

Parliamentary Counsel Committee

Model Work Health and Safety Legislation Amendment 2022

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Part 1 Preliminary

1 Short title

These model provisions are the *Model Work Health and Safety Legislation Amendment 2022*.

Part 2 Amendment of Model Law

2 Model Law amended

This part amends the *Model Work Health and Safety Bill*.

3 Amendment of s 31 (Reckless conduct—Category 1)

(1) Section 31, heading—

omit, insert—

31 Gross negligence or reckless conduct—Category 1

(2) Section 31(1)(c)—

omit, insert—

(c) the person:

- (i) engages in the conduct with gross negligence; or
- (ii) is reckless as to the risk to an individual of death or serious injury or illness.

(3) Section 31(1)—

insert—

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Note

See the jurisdictional note in the Appendix.

4 Amendment of s 52 (Negotiations for agreement for work group)

Section 52(1)(b), ‘will’—

omit, insert—

are proposed to

5 Amendment of s 72 (Obligation to train health and safety representatives)

(1) Section 72(1)(c)—

omit, insert—

(c) chosen by the health and safety representative.

(2) Section 72(5), ‘as to the matters set out in subsections (1)(c) and (2)’—

omit, insert—

about a matter mentioned in subsection (2)

6 Amendment of s 117 (Entry to inquire into suspected contraventions)

Section 117(3) to (8)—

omit.

7 Insertion of new s 119

After section 118—

insert—

119 Notice of entry

(1) A WHS entry permit holder must, as soon as

practicable after entering a workplace under this Division, give notice of the entry and the suspected contravention, in accordance with the regulations, to:

- (a) the relevant person conducting a business or undertaking; and
 - (b) the person with management or control of the workplace.
- (2) Subsection (1) does not apply if to give the notice would:
- (a) defeat the purpose of the entry to the workplace; or
 - (b) unreasonably delay the WHS entry permit holder in an urgent case.
- (3) Subsection (1) does not apply to an entry to a workplace under this Division to inspect or make copies of documents referred to in section 120.

Note

See the jurisdictional note in the Appendix.

8 Amendment of s 120 (Entry to inspect employee records or information held by another person)

Section 120(1), ‘section 117(1) and (2)’—

omit, insert—

section 117

9 Amendment of s 155 (Powers of regulator to obtain information)

(1) Section 155, after subsection (2)—

insert—

- (2A) The notice may be served in any way that a notice may be issued or given under section 209.

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- (2) Section 155(3)(b)—
omit, insert—
 - (b) contain a statement to the effect that it is an offence to refuse or fail to comply with the requirement without reasonable excuse; and
- (3) Section 155, after subsection (7)—
insert—
 - (8) A notice may be served on a person under this section even though:
 - (a) the person is outside the State; or
 - (b) the notice relates to information, documents or evidence:
 - (i) outside the State; or
 - (ii) relating to a matter happening outside the State.

10 Amendment of s 171 (Power to require production of documents and answers to questions)

- (1) Section 171(1), after ‘may’—
insert—

, while the inspector is at the workplace
- (2) Section 171(1)(b)—
omit, insert—
 - (b) require a person who has custody of, or access to, a document mentioned in paragraph (a) to produce the document to the inspector; or
- (3) Section 171, after subsection (2)—
insert—
 - (2A) Also, within 30 days after the day an inspector enters a workplace under this Division, the

inspector or another inspector may give a written notice to a person:

- (a) requiring the person, if the person has custody of, or access to, a specified document, to produce the document to the inspector within a specified period; or
 - (b) requiring the person to give written answers to specified questions within a specified period; or
 - (c) requiring the person to:
 - (i) attend before the inspector at a specified time and place and answer any questions put by the inspector; or
 - (ii) attend before the inspector at a specified time, by audiovisual link or audio link, and answer any questions put by the inspector.
- (2B) If a requirement is made of a person under subsection (2A)(c)(i) to attend before the inspector in person:
- (a) the person may ask to attend before the inspector by audiovisual link or audio link instead; and
 - (b) the inspector must agree to the request if it would be reasonable in the circumstances.
- (2C) If a requirement is made of a person under subsection (2A)(c)(ii) to attend before the inspector by audiovisual link or audio link:
- (a) the person may ask to attend before the inspector in person instead; and
 - (b) the inspector must agree to the request if it would be reasonable in the circumstances.
- (2D) A requirement under subsection (2A) may only relate to a document or question relevant to the

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purpose for which the workplace was entered.

