

**2024**

**THE LEGISLATIVE ASSEMBLY FOR THE  
AUSTRALIAN CAPITAL TERRITORY**

**WORKPLACE LEGISLATION AMENDMENT BILL 2024**

**EXPLANATORY STATEMENT  
and  
Human Rights Compatibility Statement  
(*Human Rights Act 2004, s 37*)**

**Presented by  
Mick Gentleman MLA  
Minister for Industrial Relations and Workplace Safety**

## WORKPLACE LEGISLATION AMENDMENT BILL 2024

The Workplace Legislation Amendment Bill 2024 (the Bill) is not a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

### BACKGROUND

The ACT Labor and ACT Greens Parliamentary and Governing Agreement (PAGA) commits to reviewing and amending work health and safety (WHS) laws to keep Canberrans safe.

The ACT's WHS laws adopt the nationally agreed model WHS laws as a signatory under the [Inter-Governmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety \(OHS IGA\)](#) (2008).

The OHS IGA establishes the cooperative commitment of all Australian states, territories and the Commonwealth to ensure harmonised work health and safety laws delivered through national uniformity and jurisdictional adoption of the model Work Health and Safety Act, the model Work Health and Safety Regulation and model Codes of Practice.

In 2018, WHS Ministers requested [Safe Work Australia](#) review the model WHS laws, with a view to examine and report on the content and operation of the model WHS laws (this is known as the [Boland Review](#)). The final report was published in February 2019.

Safe Work Australia is the national tripartite body with responsibility for developing, reviewing and maintaining the model WHS laws. Safe Work Australia represents the interests of the Commonwealth, states and territories and social partners (including unions and employer representatives) to achieve healthier, safety and more productive workplaces through improvement to WHS and workers' compensation arrangements.

The Boland Review considered whether the model WHS laws are operating as intended, and whether any areas of the model WHS laws had resulted in unintended consequences. The Boland Review made a number of recommendations to amend the model WHS laws. The Review was the subject of a regulatory impact assessment process to ensure that WHS Ministers were alert to the potential impacts of the recommendations to the model WHS laws.

In May 2021, WHS Ministers agreed on actions for all 34 recommendations of the Review, and tasked Safe Work Australia, the national policy body responsible for maintaining the model WHS laws, with implementation of the recommendations.

The Workplace Legislation Amendment Bill 2024 (the Bill) makes amendments to two Acts and a regulation within the responsibility of the Minister for Industrial Relations and Workplace Safety. Specifically, the Bill amends the:

- *Long Service Leave (Portable Schemes) Amendment Act 2023*;
- *Public Sector Management Act 1994*;
- *Work Health and Safety Act 2011*; and
- *Work Health and Safety Regulation 2011*.

## **OVERVIEW OF THE BILL**

The purpose of the amendments in the Bill are set out separately for each Act amended by the Bill.

### **Long Service Leave (Portable Schemes) Amendment Act 2023**

The *Long Service Leave (Portable Schemes) Act 2009* (PLSL) establishes arrangements for worker entitlements to long service leave within covered industries. This occurs by setting out specific arrangements for each specified industry in accompanying schedules.

In 2023, the Government expanded the industries covered by the Portable Schemes to the hairdressing and beauty services and accommodation and food services industries under the *Long Service Leave (Portable Schemes) Amendment Act 2023*.

The Bill provides for a minor and technical amendment adjusting the commencement of un-commenced provisions to align with quarterly return requirements administered by the Long Service Leave Authority, from 15 April 2025 to 1 April 2025.

### **Public Sector Management Act 1994**

The *Public Sector Management Act 1994* (PSMA) establishes, under Part 8, the Public Sector Standards Commissioner (PSS Commissioner). The Bill provides for amendments to the PSMA to expressly provide for the independence of the PSS Commissioner and allow for the independence of staff carrying out work for the Commissioner per arrangements made under section 148 of the PSMA.

### **Work Health and Safety Act 2011**

The *Work Health and Safety Act 2011* (WHS Act) sets out the framework for securing the health and safety of workers and workplaces. The WHS Act adopts the nationally agreed model WHS laws in the Territory as published by Safe Work Australia.

The Bill amends the WHS Act and the Work Health and Safety Regulation 2011 (WHS Regulation) to:

- a) increase the maximum penalty for bodies corporate for the offence of industrial manslaughter
- b) clarify that an officer may commit a Category 1 offence
- c) amend how WHS penalty provisions are expressed, increasing penalty amounts and providing for the indexation of penalty amounts; and
- d) insert new provisions allowing for aggregation of conduct for bodies corporate.

