</p>	<p style="text-align: center;">✓</p> <p>The varied model Code Work health and safety consultation, cooperation and coordination was published in March 2022.</p>	<p>NSW, ACT, Qld, SA, Tas and NT each rely on or have implemented a Code of Practice based on the previous version of the Model Code of Practice developed by SafeWork Australia and so have not yet implemented this recommendation.</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<p>Recommendation 7b: Work group is negotiated with proposed workers</p> <p>Amend the model WHS Act to provide that a work group is negotiated with workers who are proposed to form the work group.</p>	<p>Implement the Boland Review recommendation.</p>	<p style="text-align: center;">✓</p> <p>A minor technical amendment to Section 52 to clarify that work groups are negotiated and agreed between the PCBU and the workers who are proposed to form the work group or their representatives. The Worker representation and participation guide has been updated to reflect this amendment.</p>	<p>ACT: If passed, the <i>Workplace Legislation Amendment Bill 2022 (ACT)</i> will implement this recommendation.</p> <p>All other Australian states and territories already had existing provisions reflecting this recommendation at the time they were made.</p>
<p>Recommendation 9: Inspectors to deal with safety issue when cancelling a PIN</p> <p>Amend the model WHS Act to provide that, if an inspector cancels a PIN for technical reasons under s 102 of the model WHS Act, the safety issue which led to the issuing of the PIN must be dealt with by the inspector under s 82 of the model WHS Act.</p>	<p><i>DRIS Recommendation:</i> SWA to 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.</p>	<p style="text-align: center;">✓</p> <p>Section 4.1 of the Worker Representation and Participation Guide has been updated including to clarify what options are available if there are still concerns that a WHS issue remains following the review of a PIN. The updated Guide was published in June 2022.</p>	<p>Qld and SA rely on the current amended version of the Worker Representation and Participation Guide so have <i>indirectly</i> implemented this recommendation.</p> <p>NSW relies on a previous version of the Worker Representation and Participation Guide as amended by SafeWork Australia and so has <i>not yet</i> implemented this recommendation.</p>
<p>Recommendation 10: HSR choice of training provider</p> <p>Amend the model WHS Act to make it clear that for the purposes of s 72:</p>	<p>Implement the Boland Review recommendation.</p>	<p style="text-align: center;">✓</p> <p>Section 72 has been amended so that a health and safety representative (HSR) or deputy HSR is now entitled to attend an HSR course of their choice, as long as it</p>	<p>ACT: if passed, the <i>Workplace Legislation Amendment Bill 2022 (ACT)</i> will make it clear that health and safety representatives to attend the training course of their choice.</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<ul style="list-style-type: none"> the HSR is entitled to choose the course of training, and if the PCBU and HSR cannot reach agreement on time off for attendance or the reasonable costs of the training course that has been chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter. 		<p>is a course that's approved by the regulator and that the HSR is entitled under the regulations to attend.</p> <p>If the PCBU and the HSR cannot reach agreement on time off for attendance or the reasonable costs of the training course chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter. The Worker representation and participation guide has been updated to reflect this amendment.</p>	<p>NSW implemented this amendment in 2020, following the release of the recommendations.</p> <p>All other Australian states and territories already had existing provisions reflecting this recommendation.</p>
<p>Recommendation 11: Provide examples of HSC constitutions, agendas and minutes</p> <p>Update the model Codes and guidance with examples of HSC constitutions, agendas and minutes.</p>	<p><i>DRIS Recommendation:</i> 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.</p>	<p style="text-align: center;">✓</p> <p>The varied model Code Work health and safety consultation, cooperation and coordination was published in March 2022.</p> <p>The Worker Representation and Participation Guide has been updated to include these examples. The updated Guide was published in June 2022.</p>	<p>NSW, ACT, Qld, SA, Tas and NT each rely on or have implemented a Code of Practice based on the previous version of the Model Code of Practice developed by SafeWork Australia and so have <i>not yet</i> implemented this recommendation.</p> <p>Qld and SA rely on the current amended version of the Worker Representation and Participation Guide so have <i>indirectly</i> implemented this recommendation.</p> <p>NSW relies on a previous version of the Worker Representation and Participation Guide as amended by SafeWork Australia and so has <i>not yet</i></p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<p>Recommendation 12: Update guidance on issue resolution process and participants</p> <p>Update the Worker representation and participation guide to include:</p> <ul style="list-style-type: none"> practical examples of how the issue resolution process works, and a list of the various representatives entitled to be parties in relation to the issues under s 80 of the model WHS Act as well as ways of selecting a representative and informing the other parties of their involvement. 	