

EXPLANATORY MEMORANDUM – MODEL WORK HEALTH AND SAFETY LEGISLATION AMENDMENT (GROSS NEGLIGENCE OFFENCES) 2023 – Model Provisions

The *Model Work Health and Safety Legislation Amendment (Gross Negligence Offences) 2023* includes amendment to Part 13, Division 4 of the model Work Health and Safety (WHS) Act to introduce aggregation of conduct for body corporate PCBUs in relation to offences involving a fault element of gross negligence.

Part 1 – Name of model provisions

The model provisions are the *Model Work Health and Safety Legislation Amendment (Gross Negligence Offences) 2023*.

Part 2 – Amendment of the Model Law

This clause provides that Schedule 1 amends the model WHS Act.

Schedule 1 – Amendments to the model WHS Act

Item [1] Section 244B Fault elements other than gross negligence

This item omits the heading to section 244B and inserts instead:

244B Fault elements other than gross negligence.

Item [2] Section 244B(1A)

This item inserts a new subsection 244B(1A) after subsection 244B(1). Subsection 244B(1A) clarifies that for subsection (1), having a state of mind in relation to the commission of a physical element of an offence does not include being grossly negligent with respect to the physical element.

This item inserts a jurisdictional note in the Appendix which allows each jurisdiction to replace the term 'gross negligence' with another term consistent with the law of that jurisdiction.

Item [3] Section 244BA Gross negligence

This item inserts a new section 244BA which explains how the fault element of gross negligence is attributed to a body corporate.

Subsection (1) provides that gross negligence may exist on the part of a body corporate, despite no individual authorised person of the body corporate having the fault element if:

- gross negligence is a fault element in relation to the commission of the physical element of an offence, and
- the conduct of the body corporate is grossly negligent when viewed as a whole, determined by aggregating the conduct of more than 1 authorised person.

Where it is necessary to establish the gross negligence of a body corporate in relation to the commission of the physical element of an offence, subsection 244BA(2) provides that gross

negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:

- inadequate corporate management, control or supervision of the conduct of 1 or more of the body corporate's authorised persons; or
- failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

This item inserts a jurisdictional note in the Appendix which allows each jurisdiction to replace the term 'gross negligence' with another term consistent with the law of that jurisdiction.