

AUSTRALASIAN PARLIAMENTARY COUNSEL'S COMMITTEE

CHAIR OF SAFE WORK AUSTRALIA

Model Work Health and Safety Legislation Amendment (Offences and Penalties) 2023

REPORT OF THE AUSTRALASIAN PARLIAMENTARY COUNSEL'S COMMITTEE

On 12 September 2022, officers of Safe Work Australia provided instructions to the Australasian Parliamentary Counsel's Committee to draft legislation on this matter.

A copy of the draft legislation that has been settled with the officers is attached.



Annette O'Callaghan
NSW Parliamentary Counsel
Secretary, Australasian Parliamentary Counsel's Committee

12 July 2023

Ref: pcc-602, d15

Model Work Health and Safety Legislation Amendment (Offences and Penalties) 2023

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Model Work Health and Safety Legislation Amendment (Offences and Penalties) 2023

1 Name of Act

These model provisions are the *Model Work Health and Safety Legislation Amendment (Offences and Penalties) 2023*.

2 Amendment of Model Law

- (1) The *Model Work Health and Safety Bill* is amended as set out in Schedule 1.
- (2) The *Model Work Health and Safety Regulations* are amended as set out in Schedule 2.

Schedule 1 Amendment of Model Work Health and Safety Bill

[1] Section 4 Definitions

Insert in alphabetical order—

authorised person, in Part 13, Division 4—see section 244.

board of directors in Part 13, Division 4—see section 244.

category 1 monetary penalty, *category 2 monetary penalty* and *category 3 monetary penalty*, in relation to an offence, indicates the maximum monetary penalty a court may impose for the offence—see Schedule 4, clause 1 for the relevant maximum amounts.

Commonwealth Criminal Code, in Part 13, Division 4—see section 244.

industrial manslaughter monetary penalty means:

Note

See the jurisdictional note in the Appendix.

physical element, in Part 13, Division 4—see section 244.

tier A monetary penalty, *tier B monetary penalty*, *tier C monetary penalty*, *tier D monetary penalty*, *tier E monetary penalty*, *tier F monetary penalty*, *tier G monetary penalty*, *tier H monetary penalty* and *tier I monetary penalty*, in relation to an offence, indicates the maximum monetary penalty a court may impose for the offence—see Schedule 4, clause 2 for the relevant maximum amounts.

WHS civil penalty provision tier 1, *WHS civil penalty provision tier 2*, *WHS civil penalty provision tier 3* and *WHS civil penalty provision tier 4*, in relation to a contravention of a provision of this Act, indicates the maximum monetary penalty a court may impose for the contravention—see Schedule 4, clause 3 for the relevant maximum amounts.

[2] Section 30A

Insert after section 30—

30A Industrial manslaughter

Note

See the jurisdictional note in the Appendix. The jurisdictional note recommends a maximum penalty:

For an individual—20 years imprisonment.

For a body corporate—industrial manslaughter monetary penalty.

[3] Section 31 Gross negligence or reckless conduct—Category 1

Omit section 31(1)(b). Insert instead—

- (b) the person, without reasonable excuse, engages in conduct that:
- (i) exposes an individual, to whom the duty is owed, to a risk of death or serious injury or illness; or
 - (ii) if the person is an officer of a person conducting a business or undertaking—exposes an individual, to whom the person conducting a business or undertaking owes a health and safety duty, to a risk of death or serious injury or illness; and

[4] Section 31(1), penalty provision

Omit the penalty provision. Insert instead—

Maximum penalty:

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For an individual—category 1 monetary penalty or 10 years imprisonment or both.

For a body corporate—category 1 monetary penalty.