<p>Implement the Boland Review recommendation.</p>	<p style="text-align: center;">✓</p> <p>Section 7 of the Worker Representation and Participation Guide has been updated to clarify the range of representatives a party to an issue resolution process may seek to involve, and how they might go about this.</p> <p>Practical examples of issue resolution have been included at Appendix C to demonstrate how issue resolution might be applied across various industries and in a range of small, medium and large businesses.</p>	<p>Qld and SA rely on the current amended version of the Worker Representation and Participation Guide so <i>have indirectly</i> implemented this recommendation</p> <p>NSW relies on a previous version of the Worker Representation and Participation Guide as amended by SafeWork Australia and so has <i>not</i> yet implemented this recommendation.</p>
<p>Recommendation 13: Resolving outstanding disputes after 48 hours</p> <p>Amend the model WHS Act to provide for:</p> <p>(a) disputes under ss 82 and 89 of the model WHS Act to be referred to the relevant court or tribunal in a jurisdiction if the dispute remains unresolved 48 hours after an inspector is requested to assist with resolving disputes under the default</p>	<p><i>DRIS Recommendation: SWA to further scope the problem identified in Recommendation 13 of the Model Law Review.</i></p>	<p style="text-align: center;">✗</p> <p>At their 7 April 2022 meeting, Safe Work Australia Members agreed to maintain the status quo on the basis that the current provisions and jurisdictional processes are working as intended.</p>	<p>Qld has implemented amendments in accordance with the Boland recommendation so that a dispute may now be referred to the Queensland IR Commission.</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<p>or agreed procedures and with cease work disputes</p> <p>(b) a PCBU, a worker, an HSR affected by the dispute or any party to the dispute to notify the court or tribunal of the unresolved issue they wish to be heard</p> <p>(c) the ability for a court or tribunal to exercise any of its powers (including arbitration, conciliation or dismissing a matter) to settle the dispute, and</p> <p>(d) appeal rights from decisions of the court or tribunal to apply in the normal way.</p>			
<p>Recommendation 15: Remove 24-hour notice period for entry permit holders</p> <p>Amend the model WHS Act to retain previous wording in s 117.</p>	<p>Implement the Boland Review recommendation.</p>	<p style="text-align: center;">✓</p> <p>A WHS permit holder is no longer required to provide notice of their proposed entry and suspected contravention at least 24 hours before, but not more than 14 days before, the proposed entry and during the usual working hours at that workplace.</p> <p>A WHS permit holder must however provide notice of their proposed entry and suspected contravention as soon as practicable after entering the workplace</p>	<p>NSW, Vic, Qld, WA, Tas, NT and ACT already had provisions consistent with this recommendation.</p>
<p>Recommendation 16: Align the process for the issuing and service of notices under the model WHS Act to provide clarity and consistency</p>	<p>Implement the Boland Review recommendation.</p>	<p style="text-align: center;">✓</p> <p>Sections 155 and 171 were amended to align the service of notices with those</p>	<p>ACT: the <i>Workplace Legislation Amendment Bill 2022</i> (ACT) proposes to align the processes for issuing different types of</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<p>Amend the model WHS Act to align the service of notices provisions under s 155 and s 171 with those in s 209 of the model WHS Act dealing with improvement, compliance and non-disturbance notices.</p>		<p>under s 209 (improvement compliance and non-disturbance notices).</p>	<p>notices, while enabling inspectors to require the production of documents and answers to questions within 30 days.</p> <p>NSW has implemented this recommendation.</p>
<p>Recommendation 17: Provide the ability for inspectors to require production of documents and answers to questions for 30 days after the day they or another inspector enter a workplace</p> <p>Amend the model WHS Act to provide that, instead of being limited to the inspector who enters (or has entered) a workplace, the powers to require production of documents and answers to questions can be exercised by any inspector within 30 days following an inspector's entry to that workplace.</p>	<p>Implement the Boland Review recommendation.</p>	<p style="text-align: center;">✓</p> <p>Section 171 was amended to enable inspectors, within 30 days of any inspector's entry to the workplace, to require the production of documents or answers to questions related to the purpose of entry within a specified period or require a person to attend before the inspector at a specified time to answer questions including via audio or audio-visual link.