

3 November 2025

Safe Work Australia

Via Consultation Hub: <http://consult.swa.gov.au/best-practice-review>.

Dear Ms Boland

Best Practice Review of the model Work Health and Safety Laws

Thank you for the opportunity to provide a submission to the 2025 Best Practice Review of the model Work Health and Safety (**WHS**) laws.¹

The Australian Institute of Company Directors (**AICD**)'s mission is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society. The AICD's membership of more than 53,000 includes directors and governance leaders of not-for-profits, large and small businesses and the public sector.

The AICD welcomes the Best Practice Review of Australia's model WHS laws (**Review**). The AICD supports robust and effective laws that ensure the health and safety of employees in the workplace. Laws in this area must be fair, balanced and consistent.

Australian directors take health and safety matters in the workplace seriously. Aside from legal obligations and ethical expectations, it is critical that directors and officers pay particular attention to the health and safety of employees and others within the workplace, and this has a strong focus in the AICD's educational curriculum and materials.

Enclosed at **Attachment A** are our responses to key questions from the Review discussion paper. We have focused on those of most relevance to Australian directors and governance. Our responses have been informed by engagement with directors and other stakeholders. The AICD also obtained legal advice from King & Wood Malletsons (**KWM**) on the current operation of the WHS laws in Australia and potential implications on emerging trends or proposed changes, which we have referenced in this submission.

1. Executive Summary

The AICD commends Safe Work Australia for undertaking the Review, being to ensure that the WHS laws continue to incorporate a best practice approach. The AICD also strongly supports the objective of harmonisation of WHS regimes across the States, Territories and the Commonwealth.

Our responses focus on supporting these objectives in the context of good governance and directors' obligations and duties.

¹ The model laws comprise the Model Work Health and Safety Bill, Model Work Health and Safety Regulations, and model Codes of Practice.

Our key points under each of the relevant questions are as follows:

Key Question – How do we maintain best practice in response to the changing nature of work and emerging risks?

- Harmonisation across jurisdictions is fundamental to maintaining best practice and the AICD continues to advocate for this, particularly for those organisations that operate across jurisdictional borders. Inconsistencies create unnecessary cost and complexity, which can undermine the efficacy of the WHS Laws and is ultimately to the detriment of workers.
- It is vital that the now extensive jurisdictional variations are addressed as part of this Review, as they are undermining the harmonisation objective and making it difficult for businesses to manage their WHS obligations.
- The extensive volume of information contained across Australia within the various acts, regulations, and state or territory-based codes of practice renders it impractical for directors to remain fully informed of the detail of their obligations.
- The harmonisation focus of the Review should deliver a coherent, nationally consistent standard for governance, enforcement and assurance. Any additional regulation or variations to the model WHS Act should be targeted, evidence-based and demonstrably improve safety outcomes. Duplicative or jurisdiction-specific overlays that add complexity without lifting safety standards should be avoided or removed.
- In the view of the AICD, best practice is also maintained where the WHS laws are principles-based, not prescriptive – providing flexibility for organisations within a clear regulatory framework, whilst allowing regulation to adapt to emerging technologies and concerns.
- The AICD considers that the model WHS laws are working in accordance with their purpose and there is no need to significantly change the overall framework. Changes should only be made where clear evidence shows that the current framework is not working and there is a genuine gap that needs to be addressed.
- New or emerging risks are best addressed by having applicable Codes of Practice and education materials disseminated, rather than introducing new legislation. This approach provides greater scope to flexibly adapt to new risks, while still requiring organisations to identify, assess and control those risks.

Question 6 – Do you have any comments on the general WHS duties under the model WHS Act, including variations made by jurisdictions?

Liability of volunteer directors

- It is important that the model WHS laws continue to provide that a volunteer officer – including a volunteer director - cannot be prosecuted for failing to comply with their duties under the model WHS Act. Critically, this does not mean that they do not carry WHS obligations.
- This immunity is vital to ensure that voluntary participation at the officer level is not discouraged, especially in a range of critical sectors where directors are often unpaid (eg human services).