- [5] **Section 32 Failure to comply with health and safety duty—Category 2**
Omit the penalty provision. Insert instead—
Maximum penalty: category 2 monetary penalty.
- [6] **Section 33 Failure to comply with health and safety duty—Category 3**
Omit the penalty provision. Insert instead—
Maximum penalty: category 3 monetary penalty.
- [7] **Sections 38(1), 39(1), 52(5), 56(2), 61(4), 70(1) and (2), 71(2), 72(7), 79(1), (3) and (4), 155(5), 165(2), 171(6), 177(2) and (6), 185(4), 188, 189, 268(1) and (2) and 271(2) and (4)**
Omit the penalty provision wherever occurring. Insert instead—
Maximum penalty: tier D monetary penalty.
- [8] **Sections 38(7), 75(1), 97, 210 and 273**
Omit the penalty provision wherever occurring. Insert instead—
Maximum penalty: tier F monetary penalty.
- [9] **Sections 41, 99(2), 193, 200(1), 219, 242(1) and 272A(1)**
Omit the penalty provision wherever occurring. Insert instead—
Maximum penalty: tier B monetary penalty.
- [10] **Sections 42–46 and 47(1)**
Omit the penalty provision wherever occurring. Insert instead—
Maximum penalty: tier C monetary penalty.
- [11] **Sections 53, 57 and 74**
Omit the penalty provision wherever occurring. Insert instead—
Maximum penalty: tier H monetary penalty.
- [12] **Sections 104(1), 107, 108(1), 109(1), 197 and 197D**
Omit the penalty provision wherever occurring. Insert instead—
Maximum penalty: tier A monetary penalty.
- [13] **Sections 118(3), 124–126, 128, 129, 143, 144(1), 145, 146, 147(1) and 148**
Omit the penalty provision wherever occurring. Insert instead—
Maximum penalty: WHS civil penalty provision tier 2.
- [14] **Section 123 Contravening WHS entry permit conditions**
Omit the penalty provision. Insert instead—
Maximum penalty: WHS civil penalty provision tier 1.
- [15] **Section 149 Return of WHS entry permits**
Omit the penalty provision in section 149(1). Insert instead—
Maximum penalty: WHS civil penalty provision tier 4.

[16] Section 150 Union to provide information to authorising authority

Omit the penalty provision. Insert instead—

Maximum penalty: WHS civil penalty provision tier 3.

[17] Section 190 Offence to assault, threaten or intimidate inspector

Omit the penalty provision. Insert instead—

Maximum penalty:

In the case of an individual—tier B monetary penalty or imprisonment for 2 years or both.

In the case of a body corporate—tier B monetary penalty.

[18] Sections 244–244D

Omit section 244. Insert instead—

244 Definitions

In this Division:

authorised person, for a body corporate, means an officer, employee or agent of the body corporate acting within the officer's, employee's or agent's actual or apparent authority.

board of directors means the body, whatever it is called, exercising the executive authority of the body corporate.

Commonwealth Criminal Code means the *Criminal Code* set out in the Schedule to the *Criminal Code Act 1995* of the Commonwealth.

physical element has the meaning given by the Commonwealth Criminal Code, Division 4.

244A Physical elements

The conduct constituting the physical element of an offence is taken to have been committed by a body corporate if the conduct is committed by:

- (a) the body corporate's board of directors; or
- (b) 1 or more authorised persons; or
- (c) 1 or more persons acting at the direction of or with the express or implied agreement or consent of:
 - (i) an authorised person; or
 - (ii) the body corporate's board of directors.

244B Fault elements

- (1) If it is necessary to establish a state of mind of a body corporate in relation to the commission of the physical element of an offence, it is sufficient to show:
 - (a) the body corporate's board of directors:
 - (i) intentionally, knowingly or recklessly carried out the relevant conduct; or
 - (ii) expressly, tacitly or impliedly authorised or permitted the carrying out of the conduct constituting the physical element of the offence; or
 - (b) an authorised person—
 - (i) intentionally, knowingly or recklessly engaged in the relevant conduct; or

- (ii) expressly, tacitly or impliedly authorised or permitted the carrying out of the conduct constituting the physical element of the offence; or
 - (c) a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the carrying out of the conduct constituting the physical element of the offence.
- (2) Subsection (1)(b) and (c) do not apply if the body corporate proves it took reasonable precautions to prevent the conduct or the authorisation or permission of the conduct.
- (3) Factors relevant to the application of subsection (1)(c) include:
 - (a) whether authority or permission to carry out the conduct constituting the physical element of an offence, of the same or a similar character, had previously been given by a corporate officer; and
 - (b) whether the person who carried out the conduct constituting the physical element of the offence believed on reasonable grounds, or had a reasonable expectation, that a corporate officer would have authorised or permitted the carrying out of the conduct.
- (4) In this section:
 - corporate culture* means 1 or more attitudes, policies, rules, courses of conduct or practices existing within the body corporate generally or in the part of the body corporate in which the relevant activity takes place.
 - corporate officer* means an officer within the meaning of section 9 of the *Corporations Act 2001* of the Commonwealth other than a partner in a partnership.

244C Mistake of fact

If mistake of fact is relevant to determining liability for an offence, a body corporate may rely on mistake of fact only if:

- (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant the conduct would not have constituted the offence; and
- (b) the body corporate proves it took reasonable precautions to prevent the conduct.

244D Failure to take reasonable precautions

For sections 244B(2) and 244C, a failure to take reasonable precautions may be evidenced by the fact that the conduct constituting the offence was substantially attributable to:

- (a) inadequate management, control or supervision of the conduct of one or more of the body corporate's employees, agents or officers; or
- (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

[19] Section 254 When is a provision a WHS civil penalty provision

Omit "1 or more amounts by way of monetary penalty" wherever occurring.