</p>	<p>ACT: the <i>Workplace Legislation Amendment Bill 2022 (ACT)</i> proposes to align the processes for issuing different types of notices, while enabling inspectors to require the production of documents and answers to questions within 30 days.</p> <p>NSW has implemented this recommendation. However, it adds a qualifying statement to s 171(1)(c) requiring that an inspector specify a "reasonable time and place" for the person to attend for questioning.</p> <p>Qld had amended s 171 of its Act consistent with this recommendation, but did so prior to the release of the recommendations.</p> <p>In WA, the newly enacted WHS Act provides that an inspector who has entered a workplace can exercise their power to</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<p>Recommendation 18: Clarify that WHS regulators can obtain information relevant to investigations of potential breaches of the model WHS laws outside of their jurisdiction</p> <p>Amend the model WHS Act to clarify that the regulator's power to obtain information under s 155 has extraterritorial application.</p>	<p>Implement the Boland Review recommendation.</p>	<p style="text-align: center;">✓</p> <p>Section 155 was amended to clarify that a WHS regulator's power to obtain information has extra-territorial application.</p>	<p>require production of documents and answers to questions after entering a workplace or at any other time.</p> <p>WA has implemented this recommendation.</p> <p>ACT: the <i>Workplace Legislation Amendment Bill 2022 (ACT)</i> proposes to clarify that that WHS regulators can obtain information for investigations into possible WHS breaches from outside of their jurisdiction.</p> <p>NSW has implemented this recommendation with the addition of s 155A which clarifies that a Regulator may obtain information in respect of matter from outside the State as long as the matter relates to the administration of the NSW WHS Act.</p>
<p>Recommendation 19: Enable cross-border information sharing between regulators</p> <p>Amend the model WHS Act to include a specific power enabling regulators to share information between jurisdictions in situations where it would aid them in performing their functions in accordance with the model WHS laws.</p>	<p>Implement the Boland Review recommendation.</p>	<p style="text-align: center;">✓</p> <p>A new provision, Section 271A, clarifies the circumstances in which a WHS regulator or a person authorised by the regulator, may disclose the information, or give access to a document to any other person, including a corresponding</p>	<p>ACT: the <i>Workplace Legislation Amendment Bill 2022 (ACT)</i> proposes to facilitate cross-border information sharing between regulators.</p> <p>Vic has a provision which enables the Authority to share information with a</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
		regulator, or otherwise use the information or document.	<p>corresponding Authority in relation to matters or things arising under the OHS Act or Regulations.</p> <p>WA has a provision which allows information to be disclosed for the exercise of performance of a power or function under a corresponding WHS law (see s 271).</p> <p>NSW, Tas, NT, SA and Qld have provisions which allow information to be disclosed if it is reasonably believed that the use or disclosure is reasonably necessary for an enforcement body (see s 148).</p>
<p>Recommendation 23a: Enhance Category 1 offence</p> <p>Amend s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is grossly exposing an individual to a risk of serious harm or death.</p>	<p><i>DRIS Recommendation:</i> Implement the Boland Review recommendation 23a only – include gross negligence as a fault element in the Category 1 offence.</p> <p>The ministers did not agree to Boland's recommendation to add the offence of industrial manslaughter to the model Act, with ministers from the then conservative jurisdictions of NSW, South Australia, Tasmania and the Commonwealth jurisdiction opposing the move, meaning it did not receive the required majority of six votes.</p>	<p style="text-align: center;">✓</p> <p>The Category 1 offence in Section 31 now includes gross negligence as a fault element. The prosecution must prove either the fault element of gross negligence or recklessness, in addition to proving the physical elements of the offence.</p>	<p>NSW has implemented amendments consist with the DRIS Recommendation.</p> <p>ACT: the Workplace Legislation Amendment Bill 2022 (ACT) proposes to add gross negligence as a fault element to the category 1, reckless conduct offence.</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<p>Recommendation 24: Improve WHS regulator accountability for investigation progress</p> <p>Amend the model WHS Act to remove the 12-month deadline for a request under s 231 that the regulator bring a prosecution in response to a Category 1 or Category 2 offence and to ensure ongoing accountability to the person who made the request until a decision is made on whether a prosecution will be brought.</p>	<p>Notably, The Australian Capital Territory, the Northern Territory, Queensland, Victoria and Western Australia already have industrial manslaughter laws.</p> <p><i>DRIS Recommendation:</i> Amend the model WHS Act to:</p> <ul style="list-style-type: none"> extend the 12-month deadline for a person to request that a WHS regulator bring a prosecution in response to a Category 1 or Category 2 offence under s 231, for a period to be determined in consultation with jurisdictions, and <p>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.