Question 11 – Do you have any comments on the offences, penalties and enforceable undertaking provisions in the model WHS Act, including variations made by jurisdictions?

Regulator expectations and enforcement

- There is a need to harmonise regular expectations and enforcement provisions across the jurisdictions.
- Differences in regulator expectations across jurisdictions, the use of improvement/prohibition notices, access to enforceable undertakings, and varying prosecution policies make it hard for boards to set a nationally consistent risk threshold and assurance program.

Industrial manslaughter

- There is a compelling need to harmonise industrial manslaughter WHS regimes across the States, Territories and the Commonwealth.
- The current state complicates attempts to conduct proper incident risk assessments, consequence analysis, and crisis governance planning. This creates unnecessary complexity and confusion.

Availability of insurance associated with fines and penalties

- The WHS Act should be amended to reinstate the pre-2022 position, which did not disallow Directors and Officers (D&O) Insurance for all monetary fines and penalties imposed under WHS law.
- D&O Insurance plays a fundamental role in WHS matters. While the AICD supports strong penalties for officers who fail to exercise their duties under WHS laws, our position is that there are instances where it is appropriate for insurance to be available, particularly recognising that an individual can be held liable because of their role and without the need for culpability to be established. The common law and the *Corporations Act 2001* (Cth) both provide examples of a more balanced approach in relation to the availability and enforceability of insurance.

Question 19 – Do you have any comments on the issues raised in this section as they relate to best practice WHS laws and harmonisation going forward?

Artificial Intelligence (AI)

- AICD supports Safe Work Australia's focus on ongoing monitoring and data collection to assess the potential impacts of AI, given that the model laws are intended to be principles-based and adapt to changing work practices.
- As a general principle, the AICD believes that standalone AI WHS laws should only be included in the Model WHS Laws where there is gap in existing laws that risk causing significant harm to workers and where technology-neutral regulation is not possible. Guidance to clarify how existing WHS laws apply to AI use may be helpful.

Psychosocial risks

- We do not support introducing further new regulations into the Model WHS Laws to deal with psychosocial risks which are complex and often multi-causal, with the workplace being one of many factors that go towards psychosocial issues.
- Management of psychosocial risks can be particularly challenging and, from a director's perspective, ensuring that these risks are appropriately and adequately addressed is similarly challenging,

particularly in circumstances where training, education and reporting on risks may not be sufficient to prevent harm in particular circumstances.

2. Next Steps

We hope our submission will be of assistance when considering this complex area of law and policy. We look forward to providing additional comments as Safe Work Australia's work progresses.

If you would like to discuss any aspects of our submission further, please contact Christian Gergis, Head of Policy (cgergis@aicd.com.au) or Ilana Waldman, Senior Policy Adviser (iwaldman@aicd.com.au).

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Louise', with a long horizontal stroke extending to the right.

Louise Petschler GAICD

GM, Education and Policy Leadership

Attachment A: Responses to key questions

1. Key question: How do we maintain best practice in response to the changing nature of work and emerging risks?

Harmonisation

WHS laws will be best practice when they are balanced, fit-for-purpose and modern laws that strengthen national governance. This is best achieved when there is harmonisation across jurisdictions, providing business certainty and delivering on the key goal of providing the highest level of protection for workers.

We welcome Safe Work Australia's focus on harmonisation. The increased trend across the States and Territories to introduce jurisdiction-specific laws undermines implementation and drives up compliance costs, particularly for those organisations that operate across jurisdictional borders. Inconsistencies also create unnecessary complexity, which can undermine the efficacy of the WHS laws and is ultimately to the detriment of workers.

The AICD's legal advice from KWM confirms that the extensive volume of information contained across Australia within the various acts, regulations, and state or territory-based codes of practice renders it impractical for directors to remain fully informed of the detail of their obligations. The advice notes that given the significant recent changes to the industrial relations environment - particularly in light of the sweeping reforms implemented to the *Fair Work Act 2009* (Cth) (**FW Act**) and the Respect@Work changes to the *Sex Discrimination Act 1984* (Cth) (**SDA**) - it has become increasingly challenging for boards to keep abreast of developments in this area.