(2E) A notice under subsection (2A) may be served in any way that a notice may be issued or given under section 209.

(4) Section 171(3), after ‘subsection (1)(c)’—
insert—
or (2A)(c)

11 Amendment of s 172 (Abrogation of privilege against self-incrimination)

Section 172, after subsection (2)—
insert—

(3) To avoid doubt, this section does not apply to answering a question or providing information or a document in response to a requirement made under a corresponding WHS law.

12 Amendment of s 173 (Warning to be given)

(1) Section 173(1), after ‘this Part’—
insert—

, other than by a written notice under section 171(2A),

(2) Section 173(1)(b)—
omit, insert—

(b) warn the person it is an offence to refuse or fail to comply with the requirement without reasonable excuse; and

(3) Section 173, after subsection (1)—
insert—

(1A) A written notice under section 171(2A) must:

-
- (a) state that the notice is given under section 171(2A); and
 - (b) state the purpose of the entry to the workplace to which the notice relates; and
 - (c) contain a statement to the effect that it is an offence to refuse or fail to comply with a requirement in the notice without reasonable excuse; and
 - (d) contain a statement about the effect of sections 172 and 269; and
 - (e) if the notice requires the person to attend before an inspector—state that the person may attend with a legal practitioner or other representative.
- (4) Section 173(2), after ‘subsection (1)(c)’—
insert—
- or a notice with the statement mentioned in subsection (1A)(d)

13 Amendment of s 231 (Procedure if prosecution is not brought)

- (1) Section 231(1)—
omit, insert—
- (1) This section applies if:
 - (a) a person:
 - (i) reasonably considers that the occurrence of an act, matter or thing constitutes a Category 1 offence or a Category 2 offence; or
 - (ii) reasonably considers, from a coronial report or the proceedings at a coronial inquiry or inquest, that a Category 1

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offence or a Category 2 offence has been committed; and

- (b) no prosecution for the offence has been brought.
- (1A) The person may make a written request to the regulator that a prosecution be brought.
- (1B) The request may only be made:
 - (a) if subsection (1)(a)(i) applies—at least 6 months but not more than 18 months after the act, matter or thing occurs; or
 - (b) if subsection (1)(a)(ii) applies—within 6 months after the report is made or the inquiry or inquest ends.

Note

See section 232 in relation to the limitation period for prosecutions.

- (2) Section 231, after subsection (2)—

insert—

- (2A) If, under subsection (2)(a)(i), the regulator advises the person that the investigation is not complete, the regulator must:
 - (a) until the investigation is complete, give the person a written update about the investigation at least every 3 months; and
 - (b) when the investigation is complete, give the person a written notice stating:
 - (i) whether a prosecution will be brought; and
 - (ii) if a prosecution will not be brought—the reasons why.

- (3) Section 231(3), after ‘advises the person’—

insert—

under subsection (2) or (2A)

14 Amendment of s 271 (Confidentiality of information)

Section 271(3)(c)—

omit, insert—

(c) that is authorised under section 271A; or

15 Insertion of new s 271A

After section 271—

insert—

271A Additional ways that regulator may use and share information

- (1) This section applies in relation to information or a document mentioned in section 271(1).
- (2) The regulator or a person authorised by the regulator may, in the circumstances stated in subsection (3):
 - (a) disclose the information, or the contents of or information contained in the document, to any other person including a corresponding regulator; or
 - (b) give access to the document to any other person including a corresponding regulator; or
 - (c) use the information or document.
- (3) The circumstances are that the regulator reasonably believes the disclosure, access or use:
 - (a) is necessary for administering, or monitoring or enforcing compliance with, this Act; or

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- (b) is necessary for the administration or enforcement of another Act prescribed by the regulations; or
 - (c) is necessary for the administration or enforcement of another Act or law, if the disclosure, access or use is necessary to lessen or prevent a serious risk to public health or safety; or
 - (d) is necessary for the recognition of authorisations under a corresponding WHS law; or
 - (f) is required for the exercise of a power or function under a corresponding WHS law.
- (4) This section does not limit the operation of section 271(3)(a), (b), (d), (e) or (f) in relation to the disclosure of information, giving of access to a document or use of information or a document by the regulator or a person authorised by the regulator.