</p>	<p style="text-align: center;">✓</p> <p>Section 231 was amended to improve WHS regulator accountability for investigations by extending the timeframes in which a person can request that a WHS regulator bring a prosecution in response to a Category 1 or 2 offence.</p> <p>If an investigation is still ongoing, the WHS regulator must provide written updates on the progress of the investigation every three months until the investigation is complete</p>	<p>ACT: the Workplace Legislation Amendment Bill 2022 (ACT) proposes to improve WHS prosecution processes and accountability</p> <p>NSW has adopted the recommendation and extended the timeframe during which a person may request a prosecution be brought to 18 months and stipulated the requirement for a regulator to provide updates to the person who made the request.</p> <p>Vic has no timeframe on when a person may request that the Authority bring a prosecution (except that it must be 6 months after the matter or thing which the person considers constitutes an offence). It has adopted the recommendation to provide updates to the person who made the request.</p> <p>WA has provisions requiring a regulator to advise on the status of the investigation in the circumstances that an</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<p>Recommendation 26: Prohibit insurance for WHS fines</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 <p>take the benefit of such insurance or such an indemnity.</p>	<p>Implement the Boland Review recommendation.</p> <p>New South Wales, Victoria and Western Australia have already adopted this recommendation in the Work Health and Safety Act 2011 (NSW), Occupational Health and Safety Act 2004 (Vic) and the Work Health and Safety Act 2020 (WA), respectively.</p>	<p style="text-align: center;">✓</p> <p>There is now a prohibition on insurance and other similar arrangements that cover the costs of a monetary fine or penalty imposed on a person under the model WHS Act.</p> <p>A person cannot enter into an insurance contract or other arrangement providing insurance or an indemnity, or take the benefit of an insurance contract, other arrangement or indemnity to cover all or part of a liability for a monetary penalty.</p> <p>The model WHS Act also makes void any insurance contract or other arrangement to the extent that it purports to cover a person for all or part of a liability for a monetary penalty under the model WHS Act.</p>	<p>individual makes a written request to the regulator to bring a prosecution where no prosecution has been brought in the period six to twelve months after the alleged offence.</p> <p>ACT: If passed, the Workplace Legislation Amendment Bill 2022 (ACT) will ban PCBUs from entering into insurance contracts to cover WHS penalties.</p> <p>Vic, NSW and WA have implemented these recommendations.</p>
<p>Recommendation 28: Improved recording of amusement device infringements and operator training</p>	<p>Implement the Boland Review recommendation.</p>	<p style="text-align: center;">✓</p> <p>The revised regulations include new requirements for improved record keeping</p>	<p>ACT: the Workplace Legislation Amendment Bill 2022 (ACT) proposes to improve the</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<p>Amend reg 242 of the model WHS Regulations to ensure that details of statutory notices issued by any WHS regulator and evidence of operator training and instruction are included in the device's log book.</p>		<p>and operator training for amusement devices and passenger ropeways.</p> <p>Competent persons are now responsible for storage, or supervising storage, maintenance, testing, inspection and conducting a detailed annual inspection of amusement devices and passenger ropeways.</p> <p>The log book must now contain a wider range of information, including any statutory notices issued, maintenance records, operator details as well as instruction, training, daily checks and operation with and without passengers.</p> <p>The log book, operating and maintenance manuals must be kept with the amusement device and handed over if control of the device is relinquished.</p>	<p>recording of infringements and operator training relating to amusement devices.</p> <p>Qld has adopted a number of these amendments.</p>
<p>Recommendation 31b: Compliance with Standards not mandatory unless specified</p> <p>Amend reg 15 of the model WHS Regulations ('Reference to Standards') to make it clear that compliance with Standards is not mandatory under the model WHS laws unless this is specifically stated.</p>	<p><i>DRIS Recommendation:</i> Implement both recommendation 31a and recommendation 31b of the Boland</p>	<p style="text-align: center;">✓</p> <p>The revised regulations provide additional guidance on the circumstances in which there is an obligation to comply with the terms of a Standard referred to in the regulations and includes a note with an example to assist readers.</p>	<p>ACT: the Workplace Legislation Amendment Bill 2022 (ACT) proposes to make it clear that compliance with Australian Standards is not mandatory unless specified in a provision or clause of the WHS laws.</p>