### **Aggregation of conduct for bodies corporate - Work Health and Safety Act**

The Bill reflects changes made to the model WHS Act to establish provisions dealing with criminal liability for bodies corporate. These measures promote the right to safe and healthy working conditions by deterring non-compliance with WHS laws and facilitating more effective prosecutions of bodies corporate. The HR Act provides that only individuals have human rights and provisions do not extend to bodies corporate.

A body corporate is an artificial entity that can only act and make decisions through individuals. Existing section 244 of the WHS Act provides for the attribution of conduct engaged in on behalf of a body corporate by an employee, officer or agent of the body corporate to the body corporate – that is, the conduct is taken to have been engaged in by the body corporate.

This Bill amends section 244 and inserts new sections that set out the circumstances in which the physical and fault elements of an offence are attributed to a body corporate and allow for aggregation of conduct. This enables the conduct of authorised persons within a body corporate to be considered as a whole in determining whether the body corporate has committed an offence where intention, knowledge or recklessness is the fault element (or required state of mind). This means that the same individual does not need to have engaged in the relevant conduct and hold the relevant state of mind (fault element) in order to prove an offence against a body corporate.

Attribution and aggregation are not applicable to most offences in the model WHS laws, because for duty-based offences it is sufficient for the prosecution to demonstrate a failure by a body corporate PCBU to ensure, for example, the health and safety of workers so far as is reasonably practicable, without having to establish where in the company the failure occurred.

The provisions to which aggregation are applicable are those that have a fault element of knowledge, intention or recklessness; and which have a physical and fault element that are capable of being separated so that the physical element and fault element of two different individuals acting on behalf of the company may be attributed to the company. The model law offences to which aggregation may be applicable are:

- section 31 – Reckless conduct – category 1
- section 97(2) – intentionally remove etc an improvement notice
- section 109 – knowingly or recklessly make a misrepresentation
- section 188 – intentionally hinder or obstruct an inspector
- section 210(2) – intentionally remove etc a notice
- regulation 337 – retailer or supplier packing hazardous chemicals, and
- regulation 338 – supplier labelling hazardous chemicals.

Provision has also been made to clarify how the new fault element of negligence is attributed to a body corporate within the new aggregation of conduct arrangements.

Negligence may exist on the part of a body corporate, despite no individual authorised person of the body corporate having the fault element if:

- 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 negligence when viewed as a whole, determined by aggregating the conduct of more than one authorised person.

Where it is necessary to establish negligence of a body corporate in relation to the commission of the physical element of the offence, the new provisions provide that negligence may be evidenced by the fact that the prohibited conduct was substantially attributed to:

- inadequate corporate management, control or supervision of the conduct of one 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.

The new section explains how the fault elements of an offence are attributed to a body corporate. Where it is necessary to establish a state of mind (fault element) of a body

corporate in relation to the commission of the physical element of an offence, the Bill provides that it is sufficient to show:

- the body corporate's board of directors:
  - intentionally, knowingly, or recklessly carried out the relevant conduct; or
  - expressly, tacitly or impliedly authorised or permitted the carrying out of the conduct constituting the physical element of the offence; or
- an authorised person:
  - intentionally, knowingly or recklessly engaged in the relevant conduct; or expressly, tacitly or impliedly authorised or permitted the carrying out of the conduct constituting the physical element of the offence; or
- 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.

Amendments to the model WHS laws provides for 'gross negligence' or a term consistent with the law of the adopting jurisdiction as the alternative fault element to recklessness. As such, the ACT has applied negligence rather than gross negligence, as the test for negligence under the ACT's Criminal Code substantively aligns to the test for 'gross negligence' as described in the 2018 Boland Review - and maintains the established legal jurisprudence for the Territory. This further maintains the existing threshold of negligence for Category 1 offences in the Territory which can be applied within the new aggregation of conduct provisions - when viewing conduct as a whole.

The Bill also introduces a mechanism by which a body corporate can rely on the defence of 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:

- 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
- the body corporate proves it took reasonable precautions to prevent the conduct.

The Bill includes factors that may be used to establish that a body corporate failed to take reasonable precautions. A failure to take reasonable precautions may be evidenced by the fact that the conduct constituting the offence was substantially attributable to:

- inadequate management, control or supervision of the conduct of one or more of the body corporate's employees, agents or officers; or

- failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

The Government recognises the role that PCBUs have in ensuring workplaces are safe for all workers, which includes the elimination of factors, risks and hazards that might contribute to unsafe work practices, particularly in terms of workplace culture.

The Bill strengthens the offences and penalties framework in the WHS Act, aligning with the model WHS laws. This includes establishing provisions dealing with criminal liability for bodies corporate in considering breaches of WHS duties providing greater deterrence for poor safety management in workplaces.