16 Insertion of new ss 272A and 272B

After section 272—

insert—

272A No insurance or other indemnity against penalties

- (1) A person must not, without reasonable excuse:
 - (a) enter into a contract of insurance or other arrangement under which the person, or another person, is purportedly covered for all or part of a liability for a monetary penalty under this Act; or
 - (b) provide insurance or a grant of indemnity for all or part of a liability for a monetary penalty under this Act; or

-
- (c) take the benefit of a contract of insurance, arrangement or grant of indemnity mentioned in paragraph (a) or (b).

Maximum penalty:

In the case of an offence committed by an individual—\$50 000.

In the case of an offence committed by a body corporate—\$250 000.

- (2) Subsection (1) places an evidential burden on the accused to show a reasonable excuse.
- (3) A term of a contract of insurance or other arrangement is void to the extent it purports to cover a person for all or part of a liability for a monetary penalty under this Act.

Note

See the jurisdictional note in the Appendix.

272B Liability of officers for offences by body corporate under s 272A

- (1) A person commits an offence against this section if:
 - (a) a body corporate contravenes section 272A; and
 - (b) the person is an officer of the body corporate; and
 - (c) the person is involved in the body corporate's contravention of section 272A.

Maximum penalty: \$50 000.

- (2) For subsection (1)(c), section 256(2) applies as if a reference in that section to a civil penalty provision were a reference to section 272A.

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17 Amendment of Appendix (Jurisdictional notes)

(1) Appendix, in numerical order—

insert—

31(1)

A jurisdiction may replace the term ‘gross negligence’ with another term consistent with the law of the jurisdiction.

119

The Commonwealth may need to provide that 24 hours notice may be required to enter workplaces associated with national security, defence and federal police operations.

272A(3)

Each jurisdiction will need to consider the application of this section to contracts and other arrangements in force when the section commences.

(2) Appendix, entry for section 172, column 2, at the end—

insert—

A requirement to answer a question, or provide information or a document, may be made of a person in another jurisdiction where section 172 of the corresponding WHS law may be different. Section 172(3) is to remove doubt that, if a requirement is made under the WHS law of a jurisdiction, it is section 172 of that WHS law that applies.

For example, if the regulator in NSW issues a notice under section 155 of the NSW law to a person in the ACT, section 172 of the NSW law applies to the requirement.

Part 3 Amendment of Model Regulations

18 Model Regulations amended

This part amends the *Model Work Health and Safety Regulations*.

19 Amendment of r 5 (Definitions)

Regulation 5(1), in alphabetical order—

insert—

psychosocial hazard—see regulation 55A.

psychosocial risk—see regulation 55B.

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20 Amendment of r 15 (References to standards)

Regulation 15, note—

omit, insert—

Notes

- 1 A person is only required to comply with an Australian Standard or Australian/New Zealand Standard that is applied, adopted or incorporated by, or otherwise referred to in, a regulation to the extent the regulation provides, whether expressly or by necessary implication.

For example, in regulation 5, definition *boiler*, there is an exception in paragraph (e)(iii). The definition does not require a person to comply with AS 2593:2004, but equipment must be certified in compliance with AS 2593:2004 in order to fall within that particular exception.

The reference to an Australian Standard in this case is part of a description of equipment excluded from the definition *boiler*. As a result, the equipment is not covered by particular provisions of these Regulations relating to high risk work.

- 2 See the jurisdictional note in the Appendix.

21 Amendment of r 28 (Additional requirements—entry under section 117)

- (1) Regulation 28, heading, ‘**section 117**’—

omit, insert—

Part 7, Division 2

- (2) Regulation 28, ‘section 117 of the Act in relation to an entry under that section’—

omit, insert—

section 119 of the Act in relation to an entry under Part 7, Division 2 of the Act

22 Omission of r 28A (Exemption certificate—entry without notice under section 117)

Regulation 28A—
omit.

23 Insertion of new ch 3, pt 3.2, div 11

Part 3.2, after regulation 55—
insert—

Division 11 Psychosocial risks

55A Meaning of *psychosocial hazard*

A *psychosocial hazard* is a hazard that:

- (a) arises from, or relates to:
 - (i) the design or management of work; or
 - (ii) a work environment; or
 - (iii) plant at a workplace; or
 - (iv) workplace interactions or behaviours;and
- (b) may cause psychological harm (whether or not it may also cause physical harm).

55B Meaning of *psychosocial risk*

A *psychosocial risk* is a risk to the health or safety of a worker or other person arising from a psychosocial hazard.

55C Managing psychosocial risks

A person conducting a business or undertaking must manage psychosocial risks in accordance with Part 3.1 other than regulation 36.