Recommendations not agreed and recommendations agreed but not yet implemented



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<p>Recommendation 1: Review the model WHS Regulations and model Codes</p> <p>Review the model WHS Regulations and model Codes against agreed criteria on the purpose and content of the second and third tiers of the model WHS laws as they relate to the seven Australian Strategy priority industries.</p>	<p><i>DRIS Recommendation:</i> SWA develop a tool to assist duty holders in priority industries to identify the regulations that may apply to their business or undertaking.</p>	<p><i>In progress</i></p>	<p><i>Not applicable</i></p>
<p>Recommendation 3: Continuously assess new industries, hazards and working arrangements</p> <p>Safe Work Australia develop criteria to continuously assess new and emerging business models, industries and hazards to identify if there is a need for legislative change, new model WHS Regulations or model Codes.</p>	<p>Implement the Boland Review recommendation. SWA has already begun preliminary work on this recommendation as agreed by WHS Ministers.</p>	<p><i>In progress</i></p>	<p><i>Not applicable</i></p>
<p>Recommendation 5: Develop a new model Code on the principles that apply to duties</p> <p>Develop a model Code to provide practical guidance on how PCBUs can meet the obligations associated with the principles contained in ss 13–17 (the Principles), including examples of:</p> <ul style="list-style-type: none"> • the application of the Principles to labour hire, outsourcing, franchising, gig economy and other modern working arrangements, and • processes for PCBUs to work co-operatively and cohesively to discharge their duties (in the context of the duty to consult, co-operate and co-ordinate with other duty holders—s 46 of the model WHS Act). 	<p><i>DRIS Recommendation:</i> Develop a model Code or other practical guidance on how PCBUs can meet the obligations associated with the principles contained in ss 13-17 (the Principles), including examples of:</p> <ul style="list-style-type: none"> • The application of the Principles to labour hire, outsourcing, franchising, gig economy and other modern working arrangements, and • Processes for PCBUs to work cooperatively and cohesively to discharge their duties (in the context of the duty to consult, cooperate and coordinate with 	<p><i>In progress</i></p>	<p>Vic has implemented duties requiring labour hire providers and host employers to consult, cooperate and coordinate with each other when they share duties under the OHS legislation in respect of labour hire workers.</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
	<p>other duty holders – s 46 of the model WHS Act).</p>		
<p>Recommendation 8: Workplace entry of union officials when providing assistance to an HSR</p> <p>Safe Work Australia work with relevant agencies to consider how to achieve the policy intention that a union official accessing a workplace to provide assistance to an HSR is not required to hold an entry permit under the Fair Work Act or another industrial law, taking into account the interaction between Commonwealth, state and territory laws.</p>	<p>This recommendation was out of scope for WHS Ministers and was not considered.</p> <p>To date, the Fair Work Act has not been amended to allow a union official to access a workplace under state health and safety laws without a Federal entry permit.</p>	<p style="text-align: center;">✘</p> <p>Recommendation out of scope and not considered/agreed.</p>	<p style="text-align: center;"><i>Not applicable</i></p>
<p>Recommendation 14: Clarify court powers for cases of discriminatory or coercive conduct</p> <p>Amend the model WHS Act to make it clear that courts have the power to issue declaratory orders in proceedings for discriminatory or coercive conduct.</p>	<p><i>DRIS Recommendation:</i> Maintain the status quo.</p>	<p style="text-align: center;">✘</p> <p>Boland recommendation to amend the Model Law not agreed.</p>	<p style="text-align: center;"><i>None to date</i></p>
