

## Article Information

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# Recklessness, negligence, increased fines and the end of insurance - is your workplace ready?

**The Review of the Model Work Health and Safety Laws: Final Report (the Review) was handed down in December 2018. The Review provided multiple recommendations which could have significant impacts on penalties contained within the model work health and safety (WHS) laws.**

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These recommendations included that duty holders commit a Category 1 offence if they are grossly negligent in exposing an individual to a risk of serious harm or death, the introduction of a specific offence for industrial manslaughter, significant increases to the maximum monetary penalties and the prohibition of entering into a contract of insurance to cover liability for penalties.

### Changes to a Category 1 Offence

In its current format, Category 1 offences under the model WHS laws do not require there to be any actual serious harm caused to any person, but rather applies where there is a risk of death or serious injury or illness. In order to prove a Category 1 offence, there must be recklessness on behalf of the Person Conducting a Business or Undertaking (PCBU) or officer. Recklessness, in this sense, is intentional and requires a conscious choice to take an unjustifiable risk. The Review recommends that Category 1 offences be extended beyond situations involving recklessness to include where the duty holder is grossly negligent. In contrast to recklessness, gross negligence does not require intention. Such an amendment would make it easier for a Category 1 offence to be proven.

### Industrial Manslaughter

The introduction of an industrial manslaughter offence is a shift in policy. The introduction of a separate offence of industrial manslaughter shifts the focus of the legislation to look at the consequence or outcome of a breach of the model WHS laws, rather than being based on the degree of culpability, risk and harm. The ACT and Queensland are the only two jurisdictions to currently have industrial manslaughter laws, but both NSW and Victoria have expressed a desire to introduce versions of these laws.

The Review recommended that an industrial manslaughter offence occur where there is gross negligence causing death. Such an offence would be capable of being committed by a PCBU or an officer as defined under section 4 of the model WHS Act.

### Increased Penalties

When the model WHS laws were introduced, the penalty levels were expressed in monetary terms rather than as penalty units. In accordance with the model WHS laws, where a Category 1 offence is committed by a body corporate the maximum penalty is \$3,000,000. For an individual, the maximum penalty for a Category 1 offence is \$600,000 and/or five years' imprisonment. The Review highlighted that had the model WHS laws expressed penalties in a unit value, the maximum corporate penalty would have increased to \$5,727,000 if indexed to the Commonwealth penalty unit value.

The Review has recommended an increase of 50% to penalty levels in the model WHS laws. While this is short of the full indexed amount, the maximum penalties for a Category 1 offence would still see a significant increase to \$4,500,000 for an offence by a corporation, or \$900,000 for an offence by an individual.

### Prohibition on Contracts of Insurance

Under the current WHS laws, there is no prohibition on a company and its directors, principals, partners and employees from taking out policies of insurance to cover any liability which may arise out of breaches of WHS legislation. The Review recommends to make it an offence to enter into a contract of insurance, or to provide insurance or a grant of indemnity, which covers liability for a monetary penalty under the model WHS laws. A key consideration in recommending this is that the deterrent effect of the laws is likely to be reduced if companies believe they can take out insurance to indemnify against WHS penalties. The removal of insurance to cover penalties under the WHS laws is consistent with the current Government's position in response to last year's Senate committee inquiry into the 'framework surrounding the prevention, investigation and prosecution of industrial deaths'.

The issue of WHS insurance was highlighted in the case of *Hillman v Ferro Con (SA) Pty Ltd (in liquidation) and Anor* [2013] SAIRC 22. In his judgment, Industrial Magistrate SM Lieschke said

'In my opinion, the Defendant's actions (in taking out and relying on the insurance policy) have undermined the Court's sentencing powers by negating the principles of both specific and general deterrence. The message this sends to employers and Responsible Officers is that with insurance cover for criminal penalties for OHS offences there is little need to fear consequences of very serious offending.'

In considering this recommendation, the Review questioned the legality of insurance policies covering liability for an offence under the WHS laws without the introduction of the specific statutory offence. In general, where an insurance company does not object to a company's claim to indemnity, it appears that Courts have been willing to uphold contracts of insurance of this nature, especially where the offence does not involve wilful or dishonest conduct. In the *Hillman v Ferro Con* decision, it was also held that Courts had no legal ability to consider whether an indemnity was invalid.

#### The Government's Position

In response to the 2018 Senate committee inquiry into the 'framework surrounding the prevention, investigation and prosecution of industrial deaths', the Government provided in principle support to recommendations which were also contained in the Review. Of the recommendations discussed, in principle support was extended to increasing the maximum monetary penalties for breaches of the WHS laws and the prohibition on contracts of insurance to cover liability which arise out of a breach of the WHS laws.

With the Review's recommendations, in conjunction with the Senate committee inquiry and Government support, it is possible that in the near future insurance policies to cover liability and indemnify against penalties under the WHS laws will no longer be available. In conjunction with the other recommendations increasing monetary penalties and a broadening of fault for Category 1 offences, the cost and risk to businesses for breaching the WHS laws is becoming increasingly significant.

While the model WHS laws do not currently apply in Victoria or in Western Australia, changes to the model WHS laws may influence similar amendments being made in those jurisdictions.

If you are uncertain if your business is managing the risks of serious injury in the workplace and complying with the requirements of the WHS laws, contact a member of Piper Alderman's Employment Relations team for assistance.