Human rights are not applicable to bodies corporate; however, the Government recognises that a body corporate is an artificial entity that can only act and make decisions through individuals. The Bill displaces the corporate criminal responsibility for WHS offences from the *Criminal Code 2002* and establishes provisions to ensure the WHS Act can operate alongside the ACT's broader criminal law framework - this allows the existing corporate criminal responsibility provisions in the Criminal Code to apply with a broadened scope to allow for the conduct of officers, employees and agents acting within their actual or apparent authority to be attributed to a body corporate, and considered as a whole in determining whether there has been an WHS offence.

### **Work Health and Safety Regulation 2011**

Section 276(1) of the WHS Act provides for the Executive to make regulations in relation to any matter relating to work health and safety. Under section 276(2), the WHS Regulation may make a provision in relation to matters set out in Schedule 3.

The WHS Regulation is subordinate law under the WHS Act. The WHS Regulation is notified on the Legislation Register and presented to the Legislative Assembly according to Part 7 of the *Legislation Act 2001*.

The WHS Regulation implements the model WHS Regulation in the Territory and forms part of a system of nationally harmonised WHS laws.

The Bill makes consequential amendments to the WHS Regulation to implement two recommendations from the Boland Review relating to the increase in penalty amounts as described above.

### **Consultation on the amendments**

Consultation on the policy associated with the Bill occurred with the Work Health and Safety Council, following national consideration of the amendments as part of the Safe Work Australia network.

Consultation with directorates and WorkSafe ACT occurred during the development of the Bill.

Changes to the model WHS laws follow the usual consultative process through Safe Work Australia, including with jurisdictions and social partners (industry and trade unions), and have been agreed to by work health and safety ministers.

### **CONSISTENCY WITH HUMAN RIGHTS**

During the development of this Bill due regard was given to its compatibility with human rights as set out by the *Human Rights Act 2004* (HR Act).

#### **Rights Promoted**

The Bill engages and promotes the following rights under the HR Act:

- Section 9 - right to life.
- Section 27B - right to work.

The Bill engages and promotes the right to life of workers and members of the public in workplaces in the ACT. The Bill also engages and promotes the right to work including undertaking measures to ensure just and favourable conditions of work, and safe and healthy working conditions.

The right to life imposes duties on the ACT Government to protect life and to take reasonable measures to protect individuals and prevent future injury in workplaces and places of work where members of the public may be present.

Through the Bill, the ACT Government is taking positive steps to satisfy its duty to protect life and prevent future injury and ensure safe and healthy working conditions by modifying the legal framework under the WHS Act to increase penalty arrangements for offences to ensure there are appropriate sanctions for unlawful behaviour. This will protect the lives of workers and people at a workplace and prevent future injury.

The offences and increased penalties that apply to the offences will act as a deterrent to poor work safety practices and encourage employers and businesses to dedicate sufficient



resources and attention to workplace safety. The increase in monetary penalties reflect real value over time, given they have not increased since their inception in 2011.

On 30 June 2022, Safe Work Australia Members agreed to give effect to the WHS ministers' decision on Recommendation 22 by amendment to the model Work Health and Safety laws to:

- a. insert a mechanism to increase penalties annually in line with national CPI so that penalties maintain their real value over time;
- b. immediately increase monetary penalties by 39.03%.

The 39.03% increase in monetary penalty amounts represents the average increase in penalty units for non-WHS offences across all jurisdictions since 2011 (when the model WHS law was introduced).

### **Rights limited - increase penalty provisions for category 1 offences and retain strict liability to duty element**

The Bill engages and limits the following rights under the HR Act:

- Section 18 - right to liberty and security of a person.
- Section 22 - rights in criminal proceedings.

The Work Health and Safety Act 2011 makes it an offence for a person to negligently or recklessly engage in conduct that exposes an individual to whom a health and safety duty is owed to a risk of death or serious injury or illness as a category 1 offence.

The Bill gives effect to amendments to the model WHS laws to increase penalties for the Category 1 offence in recognition of the seriousness of the offence:

	<b>Current Category 1 offence penalty</b>	<b>amended Category 1 offence penalty</b>
<b>Individual (other than PCBU)</b>	5 years' imprisonment; and/or \$300,000	10 years' imprisonment; and/or \$1,042,000
<b>Individual – PCBU or officer</b>	5 years' imprisonment; and/or \$600,000	10 years' imprisonment; and/or \$2,085,000
<b>Body corporate</b>	\$3m	\$10,425,000

### **1. Nature of the right and the limitation (s 28 (2) (a) and (c))**

Section 22 (1) of the HR Act provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law. The amendment engages and limits this right insofar that it maintains the existing category 1 offence provisions which apply strict liability to one element of the offence provision. The Bill maintains strict liability to the work health and safety duty element of the offence at 31(1)(a).