This complexity often results in directors being drawn into time-consuming compliance exercises focusing on detailed regulatory requirements in each of the applicable jurisdiction-specific acts, regulations and codes of practice, detracting from a holistic assessment of safety issues at an appropriate strategic level. Furthermore, jurisdictional disparities exacerbate the situation, undermining the primary advantage of a harmonised approach.

As a result, organisations are adopting a national approach to safety having regard to the 'highest common denominator' approach. This means that the business identifies the strictest WHS standard from all the jurisdictions in which a business operates and applies it across the organisation at the enterprise level. While this approach is understandable (as it is often simply the most practical), this can drive over-compliance and introduce problems where uniform rules are not appropriately aligned with local operational realities.

While complete consistency and harmonisation has never been fully realised, it remains a vital objective to guide potential changes to the model WHS laws.

The harmonisation focus of the Review should deliver a coherent, nationally consistent standard for governance, enforcement and assurance. Any additional regulation or variations to the model WHS Act should be targeted, evidence-based and demonstrably improve safety outcomes. Duplicative or jurisdiction-specific overlays that add complexity without lifting safety standards should be avoided or removed.

Principles based regulation

In addition to focusing on national consistency, the AICD also believes that best practice is maintained where WHS are principle based and not prescriptive. This provides flexibility for organisations within a clear regulatory framework that can adapt to emerging issues and technology.

The AICD considers that the model WHS laws are working in accordance with their purpose and there is no need to significantly change the overall framework. Changes to the existing framework in the model WHS laws should only be made where there is clear evidence to support that the current framework is not best practice and there is a genuine gap that compromises worker safety. Additional laws and regulations should not be added where they will add to the regulatory burden without addressing a genuine need or outstanding issue.

KWM's advice concludes that current WHS laws are fit-for-purpose and do not have any major gaps. The law is flexible enough that new or rapidly emerging safety risks (e.g. AI) can be addressed by having via Codes of Practice or education material, rather than introducing new legislative requirements. Policy-makers should be slow to introduce new regulations unless there is clearly a gap in the law or unacceptable risk to safety caused by the existing regime.

The AICD has also recently received updated research from Allens on director liability in Australia.² The research compared how directors are held legally responsible in Australia and five other comparable jurisdictions – Canada, Hong Kong, New Zealand, the UK, and the US – across 10 key areas including workplace laws. Broadly, the research concluded that Australia's director liability environment remains unique and, overall, is more burdensome compared to Canada, Hong Kong, New Zealand, the UK, and the US. In relation to WHS laws specifically, the research found that:

- the new industrial manslaughter WHS offences in all Australian states and territories is one of the material new exposures for Australian directors that has emerged since 2019; and
- Australia's WHS laws are relatively burdensome when compared to other jurisdictions.

Question 6 – ‘Do you have any comments on the general WHS duties under the model WHS Act, including variations made by jurisdictions?’

Liability of volunteer directors

Not-for-profit (**NFP**) organisations who employ workers are PCBUs under the WHS Laws and directors of NFPs have a duty of care to ensure, so far as is reasonably practicable:

- the health and safety of their workers at work; and
- that the health and safety of other people is not affected by the way in which the organisation conducts its business or undertaking.

The AICD agrees that individual directors play a fundamental role in setting the 'tone from the top' and have a duty to exercise due diligence to confirm that their organisation is meeting its WHS obligations.

However, under the Model WHS laws a volunteer officer – including a director - cannot be prosecuted for failing to comply with their duties under the model WHS Act. This immunity is designed to ensure that voluntary participation at the officer level is not discouraged

This position is supported by the AICD and should not change because of the Review. Exposing unpaid directors to personal criminal liability risks limiting the pool of qualified directors, with potential knock-on effects for worker safety.