<p>Recommendation 20: Review incident notification provisions</p> <p>Review incident notification provisions in the model WHS Act to ensure they meet the intention outlined in the 2008 National Review, that they provide for a notification trigger for psychological injuries and that they capture relevant incidents, injuries and illnesses that are emerging from new work practices, industries and work arrangements.</p>	<p><i>DRIS Recommendation:</i> Review the incident notification provision in the model WHS Act with the objective of ensuring that:</p> <ul style="list-style-type: none"> • the incident notification provisions meet the intention outlined in the 2008 national review, • the incident notification provisions capture relevant incidents, injuries and 	<p style="text-align: center;"><i>In progress</i></p>	<p>ACT: the <i>Workplace Legislation Amendment Bill 2022 (ACT)</i> defines “sexual assault” as a notifiable incident. The amendment requires PCBUs to notify WorkSafe ACT of “an incident or a suspected incident that exposes a worker or any other person at the workplace to sexual assault”, and the obligation is not limited to circumstances where the</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
	<p>illnesses that are emerging from new work practices, industries and work arrangements; and</p> <ul style="list-style-type: none"> WHS regulators have appropriate visibility of work-related psychological injuries and illnesses. SWA has already begun preliminary work on this recommendation as agreed by WHS Ministers. 		<p>assault is proven, witnessed or results in the conviction of an assailant.</p> <p>Victoria has implemented amendments consistent with the DRIS Recommendation including:</p> <ul style="list-style-type: none"> Introducing amendments to its incident reporting provisions under the OHS Act; and Creating new regular reporting requirements in its OHS Regulations for certain categories of psychosocial hazards.
<p>Recommendation 21: Review the National Compliance and Enforcement Policy (NCEP)</p> <p>Review the NCEP to include supporting decision-making frameworks relevant to the key functions and powers of the regulator to promote a nationally consistent approach to compliance and enforcement.</p>	<p>Implement the Boland Review recommendation. SWA has already begun preliminary work on this recommendation as agreed by WHS Ministers.</p>	<p><i>In progress</i></p>	<p><i>Not applicable</i></p>
<p>Recommendation 22: Increase penalty levels</p> <ul style="list-style-type: none"> Amend the penalty levels in the model WHS Act to reflect increases in consumer price index and in the value of penalty units in participating jurisdictions since 2011, and Review the increased penalty levels as part of future reviews of the model WHS Act and 	<p><i>DRIS Recommendation:</i> Increase the penalty levels in the model WHS Act and review penalty levels as part of future reviews of the model WHS Act. Ministers also agreed to further consider significant increases to</p>	<p><i>In progress</i></p>	<p>NSW has implemented amendments consistent with the DRIS Recommendation.</p> <p>Notably, the following jurisdictions have implemented increased penalties in relation to Industrial Manslaughter:</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
------------------------------	--	--	---

model WHS Regulations to ensure they remain effective and appropriate.

penalties under the model WHS laws in relation to Category 1 offences.

- WA;
- Vic;
- ACT; and
- NT.

Further, the following jurisdictions have introduced penalties for offences for entering into an insurance contract to cover the cost of monetary fines or penalties:

- Vic;
- NSW; and
- WA.