Strict liability provisions generally engage and limit the right to be presumed innocent as they remove the need for the prosecution to prove an accused person's fault (ie the mental element of intent or recklessness) in relation to an offence generally or for particular elements of an offence. As a result, section 31(1)(a) of the WHS Act reverses the onus in criminal proceedings and requires an accused to prove a defence for that element for the offence to which strict liability applies.

The amendment also engages and limits the right to liberty (section 18 of the HR Act) as the offence under section 31(1) carries a maximum penalty of 10 years imprisonment. Section 18 of the HR Act provides that no-one may be arbitrarily arrested and detained, and no one will be deprived of their liberty, except on grounds and in accordance with the procedures established by law. Arrest or detention may be 'arbitrary' if it is unreasonable, unjust, inappropriate or disproportionate in all the circumstances of the case or not in accordance with due process.

### **1. Legitimate purpose (s28(2)(b))**

Noting that the Bill does not amend the application of strict liability, the legitimate purpose of the limitations (strict liability and penalties of imprisonment provisions) is to protect the health and safety of workers, and act as a deterrent against persons conducting a business or undertaking (PCBUs) from providing unsafe workplaces and work cultures.

### **2. Rational connection between the limitation and the purpose (s28(2)(d))**

In order to protect the health and safety of workers, it is necessary to provide an appropriate legal framework to support enforcement and regulation of PCBUs.

The offence elements applying strict liability have been carefully considered during the Bill's development and they are considered appropriate to achieve the legitimate purpose. The strict liability offences arise in a regulatory context where, for reasons such as public safety, the public interest in ensuring that regulatory schemes are observed, requires the sanction of criminal penalties. The rationale for maintaining its use in this Bill is that people who owe work safety duties such as PCBUs, persons in control of aspects of work and designers and manufacturers of work structures and products, as opposed to members of the general

public, can be expected to be aware of their duties and obligations to workers and the wider public. In particular, where an accused can reasonably be expected, because of his or her professional involvement, to know what the requirements of the law are, the mental (or fault) element can justifiably be excluded. Accordingly, strict liability offences are applied so that every relevant person complies with their obligations at all times and acts appropriately to secure the health and safety of workers and other at the workplace.

The model WHS Act provides for three categories of offence for failure to comply with a health and safety duty. Category 1 offences relate to the most serious (with the exception of industrial manslaughter) cases of noncompliance, involving recklessness in exposing an individual to whom a duty of care is owed to the risk of death, serious injury or illness. In May 2021, in response to the Boland Review, WHS Ministers, agreed to consider significant increases to penalties including maximum imprisonment for individuals to prevent workplace deaths and serious injury. The increases to the maximum term of imprisonment proposed by the Bill reflect this agreement and adopt the maximum terms provided by the model WHS Act. Increases to the maximum penalty of imprisonment reflect the objective of ensuring that the penalty reflects the gravity and seriousness of the offence and meets community expectations. Findings of the review further suggested that ensuring greater deterrent to duty-holders for unsafe work conditions and practices would in turn lead to a reduction in health and safety costs with potential increases in safety standards and compliance.

The penalty of imprisonment is also reasonable and proportionate, as it reflects the seriousness of the harm which could result where PCBUs provide unsafe workplaces and practices. Further, as each case for the offence will turn on its own facts and circumstances, and that different offenders may be described as having acted with differing levels of culpability or blameworthiness, to the extent that unique cases arise when a person may commit the offence, the Court's wide sentencing discretion, and the safeguard inclusion of alternative verdicts, such as through category 2 offences, will allow the offender's level of culpability to be reflected through a more lenient sentence.

It is appropriate to ensure that the penalties for category 1 offences are commensurate with the risks of the offence and proportionate to other offences for breach of duties that seriously risk the health and safety of workers and that duty holders are appropriately held accountable for their behaviour. The ACT's industrial manslaughter offence attracts a maximum penalty of 20 years imprisonment, recognising the seriousness of the offence and the consequences of an industrial death.

Without adoption of the model WHS law increases to the maximum imprisonment penalty, it is likely that the ACT would be seen as reducing the relative value of safety for workers in

the Territory as compared to other jurisdictions, and in comparison with the maximum penalties imposed for related serious offences.

The Bill does not amend or limit the reasonable excuse defence contained in section 31 for category 1 offences.