The AICD also notes that the legal advice makes it clear that the current framework does not allow volunteer directors to obviate accountability. A volunteer director may be guilty of an offence in their

² AICD (September 2025). Director Liability: Comparative assessment of Australia and international peers. Allens research available [here](#).

capacity as a 'worker' if they do not take reasonable care. This includes not taking reasonable care for the health and safety of themselves or others or failing to co-operate with the organisation's reasonable workplace procedures. Further, volunteers remain subject to all applicable non-pecuniary consequences, such as being the subject of an investigation, or being disqualified from acting as a board member. These consequences have obvious reputational repercussions. These mechanisms preserve incentives for safe conduct without imposing criminal fines.

2. Question 11 – 'Do you have any comments on the offences, penalties and enforceable undertaking provisions in the model WHS Act, including variations made by jurisdictions?'

Regulator expectations and enforcement

Differences in regulator expectations across jurisdictions, the use of improvement/prohibition notices, access to enforceable undertakings, and varying prosecution policies make it difficult to set a nationally consistent risk threshold and assurance program.

Examples of these inconsistencies from the AICD's recent legal advice include:

- **Industrial manslaughter:** the availability, elements, and penalties of industrial manslaughter offences vary by jurisdiction as detailed further in the 'Industrial Manslaughter' section below;
- **Penalties:** the maximum penalties and sentencing trends differ across jurisdictions. These differences influence corporate risk appetite, self-reporting strategies and board-level oversight settings;
- **Enforcement tools:** the level at which regulatory intervention occurs, and the availability of enforceable undertakings will depend on the jurisdiction; and
- **Notifiable incidents:** the definition of 'notifiable incident' and the mechanics of such a notification vary somewhat across different jurisdictions.

As a result, organisations are adopting a national approach to safety having regard to the 'highest common denominator' approach mentioned above.

Industrial manslaughter

The AICD did not initially support the introduction of industrial manslaughter offences into the Model WHS Laws due to existing criminal law offences providing a pathway for prosecutions in relation to workplace fatalities. However, the AICD acknowledges that industrial manslaughter has now been included in the WHS Model Laws and has been adopted by all jurisdictions in various forms.

The discrepancies between the jurisdictions create inconsistency and are problematic. Below is a comparison of industrial manslaughter penalties across Australian states and territories (as at October 2025).

Jurisdiction	Maximum penalties
Commonwealth	Individual: 25 years' imprisonment Body corporate: \$18M
ACT	Individual: 20 years' imprisonment Body corporate: \$16.5M
NSW	Individual: 25 years' imprisonment Body corporate: \$20M
NT	Individual: imprisonment for life

	Body corporate: \$11.440M
QLD	Individual: 20 years' imprisonment Body corporate: \$15.480M
SA	Individual: 20 years imprisonment Body corporate: \$18M
TAS	Individual: 21 years' imprisonment Body corporate: \$18M
VIC	Individual: 25 years' imprisonment Body corporate: \$19.231M
WA	Individual: 20 years imprisonment and a fine of \$5M Body corporate: \$10M

There are also inconsistent fault elements between jurisdictions ('negligence' v 'gross negligence' v 'recklessness' and inconsistent roles within companies who can be charged (for example, in Queensland 'senior officers' as opposed to 'officers' in other states). These differences are significant, particularly where the fault threshold is set as low as negligence.

This complicates attempts to conduct proper incident risk assessments, consequence analysis, and crisis governance planning.

The AICD believes there is the need to harmonise these differing WHS regimes to reduce complexity and inconsistency, particularly for the entities that operate across jurisdictions. Accordingly:

- The AICD supports the use of the existing definitions in the Model WHS Laws for the purposes of who can commit and offence of industrial manslaughter.
- The AICD believes that the penalties in the existing Model WHS Laws strike the correct balance and supports the various jurisdictions aligning their offence penalties with the Model WHS Laws.
- The AICD supports the position in the Model WHS Laws that the industrial manslaughter offence applies when a duty holder's conduct causes the death of other persons at the workplace as well as workers. This is also consistent with the recommendations of the Boland Review.
- The AICD supports a legal test and fault threshold of 'gross negligence causing death' on the part of a duty holder, in line with the Model WHS Laws and the recommendations of the Boland Review. This is also consistent with most jurisdictions that have legislated an industrial manslaughter offence.