Recommendation 23b: Industrial manslaughter

Amend the model WHS Act to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and include the following:

- The offence can be committed by a PCBU and an officer as defined under s 4 of the model WHS Act.
- The conduct engaged in on behalf of a body corporate is taken to be conduct engaged in by the body corporate.
- 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.

DRIS Recommendation: Implement the Boland Review recommendation 23a only – include gross negligence as a fault element in the Category 1 offence.

The ministers did not agree to Boland's recommendation to add the offence of industrial manslaughter to the model Act, with ministers from the then conservative jurisdictions of NSW, South Australia, Tasmania and the Commonwealth jurisdiction opposing the move, meaning it did not receive the required majority of six votes.



Boland recommendation to amend the Model Law not agreed.

The following jurisdictions have independently introduced a form of Industrial Manslaughter laws into their local WHS Act:

- Victoria
- ACT
- NT
- QLD
- WA

Although a Bill to introduce IM laws in South Australia lapsed in February 2022, the incoming Premier has indicated the Labour Government's commitment to pressing for the



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<p>The offence covers the death of an individual to whom a duty is owed.</p> <p>Safe Work Australia should work with legal experts to draft the offence and include consideration of recommendations to increase penalty levels (Recommendation 22) and develop sentencing guidelines (Recommendation 25).</p>	<p>Notably, The Australian Capital Territory, the Northern Territory, Queensland, Victoria and Western Australia already have industrial manslaughter laws.</p>		<p>introduction of IM laws in the State (refer to Schedule 3 below for more information on industrial manslaughter laws across Australia)</p>
<p>Recommendation 25: Consistent approach to sentencing</p> <p>Safe Work Australia work with relevant experts to develop sentencing guidelines to achieve the policy intention of Recommendation 68 of the 2008 National Review. As part of this process, any unintended consequences due to the interaction of local jurisdictional criminal procedure and sentencing legislation should also be considered. (I note that the work required by Recommendation 22 ('Increase penalty levels'), Recommendation 23a ('Enhance Category 1 offence') and Recommendation 23b ('Industrial manslaughter') could be combined with the work required by this recommendation).</p>	<p><i>DRIS Recommendation:</i> SWA, working with relevant experts, will undertake a review into the feasibility of developing national WHS sentencing guidelines</p>	<p><i>In progress</i></p>	<p><i>Not applicable</i></p>
<p>Recommendation 26: Prohibit insurance for WHS fines</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 	<p>Implement the Boland Review recommendation.</p> <p>New South Wales, Victoria and Western Australia have already adopted this recommendation in the Work Health and Safety Act 2011 (NSW), Occupational Health and Safety Act 2004 (Vic) and the Work</p>	<p style="text-align: center;">✓</p> <p>There is now a prohibition on insurance and other similar arrangements that cover the costs of a monetary fine or penalty imposed on a person under the model WHS Act.</p> <p>A person cannot enter into an insurance contract or other arrangement providing</p>	<p>ACT: If passed, the Workplace Legislation Amendment Bill 2022 (ACT) will ban PCBUs from entering into insurance contracts to cover WHS penalties.</p> <p>Vic, NSW and WA have implemented these recommendations.</p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<ul style="list-style-type: none"> provide insurance or a grant of indemnity for liability for a monetary penalty under the model WHS Act, and take the benefit of such insurance or such an indemnity. 	<p>Health and Safety Act 2020 (WA), respectively.</p>	<p>insurance or an indemnity, or take the benefit of an insurance contract, other arrangement or indemnity to cover all or part of a liability for a monetary penalty.</p> <p>The model WHS Act also makes void any insurance contract or other arrangement to the extent that it purports to cover a person for all or part of a liability for a monetary penalty under the model WHS Act.</p>	
<p>Recommendation 27: Clarify the risk management process in the model WHS Act</p> <p>Amend the model WHS Act to clarify the risk management process by including a hierarchy of controls (consistent with reg 36) and making any corresponding amendments necessary to the model WHS Regulations.</p>	<p><i>DRIS Recommendation:</i> SWA to further scope this issue to inform the development of guidance, particularly for small business, on the risk management process and the application of the hierarchy of controls.</p>	<p><i>In progress</i></p>	<p><i>None to date</i></p>
<p>Recommendation 29a: Add a SWMS template to the WHS Regulations</p> <p>Amend the model WHS Regulations to prescribe a SWMS template.</p>	<p><i>DRIS Recommendation:</i> Implement the Boland Review recommendation 29b – develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMSs.</p>	<p style="text-align: center;">✘</p> <p>Boland recommendation to amend the Model Law not agreed.</p>	<p><i>None to date</i></p>
<p>Recommendation 29b: Develop an intuitive, interactive tool to support the completion of fit-for-purpose SWMS</p>		<p><i>In progress</i></p>	<p><i>Not applicable</i></p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
<p>Safe Work Australia develop an intuitive, interactive tool to assist in the effective and efficient completion of fit-for-purpose SWMS.</p>			
<p>Recommendation 30: Photographic ID on White Cards</p> <p>Amend the model WHS Regulations to require photographic ID on White Cards consistent with high-risk work licences.</p>	<p><i>DRIS Recommendation:</i> Additional work to be undertaken to gain a greater understanding of the nature and scope of the problems identified in the Model Law Review and determine whether the recommendation is the most appropriate mechanism to treat them.</p>	<p><i>In progress</i></p>	<p><i>None to date</i></p>
<p>Recommendation 31a: Consider removing references to Standards in model WHS Regulations</p> <p>Review the references to Standards in the model WHS laws with a view to their removal and replacement with the relevant obligations prescribed within the model WHS Regulations.</p>	<p><i>DRIS Recommendation:</i> Implement both recommendation 31a and recommendation 31b of the Boland</p>	<p><i>In progress</i></p>	<p><i>None to date</i></p>
<p>Recommendation 32: Review MHF Regulations</p> <p>Review the model WHS Regulations dealing with MHF, with a focus on administrative or technical amendments to ensure they meet the intended policy objective.</p>	<p>Implement the Boland Review recommendation. SWA has already begun preliminary work on this recommendation as agreed by WHS Ministers.</p>	<p><i>In progress</i></p>	<p><i>None to date</i></p>
<p>Recommendation 33: Review crane licence classes</p>	<p>Implement the Boland Review recommendation. SWA has already</p>	<p><i>In progress</i></p>	<p><i>None to date</i></p>