The use of imprisonment as a penalty is considered an appropriate and effective to achieve the legitimate purpose, given the significant consequences that can arise from unsafe working conditions. The increase in the maximum penalty of imprisonment for a category 1 offence (which is an established offence provision under the ACT's WHS Act), stresses the seriousness of the offence and acts as an appropriate deterrent from that behaviour.

### **3. Proportionality (s28(2)(e))**

The application of strict liability to the duty element at 31(1)(a) of the category 1 offence and the increase to the maximum penalty amount is proportionate to the limitation on the right to the presumption of innocence encapsulated by the ACT's Work Health and Safety laws and this Bill.

The penalty of imprisonment is reasonable and proportionate, as it reflects the seriousness of the harm which could result where PCBUs provide unsafe workplaces and practices. Further, as each case for the offence will turn on its own facts and circumstances, and that different offenders may be described as having acted with differing levels of culpability or blameworthiness, to the extent that unique cases arise when a person may commit the offence, the Court's wide sentencing discretion, and the safeguard inclusion of alternative verdicts, such as through category 2 offences, will allow the offender's level of culpability to be reflected through a more lenient sentence.

It is appropriate to ensure that the penalties for category 1 offences are commensurate with the risks of the offence and proportionate to other offences for breach of duties that seriously risk the health and safety of workers and that duty holders are appropriately held accountable for their behaviour. The ACT's industrial manslaughter offence attracts a maximum penalty of 20 years imprisonment, recognising the seriousness of the offence and the consequences of an industrial death.

The increase to penalties including the increase in imprisonment is made under the national model WHS legislation and the amendment in this Bill adopts the same amounts as the model laws and consistent with other harmonised jurisdictions.

Without adoption of the model WHS law increases to the maximum imprisonment penalty, it is likely that the ACT would be seen as reducing the relative value of safety for workers in

the Territory as compared to other jurisdictions, and in comparison with the maximum penalties imposed for related serious offences.

The Bill does not amend or limit the reasonable excuse defence contained in section 31 for category 1 offences.

Category 1 offences are serious breaches of WHS duties and apply where a person is exposed to risk of death or serious injury resulting from reckless conduct without reasonable excuse. For a Category 1 offence this means that the person is reckless as to the risk of death or serious injury to an individual to whom a WHS duty is owed.

Given the seriousness of category 1 offences, the application of strict liability is necessary and proportionate to ensure a culture of proactive work safe practices. Strict liability offences are needed to ensure that every relevant person complies with their obligations at all times and acts appropriately to secure the health and safety of workers and others at the workplace. The regulatory regime established for this purpose seeks to encourage duty holders to maintain a workplace that is as free as possible from harm or injury, and, to develop a safety culture. The fostering of such a culture would be far more difficult to accomplish without the use of strict liability offences.

The application of strict liability is reasonable and proportionate to protect the health and safety of workers. Strict liability is only applied to the particular element of the offence under sections 31(1)(a) of the WHS Act. It ensures that those who hold responsibility for a health or safety duty do uphold that responsibility and cannot escape liability by claiming ignorance of the duty, or ignorance of the effect of their conduct. The defence of mistake of fact as provided by the *Criminal Code 2002* also remains available to any accused for any strict liability provisions.

The WHS Act imposes health and safety duties on all PCBUs in the Territory, as well as duties to their officers and workers. All PCBUs are required to be aware of their health and safety duties under the WHS Act and it is reasonable for the law to assume this is the case in the context of a serious breach of duties that such as a workplace death or serious workplace injury or illness.

The penalty of 10 years imprisonment is the maximum penalty that can be imposed and recognises the seriousness of the conduct that would be captured by a category 1 offence, which involves negligently or recklessly endangering a person to risk of death or serious injury.

Imprisonment is a necessary penalty for the category 1 offence provisions so as to adequately deter potential PCBUs and their officers from creating and maintaining unsafe

workplaces and engaging in unsafe workplace practices that may result in the death or serious injury of workers.

The Bill places the least restrictive limitation on the right to presumption of innocence, as it does not apply strict liability to information that is known by an accused, and that may be revealed to prove or disprove the defence.

### **Climate Change Vulnerability Assessment**

There are no climate change implications associated with the Bill.

## Workplace Legislation Amendment Bill 2024

### *Human Rights Act 2004 - Compatibility Statement*

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Workplace Legislation Amendment Bill 2024**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly **is** consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA  
Attorney-General

## Workplace Legislation Amendment Bill 2024

### CLAUSE NOTES

#### **Part 1 Preliminary**

##### **Clause 1 Name of Act**

This clause provides the name of the Act as the Workplace Legislation Amendment Act 2024.

##### **Clause 2 Commencement**

This clause provides for commencement of the Act; noting commencement of Parts 4 and 5 4 months after the Act's notification day.