Insert instead "a maximum penalty, expressed as a WHS civil penalty provision tier,".

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[20] Section 272B Liability of officers for offences by body corporate under s 272A

Omit the penalty provision from section 272B(1). Insert instead—
Maximum penalty: tier B monetary penalty.

[21] Section 276 Regulation-making powers

Omit section 276(3)(h). Insert instead—

- (h) prescribe the following penalties for an offence under the regulations—
 - (i) a tier E monetary penalty;
 - (ii) a tier F monetary penalty;
 - (iii) a tier G monetary penalty;
 - (iv) a tier H monetary penalty;
 - (v) a tier I monetary penalty; or

[22] Schedule 4

Insert after Schedule 3—

Schedule 4 Penalty amounts

1 Maximum monetary penalties—categories 1–3

If a category 1 monetary penalty, category 2 monetary penalty or category 3 monetary penalty is specified as the maximum penalty for an offence under this Act the maximum penalty is the penalty set out in the table to this clause as indexed under clause 4 and rounded under clause 5.

Tier	Maximum penalty—individual (as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking)	Maximum penalty—individual (otherwise)	Maximum penalty—body corporate
category 1	\$2 085 000	\$1 042 000	\$10 425 000
category 2	\$418 000	\$209 000	\$2 090 000
category 3	\$140 000	\$70 000	\$700 000

1A Maximum monetary penalties—industrial manslaughter

Note

See the jurisdictional note in the Appendix. The jurisdictional note recommends a maximum monetary penalty of \$18 million.

2 Maximum monetary penalties—tiers A–I

If a tier A monetary penalty, tier B monetary penalty, tier C monetary penalty, tier D monetary penalty, tier E monetary penalty, tier F monetary penalty, tier G monetary penalty, tier H monetary penalty or tier I monetary penalty is specified as the maximum penalty for an offence under this Act the maximum

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penalty is the penalty set out in the table to this clause as indexed under clause 4 and rounded under clause 5.

Tier	Maximum penalty— individual	Maximum penalty—body corporate
tier A	\$139 000	\$695 000
tier B	\$70 000	\$350 000
tier C	\$28 000	\$140 000
tier D	\$14 000	\$70 000
tier E	\$8 400	\$42 000
tier F	\$7 000	\$35 000
tier G	\$5 000	\$25 000
tier H	\$2 800	\$14 000
tier I	\$1 700	\$8 500

3 Maximum monetary penalty—WHS civil penalty tiers 1–4

If a tier 1 WHS civil penalty provision, tier 2 WHS civil penalty provision, tier 3 WHS civil penalty provision or tier 4 WHS civil penalty provision is specified as the maximum penalty for an offence under this Act the maximum penalty is the penalty set out in the table to this clause as indexed under clause 4 and rounded under clause 5.

Tier	Maximum penalty— individual	Maximum penalty—body corporate
tier 1	\$28 000	\$140 000
tier 2	\$14 000	\$70 000
tier 3	\$7 000	\$35 000
tier 4	\$2 800	\$14 000

4 Indexation of maximum penalty amounts

- (1) The maximum amount of each monetary penalty set out in clauses 1–3 must be indexed for the year commencing on 1 July 2024, and each subsequent year, in accordance with this clause.
- (2) The maximum amount of each monetary penalty applying in each year is calculated as follows—

$$A \times \frac{B}{C}$$

where—

A is the maximum amount of a monetary penalty set out in clauses 1–3.

B is the CPI number for the March quarter in the year immediately preceding the year for which the amount is calculated.

C is the CPI number for the March quarter of 2022.

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(3) If the maximum amount of a monetary penalty calculated for a year is less than the amount that applied in the previous year, then the amount for the previous year continues to apply.

(4) In this clause:

CPI number means the All Groups Consumer Price Index number, that is, the weighted average of the 8 Australian capital cities, published by the Australian Statistician.

year means a period of 12 months starting on 1 July.

5 Rounding of maximum penalty amounts

If, after indexation under clause 4, the maximum amount of a monetary penalty is:

(a) less than \$10 000 and not a multiple of \$100:

(i) the maximum amount of the penalty must be rounded to the nearest \$100; and

(ii) an amount of \$50 is rounded down; or

(b) more than \$10 000 and not a multiple of \$1 000:

(i) the maximum amount of the penalty must be rounded to the nearest \$1 000; and

(ii) an amount of \$500 is rounded down.

6 Public notification of adjusted maximum penalty amounts

(1) As soon as practicable after publication by the Australian Statistician of the CPI number for the March quarter each year, the regulator must give notice of the maximum amount of each monetary penalty calculated under this Schedule.