55D Control measures

- (1) A person conducting a business or undertaking must implement control measures:
 - (a) to eliminate psychosocial risks so far as is reasonably practicable; and
 - (b) if it is not reasonably practicable to eliminate psychosocial risks—to minimise the risks so far as is reasonably practicable.
- (2) In determining the control measures to implement, the person must have regard to all relevant matters, including:
 - (a) the duration, frequency and severity of the exposure of workers and other persons to the psychosocial hazards; and
 - (b) how the psychosocial hazards may interact or combine; and
 - (c) the design of work, including job demands and tasks; and
 - (d) the systems of work, including how work is managed, organised and supported; and
 - (e) the design and layout, and environmental conditions, of the workplace, including the provision of:
 - (i) safe means of entering and exiting the workplace; and
 - (ii) facilities for the welfare of workers; and
 - (f) the design and layout, and environmental conditions, of workers' accommodation; and
 - (g) the plant, substances and structures at the workplace; and
 - (h) workplace interactions or behaviours; and

- (i) the information, training, instruction and supervision provided to workers.
- (3) In this regulation:
workers' accommodation means premises to which section 19(4) of the Act applies.

Note

WHS Act—section 19 (see regulation 9).

24 Amendment of r 238 (Operation of amusement devices and passenger ropeways)

Regulation 238, after subregulation (2)—

insert—

- (3) The reference in subregulation (1) to instruction and training in the proper operation of a device or ropeway includes a reference to instruction and training in carrying out the checks and operation required under subregulation (2)(a) and (b).

25 Amendment of r 242 (Log book and manuals for amusement devices)

(1) Regulation 242(1)(a)—

omit, insert—

- (a) the log book for the amusement device records the details required under subregulation (1A); and

(2) Regulation 242, after subregulation (1)—

insert—

- (1A) The log book for an amusement device must record:
 - (a) for each occasion on which the device is erected, details (including the date) of the erection; and

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- (b) for each occasion on which the device is stored, details of the storage; and
- (c) details of the maintenance of the device; and
- (d) for each day on which the device is operated, the number of hours for which it is operated; and
- (e) the total number of hours for which the device has ever been operated; and
- (f) details of any faults, or other matters relevant to the safety of the device, identified during its operation; and
- (g) the following details for each person who operates the device:
 - (i) the person's name;
 - (ii) whether the person has been provided with instruction and training in the proper operation of the device;
 - (iii) for each occasion on which instruction or training in the proper operation of the device is provided to the person:
 - (A) the date; and
 - (B) a summary of the instruction or training; and
 - (C) the name and qualifications of the instructor or trainer; and
- (h) details of each statutory notice issued in relation to the device, including:
 - (i) the date on which the notice was issued; and
 - (ii) the reasons for issuing the notice; and
 - (iii) any action taken in response to the notice: and

- (iv) for a notice given under a corresponding WHS law—the location of the device when the notice was issued.

Note

See also regulation 238(2)(c).

- (3) Regulation 242(2)(a)—

omit, insert—

- (a) the log book for the amusement device; and

- (4) Regulation 242, after subregulation (2)—

insert—

- (3) The person with management or control of an amusement device at a workplace must make the log book for the device available to any person to whom the person relinquishes control of the device.

Maximum penalty:

In the case of an offence committed by an individual—\$1 250.

In the case of an offence committed by a body corporate—\$6 000.

- (4) In this regulation:

statutory notice means:

- (a) an improvement notice, prohibition notice or infringement notice; or
(b) an improvement notice, prohibition notice or infringement notice under a corresponding WHS law.

- (5) Regulation 242, note—

omit, insert—

Note

See the jurisdictional notes in the Appendix.

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26 Amendment of r 702 (Confidentiality of information—exception relating administration or enforcement of other laws)

- (1) Regulation 702, heading, after ‘relating’—
insert—
to
- (2) Regulation 702, ‘section 271(3)(c)(ii)’—
omit, insert—
section 271A(3)(b)

27 Amendment of Appendix (Jurisdictional notes)

Appendix, in numerical order—
insert—

242(1A)

Regulation 242(1A)(e) requires that the log book for an amusement device record the total number of hours for which the device has ever been operated.

For some devices, operated for a period before the commencement of this requirement, that particular information may not be available. A jurisdiction may insert a transitional provision to deal with the requirement in that case.

242(4)

In the definition *statutory notice*, a jurisdiction may replace the reference to an ‘infringement notice’ with another term consistent with the law of the jurisdiction and may include other notices under the law of the jurisdiction.