##### **Clause 3 Legislation amended**

This clause provides that the Act amends the:

- *Long Service Leave (Portable Schemes) Amendment Act 2023;*
- *Work Health and Safety Act 2011;*
- *Work Health and Safety Regulation 2011.*

#### **Part 2 Long Service Leave (Portable Schemes) Amendment Act 2023**

##### **Clause 4 Commencement Section 2(3)**

This clause provides for a minor and technical amendment to the Long Service Leave (Portable Schemes) Amendment Act 2023 to align commencement of un-commenced provisions with quarterly reporting processes for the Long Service Leave Portable Schemes.

#### **Part 3 Public Sector Management Act 1993**

##### **Clause 5 New Section 143A**

This clause provides for the independence of the Public Sector Standards Commissioner in the exercise of the commissioner's functions.



**Clause 6      New section 149A**

This clause provides for the independence of a public employee exercising a function of the commissioner.

**Part 4            Work Health and Safety Act 2011**

**Clause 7           Offences against Act - application of Criminal Code etc New section 12B(2)**

This clause disapplies the ACT *Criminal Code 2002* Part 2.5 (Corporate criminal responsibilities) to an offence under the WHS Act - accommodating the new corporate criminal responsibility provision dealt with by division 13.4.

**Clause 8           Negligence or reckless conduct - category 1 Section 31(1)(b)**

This clause makes a technical change to clarify that category 1 offences apply to an officer of a person conducting a business or undertaking. Officer is defined by the WHS Act and attracts additional WHS duties as provided by section 27 of the WHS Act. It has always been understood that these persons, like any duty holder, are liable for a category 1 offence.

**Clause 9           Section 31(1), penalty**

This clause provides for the applicable penalties for a category 1 offence specifying the maximum monetary penalty and maximum term of imprisonment. This gives effect to the May 2021 decision by WHS Ministers to increase category 1 offence penalties in addition to the increase of all monetary penalties in the model WHS Act. The increase in penalties for a category 1 offence reflects the seriousness of offences of this kind and addresses community concerns for greater accountability of duty holders who put workers and other persons' lives at risk.

**Clause 10        Failure to comply with health and safety duty - category 2 Section 32, penalty**

At present, every offence/civil penalty provision includes the maximum monetary penalty at the foot of the provision expressed as a dollar amount.

To facilitate the introduction of annual indexation of penalties and maintain the ACT's harmonisation with model WHS laws, the monetary amounts for each of the WHS penalties will be replaced by a reference to a WHS penalty category or tier (civil).

Given the number of individual penalty provisions and the introduction of annual indexation to adjust penalty amounts for changes in the national CPI, it was considered impractical to modify each penalty provision annually.

To account for this, the following items would replace each individual penalty amount with a reference to the relevant penalty tier set out in new Schedule 4. Indexation will be applied to the penalty tier amounts set out in new Schedule 4 and as a result apply automatically to each provision that specifies that penalty tier as the maximum penalty amount for that offence or civil penalty provision.

There will be three kinds of penalty tiers:

- Category penalties would be the penalties set for the three category offences in Part 2 of the WHS Act (sections 31-33).
- nine different monetary penalty tiers used for the general offences in the WHS Act and Regulations reflecting the nine different penalty levels used in the WHS Act and Regulations.
- four WHS civil penalty provision tiers for the four different civil penalty amounts used in Part 7 of the WHS Act.

The general 39.03 per cent increase in monetary penalties represents the average increase in penalty units for non-WHS offences across all jurisdictions since 2011 (when the model Act was introduced).

Indexation will be applied to the penalty tier amounts.

**Clause 11      Failure to comply with health and safety duty - category 3 Section 33, penalty**

As provided at Clause 8.

**Clause 12      Industrial manslaughter Section 34A(1), penalty, except note**

This clause sets the offence provisions for an industrial manslaughter offence - increasing the maximum monetary penalty, expressed in penalty units as per the above, to \$18 million. The increase in the maximum monetary penalty reflects the seriousness of the offence and is consistent with the penalty for industrial manslaughter in the model WHS Act.

**Clause 13      Contravening WHS entry permit conditions Section 123, penalty**

As provided at Clause 8.

**Clause 14      Unauthorised use or disclosure of information or documents Section 148(d)**

This clause provides for a technical correction to reference of the (Cwlth)).

**Clause 15      Return of WHS entry permits Section 149(1), penalty**

As provided at Clause 8.

**Clause 16      Union to provide information to regulator Section 150, penalty**

As provided at Clause 8.

**Clause 17      Abrogation of privilege against self-incrimination Section 173(2)**

This clause provides a technical amendment to clarify that the abrogation of privilege against self-incrimination applies to an individual aligning with the terminology in the model WHS Act.