(2) Notice must be given:

(a) on an appropriate government website; and

(b) in the Government Gazette.

[23] Appendix

Insert in numerical order in the table—

4

industrial manslaughter monetary penalty

A jurisdiction that creates the offence of industrial manslaughter will need to insert a monetary penalty in Schedule 4.

The recommended maximum monetary penalty applies only to a body corporate and is \$18 million.

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30A

Each jurisdiction may insert local provisions to create an offence of industrial manslaughter. The offence of industrial manslaughter would be in addition to the existing offence under section 31 and address conduct by a person that represents a gross deviation from the reasonable standard of care resulting in a work-related fatality.

The recommended maximum penalty for the offence is:

For an individual—20 years imprisonment.

For a body corporate—industrial manslaughter monetary penalty.

Schedule 4, clause 1A

A jurisdiction that creates the offence of industrial manslaughter should insert a clause providing for the maximum monetary penalty payable for the offence by a body corporate.

The recommended maximum penalty is \$18 million.

[24] Appendix

Omit the matter relating to section 244 from the table. Insert instead—

244–244D

A jurisdiction may omit these sections if the relevant laws of the jurisdiction already provide for this.

Schedule 2 Amendment of Model Work Health and Safety Regulations

- [1] Regulations 19, 22, 46, 47, 50(3), 66(2) and (5), 68, 70, 77(5), 85(1)–(3), 149, 150(1) and (2), 151, 162(4), 165(1), 176(2), 182(4), 187, 188, 195, 196, 198, 200, 213, 224, 235, 236, 239, 253, 254, 294–296, 298, 301, 302, 303(3), 304(2)–(4), 308, 310, 311, 312, 313(3), 316, 317, 327, 336–338, 344(3), (5) and (6), 346(3), 347(3), 369, 371(2), 372, 373, 385, 387, 388, 398(2), 401, 403, 409, 410, 415(2), 425–428, 429(5), 430, 432(5), 433, 438, 439, 446, 448, 451(5), 454, 455, 464(3), 465, 466, 482(3), 529, 547, 548, 551, 553, 555(5), 557(8), 560, 562, 563, 567(4), 570 and 576

Omit the penalty provision wherever occurring. Insert instead—

Maximum penalty: tier G monetary penalty.

- [2] Regulations 39–45, 48, 49, 50(1), 53, 55, 57–59, 61, 64, 65, 67, 69, 71–75, 76(1), 78–80, 84, 154–161, 163, 164, 166, 168, 177–179, 183, 184A, 189–194, 197, 199, 201, 202, 204–212, 215, 216, 218, 219, 222, 223, 225, 231–234, 238, 240, 241, 299, 300, 306, 309, 314, 329–335, 339, 340(1) and (2), 341–343, 344(1), 345, 346(1), 347(1), 348–350, 352–363, 365–368, 370, 371(1), 374–377, 379, 389, 391(2), 395–397, 398(1), 399, 400, 402, 405–408, 411–414, 415(1), 416, 417, 419, 420, 422, 424, 429(2) and (3), 432(2) and (3), 434–437, 440–443, 445(1), 449, 450, 451(2) and (3), 452, 453, 456–460, 462, 463, 464(1), 467–477, 479–481, 482(1) and (2), 483, 484, 536, 554, 555(1) and (4), 556, 557(1) and (5)–(7), 558, 559, 564–566, 567(1)–(3), 568, 569, 571, 572(1), 573–575

Omit the penalty provision wherever occurring. Insert instead—

Maximum penalty: tier E monetary penalty.

- [3] Regulations 50(2), 66(3), 76(2), 77(2)–(4), 85(4), 94, 96–98, 111, 124–127, 139, 142, 150(3), 162(2), (3) and (5), 165(2), 170, 175, 176(3), 180, 181, 182(2), (3) and (5), 226, 228–230, 237, 242, 260, 262, 273, 275, 282, 287, 288, 288D, 303(1), (2) and (4), 304(5), 313(1), (2) and (4), 326, 340(3) and (4), 364, 378, 390, 391(3), 404, 418, 423, 444, 445(3) and (4), 461, 505–507, 512, 513, 525, 572(4), 587, 588, 593, 594 and 607

Omit the penalty provision wherever occurring. Insert instead—

Maximum penalty: tier I monetary penalty.

- [4] Regulation 55C

Omit regulation 55C. Insert instead—

55C Managing psychosocial risks

A person conducting a business or undertaking must:

- (a) manage psychosocial risks in accordance with Part 3.1 other than regulation 36, and
- (b) implement the control measures required by regulation 55D.

Note

WHS Act—section 19 (see regulation 9).

- [5] Regulation 55D Control measures

Omit the note to regulation 55D(3).