Availability of insurance associated with fines and penalties

In 2022 the WHS Act was amended to remove the ability for directors and officers to get D&O Insurance associated with fines and penalties under WHS law.

This amendment means that insurance is not available for pecuniary penalties, which are punitive in purpose but subject to a civil burden of proof and often require no intention or even negligence in their commission. This means that there is the possibility that an individual could be held liable because of their role with a company, for example directorship, without the need for some culpability to be established.

There are already several limits on the availability and enforceability of insurance under common law, and the *Corporations Act 2001* (Cth) (**Corporations Act**), reflecting a balancing of public policy considerations. Under the common law, the general rule is that a contract of insurance is not

enforceable in respect of criminal acts. This rule reflects the long-held principle that the availability of such insurance is contrary to public policy.

Prior to 2022, insurance cover was available for WHS fines but was not available if the fine (i) was uninsurable at law; or (ii) arose from wilful, intentional or deliberate acts or omissions, or acts or omissions of gross negligence or recklessness. To the extent that insurance policies were being sold which provide insurance for this type of conduct, they may have been deemed unenforceable.

In particular, the public policy reasons for disallowing insurance in relation to fines and penalties has rested on there being some culpability on the part of the insured³. In relation to WHS offences there is the possibility that an honest and well-intentioned individual can nonetheless incur personal liability.

The Corporations Act also attempts to balance these considerations, prohibiting some types of recovery while enabling insurance to be obtained for other activities, such as civil penalty provisions. Specifically, the Corporations Act imposes targeted prohibitions on both indemnity and insurance for individuals in sections 199A(2) and (3) and section 199B(1). These provisions further restrict the availability of insurance and indemnity, while providing some capacity for officers and directors to obtain insurance for contraventions of the law, including civil penalty provisions. The same position should apply under WHS Law.

In this way the law has attempted, over time, to strike a careful balance between prohibiting an inappropriate transfer of risk to a third party, while enabling some reallocation of risk by insurance contract, where appropriate.

Finally, access to insurance generally is an important issue for directors. The current prohibition on insurance for directors may have the unintended consequence of deterring skilled and experienced individuals from taking on directorships. It is fundamental that sufficient insurance is available for directors, especially for those offences which are of a strict liability nature.

3. Question 19 – ‘Do you have any comments on the issues raised in this section as they relate to best practice WHS laws and harmonisation going forward?’

Artificial Intelligence

The AICD recognises the significant opportunities of AI and the need to incentivise its development and use to remain competitive in the global market and boost national productivity. However, we agree that AI's far-reaching impact and the presence of unique risks, including in a WHS context, require careful management. The AICD also recognises the need to support directors in implementing effective, safe and responsible AI governance.

AICD supports Safe Work Australia's focus on ongoing monitoring and data collection to assess the potential impacts of AI, given that the model laws are intended to be principles-based and adapt to changing work practices. AICD also supports ongoing consultation with workers using AI technologies to help understand and manage risks and impacts on the workforce.

As a general principle, the AICD believes that standalone AI WHS laws should only be included in the Model WHS Laws where there is gap in existing laws that risk causing significant harm to workers and where technology-neutral regulation is not possible. In these limited circumstances specific new regulations may be warranted.

³ Burrows v Rhodes (1899) 1 QB 816 at 828

The WHS laws should be principles-based, not prescriptive – providing flexibility for organisations within clear regulatory frameworks. To the extent possible, AI use should be covered by the general WHS law duties and obligations that exist to protect workers. We are also concerned that specific WHS AI regulation could create and exacerbate gaps and inconsistencies in how AI systems are regulated across the economy. Given the breadth of AI application, we are also concerned about the cumulative regulatory burden and the risk of duplication of obligations across different sectors.

The problems of introducing AI specific laws can be seen in the AI-specific WHS duty being proposed by the NSW Government.⁴ The NSW proposal would require organisations to ensure that ‘digital work systems’ do not create health and safety risks to workers and require organisations to provide WHS entry permit holders reasonable assistance to access and inspect a ‘digital work system.’