**Clause 18      Offence to assault, threaten or intimidate inspector Section 190, penalty**

As provided at Clause 8.

**Clause 19      Offence to impersonate inspector Section 189, penalty**

As provided at Clause 8.

**Clause 20      Offence to assault, threaten or intimidate inspector Section 190, penalty**

As provided at Clause 8, noting that no amendment has been made to the maximum imprisonment penalty.

**Clause 21      Division 13.4 Offences by bodies corporate**

**Section 244 Definitions**

The new section 244 defines key terms and concepts in sections 244A-244D.

***Authorised person*** for a body corporate is defined to mean an officer, employee or agent of the body corporate acting within the officer's, employee's or agent's actual or apparent authority.

The definition of ‘authorised person’ incorporates the common law doctrine of actual and apparent authority. A person’s actual or apparent authority may extend beyond the actual or apparent scope of his or her employment.

Actual authority derives from the relationship between the principal and the agent (*Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 [502]). Apparent authority is created by the relationship between the principal and the third party:

An ‘apparent’ or ‘ostensible’ authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the ‘apparent’ authority, so as to render the principal liable to perform any obligations imposed upon him by such contract (*Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 [502]).

**Board of directors** is defined to mean the body, whatever it is called, exercising the executive authority of the body corporate.

### **Section 244A Physical elements**

The new section 244A explains how the physical elements of an offence are attributed to a body corporate. Section 244A allows for the physical elements of an offence to be taken to have been committed by a body corporate if the conduct is committed by:

- the body corporate’s board of directors; or
- 1 or more authorised persons; or
- 1 or more persons acting at the direction of or with the express or implied agreement or consent of:
  - an authorised person, or
  - the body corporate’s board of directors.

### **Section 244B Fault elements other than negligence**

The new section 244B explains how the fault elements of an offence are attributed to a body corporate. Where it is necessary to establish a state of mind (fault element) of a body corporate in relation to the commission of the physical element of an offence, subsection 244B(1) provides that it is sufficient to show:

- the body corporate’s board of directors:

- engaged in the conduct constituting the offence and had that state of mind in relation to the physical element of the offence; or
- expressly, tacitly or impliedly authorised or permitted the carrying out of the conduct constituting the physical element of the offence; or
- an authorised person for the body corporate:
  - engaged in the conduct constituting the offence and had that state of mind in relation to the physical element of the offence; or
  - expressly, tacitly or impliedly authorised or permitted the carrying out of the conduct constituting the physical element of the offence; or
- 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.

Subsection 244B(2) establishes that paragraphs 244(1)(b) and (c) do not apply if the body corporate proves it took reasonable precautions to prevent the conduct, authorisation or permission of the conduct.

Subsection 244(3) establishes the factors relevant to the application of paragraph 244(1)(c) to include whether authority or permission to engage in the conduct constituting an offence, of the same or a similar character, had previously been given by a corporate officer of the body corporate; and whether the person who engaged in the conduct constituting the offence believed on reasonable grounds, or had a reasonable expectation that a corporate officer of the body corporate would have authorised or permitted the conduct.

‘Corporate culture’ and ‘corporate officer’ are defined in subsection 244B(4). *Corporate culture* means one 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* is defined by reference to section 9AD of the *Corporations Act 2001* (Cwlth).

### **244BA Negligence**

The new section 244BA explains how the fault element of negligence is attributed to a body corporate. It provides that negligence may exist on the part of a body corporate, despite no individual authorised person of the body corporate having the fault element if:

- negligence is a fault element in relation not the commission of the physical element of an offence; and
- the conduct of the body corporate is negligent when viewed as a whole, determined by aggregating the conduct of more than 1 authorised person.

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

### **Section 244C Mistake of fact**

The new section 244C introduces a mechanism by which a body corporate can rely on the defence of 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:

- 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
- the body corporate proves it took reasonable precautions to prevent the conduct.

### **Section 244D Failure to take reasonable precautions**

The new section 244D includes factors that may be used to establish that a body corporate failed to take reasonable precautions, in relation to subsections 244B(2) and 244C(b). A failure to take reasonable precautions may be evidenced by the fact that the conduct constituting the offence was substantially attributable to:

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

### **Section 244E How this division applies to public authorities**

This new section provides that the division applies in relation to a body corporate in accordance with section 251 (imputing conduct to public authorities).

### **Clause 22 When is a provision a WHS civil penalty provision Section 254(1)(a) and (2)(a)**

As provided for Clause 8 this clause provides for the expression of a maximum penalty used to be expressed as a WHS civil penalty provision tier.