Boland Review Recommendation	Agreed response by WHS Ministers in relation to each Boland Recommendation	Has the Boland Recommendation or DRIS Recommendation been implemented into the Model Law (Act, Regs, Codes etc.)	Which jurisdictions have implemented the Recommendation (or a version of it)?
Review the high-risk work licence classes for cranes to ensure that they remain relevant to contemporary work practices and equipment.	begun preliminary work on this recommendation as agreed by WHS Ministers.		
<p>Recommendation 34a: Improving the quality of asbestos registers</p> <p>Amend the model WHS Regulations to require that asbestos registers are created by a competent person and update the model Codes to provide more information on the development of asbestos registers.</p>	<p><i>DRIS Recommendation:</i> SWA to publish additional guidance to improve the quality of asbestos registers and implement Model Law Review recommendation 34b.</p>	<i>In progress</i>	<i>None to date</i>
<p>Recommendation 34b: Competent persons in relation to asbestos</p> <p>Review existing requirements for competent persons, including consideration of amendments to the model WHS Regulations to provide specific competencies for asbestos-related tasks or requirements for further guidance on the skills and experience required for all asbestos-related tasks.</p>		<i>In progress</i>	<i>None to date</i>

This article was prepared by [Steve Bell](#), Partner, [Julie Marotta](#), Special Counsel, and [Shaesta Nand](#), Senior Associate.

The contents of this publication, current at the date of publication (4 July 2022), are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

Herbert Smith Freehills LLP and its affiliated and subsidiary businesses and firms and Herbert Smith Freehills, an Australian Partnership, are separate member firms of the international legal practice known as Herbert Smith Freehills.

© Herbert Smith Freehills 2022