This proposal is problematic. The AICD’s recent legal advice is that a technology-specific duty is unnecessary for the following reasons:

- AI-related risks are already captured by the existing technology-neutral and broader duties to provide and maintain safe systems of work. This duty was made to be adaptable with new technology, including AI;
- It will introduce a new jurisdiction-specific law, moving NSW further from a harmonised WHS regime. The creation of bespoke, state-specific obligations increases complexity for national boards;
- The proposal to give WHS permit holders investigative rights over AI systems (e.g. to review “code or algorithms, performance metrics, records, data logs, and audit trails generated by digital systems”) is impractical and risks exceeding the competencies and assurances that the WHS framework is designed to deploy. Effective oversight of AI should focus on risk controls, validation evidence, and outcomes, not source code inspection; and
- Many organisations are still establishing a clear inventory of where and how AI is used across their operations (and some organisations might not even know their employees use AI). In this context, creating AI-specific statutory duties risks outpacing enterprise readiness and diverting attention from foundational precepts of governance, competency and assurance.

There will undoubtedly be AI-related WHS issues over time, but it is too early to predict the full profile of those impacts. The prudent course is to apply the existing WHS lens to AI, just as with any new plant, process, or system of work. Conversely, the more prescriptive the framework is, the less adaptable it becomes in the future.

Regulation alone is not sufficient to achieve the policy objective of maximising AI benefits in the workplace while minimising harms. Regulation must be accompanied by actions aimed at uplifting AI capability and governance skills. The AICD is committed to lifting awareness, education and competency on AI governance at the director and board level.⁵

Psychosocial risks

Directors are increasingly focused on the management of psychosocial risks in the workplace.⁶

⁴ HSF Kramer (August 2025). Australia: Use of AI and automation in the workplace to be regulated in NSW under further WHS reforms. Article available [here](#).

⁵ AICD (June 2024). Directors’ Guide to AI Governance. Available [here](#). See Figure 1: Existing legal obligations when using AI (including WHS) on page 11.

⁶ AICD (April 2025). Governing WHS psychosocial risks: A primer for boards. Available [here](#).

We do not support introducing further new regulations into the Model WHS Law to deal with psychosocial risks which are complex and often multi-causal, with the workplace being one of many factors that go towards psychosocial issues.

Management of psychosocial risks can be very challenging and, from a director's perspective, ensuring that these risks are being appropriately and adequately addressed is similarly challenging, particularly in circumstances where training, education and reporting on risks may not be sufficient to prevent harm in particular circumstances.

It is important that regulation achieves a balance between preventing harm, while also not allowing psychological risks to be inappropriately used against employees who are seeking outcomes that align with good business practice.

For example, businesses looking to introduce AI capability to increase efficiencies and customer satisfaction need to be able to do so, even if that may mean redeployment of staff or redundancies. While all care should be taken to manage the psychological impacts of these technology-driven changes, the fact that there may be job losses should not be equated with unacceptable psychosocial outcomes, particularly if appropriate retraining, redeployment or other mitigations are put in place.

Better guidance on psychosocial risks

On a separate point, there is also a need for better guidance on how to manage the psychosocial impacts of risks to employees. The current guidance at a Federal and State level is voluminous and can be particularly challenging to apply in practice.

The guidance is also lacking in terms of details about how to manage risks from third parties, particularly in retail and service industries. In these circumstances, directors are finding that training and education is not enough to remove risks of staff being unacceptably treated by third parties such as aggrieved customers. Clear guidance would be extremely helpful in clarifying what measures a reasonable PCBU would take and would give directors confidence that they and company officers are meeting their obligations.

The KWM advice suggests the utility of training directed specifically at board members. This will ensure directors are up to date with developments to ensure knowledge, and more importantly, ongoing verification of knowledge. This will be a more effective mode of uplifting expectations and safety compliance than implementing stricter state-based safety requirements, which drives compliance rather than reinforces safety behaviours.