**Clause 23 Additional ways that regulator may use and share information, Section 271A(3)(b)**

This clause provides for interstate coverage of laws prescribed by regulation to ensure that it is sufficient to capture interstate legislation for the purpose of using or sharing information where the regulator reasonably believes the disclosure, access or use is necessary for regulatory purposes under the Act.

**Clause 24 Liability of officers for offences by body corporate under s272A Section 272B(1), penalty, except note**

As per clause 8.

**Clause 25 Regulation-making powers New section 276(3)(g)**

This clause facilitates the establishment of monetary penalty tiers for the purposes of the WHS Regulation.

**Clause 26 New Schedule 4 Penalty amounts**

Clause 4.1 defines monetary penalties - categories 1 - 3.

Clause 4.1A prescribes the maximum monetary penalty for *industrial manslaughter monetary penalty* as \$18,000,000.

Clause 4.2 defines monetary penalties tiers A - I.

Clause 4.3 defines WHS civil penalty tiers 1 - 4.

Clause 4.4 amends the penalty levels in the WHS Act to reflect increases in the Consumer Price Index (CPI), as discussed at above. This is achieved by introducing an indexation formula, which is to be applied annually to all monetary penalties as provided in the model WHS Act and the model WHS Regulations.

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 clause 4.

Clause 4.4 contains the formula for calculating the maximum amount of each monetary penalty that will apply in each year. The maximum amount 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.

Clause 4.4(3) provides that 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. This ensures that penalty levels do not decrease.

Clause 4.4(4) defines CPI number to mean the All Groups Consumer Price Index number, that is, the weighted average of the eight Australian capital cities, published by the Australian Statistician.

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

Clause 4.5 specifies that for penalties under \$10,000 and not a multiple of \$100, the maximum amount of a monetary penalty will be rounded down to the nearest \$100 and an amount of \$50 is rounded down. For penalties more than \$10,000 and not a multiple of \$1,000, the maximum amount of the penalty must be rounded to the nearest \$1,000 and an amount of \$500 is rounded down.

Clause 4.6 provides that as soon as practicable after publication by the Australian Statistician of the CPI number for the March quarter each year the regulator must give public notice of the amount of each monetary penalty calculated under this Schedule. It also establishes the notice as a notifiable instrument.

## **Clause 27 Dictionary, new definitions**

This clause provides for key terms and concepts used in the Bill as:

authorised person, for division 14.3 Offences by bodies corporate

board of directors, for division 13.4 Offences by bodies corporate

category 1 monetary penalty - see section 4.1

category 2 monetary penalty - see section 4.1



category 3 monetary penalty - see section 4.1  
fault element - see the Criminal Code, section 17  
industrial manslaughter monetary penalty - see section 4.1A  
physical element - see the Criminal Code, section 14  
tier A monetary penalty - see section 4.2  
tier B monetary penalty - see section 4.2  
tier C monetary penalty - see section 4.2  
tier D monetary penalty - see section 4.2  
tier E monetary penalty - see section 4.2  
tier F monetary penalty - see section 4.2  
tier G monetary penalty - see section 4.2  
tier H monetary penalty - see section 4.2  
tier I monetary penalty - see section 4.2  
WHS civil penalty provision tier 1 - see section 4.3  
WHS civil penalty provision tier 2 - see section 4.3  
WHS civil penalty provision tier 3 - see section 4.3  
WHS civil penalty provision tier 4 - see section 4.3

**Clause 28** Further amendments, penalties  
**Clause 29** Further amendments, penalties  
**Clause 30** Further amendments, penalties  
**Clause 31** Further amendments, penalties  
**Clause 32** Further amendments, penalties  
**Clause 33** Further amendments, penalties  
**Clause 34** Further amendments, penalties  
**Clause 35** Further amendments, penalties

**Part 4** Work Health and Safety Regulation 2011

**Clause 36** Section 55C

This clause amends section 55C to clarify that persons conducting a business or undertaking must:

- a) manage psychosocial risks in accordance with part 3.1 (Managing risks to health and safety) and
- b) implement the control measures required by section 55D.

**Clause 37      psychosocial risks - control measures Section 55D(3), note**

This clause omits the note as a typographical error.

**Clause 38      Section 702, heading**

This clause provides for a technical amendment to the heading of the section.

**Clause 39      Section 702**

This clause is a technical correct to references within the provision.

**Clause 40      Further amendments, penalties**

**Clause 41      Further amendments, penalties**

**Clause 42      Further amendments, penalties**

As provided at clause 8 - amendments have been made to the WHS Regulation to facilitate introduction of the tier penalty framework to allow an indexation mechanism to be implemented.