



Work Health and Safety Bill 2019

Submission to Standing Committee on Legislation in the Western Australian
Legislative Council

Contact
Elysha Millard
Manager
Workplace Health and Safety

e.millard@cmewa.com

Contents

About CME	1
Submission Summary	1
Summary of Recommendations	2
Context.....	3
WHS reforms & harmonisation	3
Work Health and Safety Bill 2019 (WA)	3
Industrial manslaughter	5
Section 30A: ‘criminal’ industrial manslaughter offence	6
Section 30B: ‘simple’ industrial manslaughter offence	7
Section 31: (amended) Category 1 offence	10
Conclusion.....	11
Appendix 1 – Summary of industrial manslaughter offences, CME position and recommended drafting amendments.....	12
Appendix 2 – detailed drafting amendments 30A, 30B (if retained), 31	14

About CME

The Chamber of Minerals and Energy of Western Australia (CME) is the peak resources sector representative body in Western Australia. CME is funded by member companies responsible for over 90 per cent of the State's mineral and energy production and workforce employment.

In 2018-19, the Western Australia's mineral and petroleum industry reported a record value of \$145 billion.¹ Iron ore is currently the State's most valuable commodity at \$78 billion. Petroleum products (including crude oil, condensate, liquefied natural gas, liquefied petroleum gas and natural gas) followed at \$38 billion, with gold third at \$12 billion.

The value of royalties received from the sector totalled \$6.8 billion in 2018-19,² accounting for 21 per cent of general government revenue.^{3 4} In addition to contributing 40 per cent of the State's total industry Gross Value Added,⁵ the sector is a significant contributor to growth of the local, State and Australian economies.

Submission Summary

CME appreciates the opportunity to comment on the Standing Committee on Legislation's current Inquiry (the Inquiry) into *the Work Health and Safety Bill 2019 (WA)* (WHS Bill). The Inquiry is particularly relevant given this is the first formal opportunity for stakeholders to be consulted on particular provisions which were included in the WHS Bill subsequent to the reform consultation process.

The WHS Bill contains two new offences for industrial manslaughter, a 'criminal' and 'simple' offence. It also contains a Category 1 offence with new drafting. These matters will be the focus of the below submission.

In summary, CME does not oppose the objective of the introduction of industrial manslaughter in Western Australia (WA), acknowledging national recommendations to introduce such an offence for the most egregious breaches of workplace health and safety laws. However, CME holds significant concerns with particular provisions that have potential to fundamentally undermine the intent of the Bill to drive improved management health and safety in the workplace.

The criminal offence proposed appears to meet industry expectations given the seriousness of industrial manslaughter, however CME holds serious concerns with the simple provisions which are the broadest of any jurisdiction in Australia. The simple offence goes beyond the recommendations of the national *Review of the WHS laws* (Boland Review). Under the proposed simple offence, to convict a person conducting a business or undertaking (PCBU i.e. employer) the prosecution must prove only that the person failed to comply with a health and safety duty and that this failure caused the death of an individual. An officer could also be prosecuted under the simple offence if the PCBU's breach of duty which causes death is attributable to any neglect on the part of the officer (or is engaged in with the officer's consent or connivance). There is no requirement for the officer to disregard a known likelihood of death. This is likely to apply broadly, to all fatalities able to be prosecuted.

CME also has concerns with the amended Category 1 offence as drafted and considers changes are required to align the offence to what was recommended under the Boland Review.

Industry is concerned these provisions have real potential to damage the way in which workplace health and safety is managed. The resources sector is committed to keeping its workforce safe and strives for best practice in safety and health management, whilst recognising there will always be room to continuously improve. Organisations in the sector invest considerably in fostering collaborative workplace cultures that encourage all duty holders to proactively assess and manage risk, freely report incidents, and robustly and collaboratively analyse incidents (including 'near misses') recognising the ability to learn from these is critical. Overly punitive offences such as the simple offence and amended Category 1 offence could discourage the free flow of communication due to a fear of prosecution, resulting in less reporting, root-cause analysis and potentially more injuries and fatalities.

¹ Government of Western Australia, *Latest statistics release: Mineral sector highlights*, Department of Mines, Industry Regulation and Safety, September 2019: <http://dmp.wa.gov.au/About-Us-Careers/Latest-Statistics-Release-4081.aspx>

² Government of Western Australia, *Annual report 2018-19*, Department of Mines, Industry Regulation and Safety, November 2019, p. 77.

³ References hereafter to government refer to the Government of Western Australia, unless otherwise indicated.

⁴ Government of Western Australia, *2018-19 Annual report on State finances*, Department of Treasury, September 2019, p. 8.

⁵ Duncan, A. and Kiely, D., *BCEC Briefing note: WA Economic update*, Bankwest Curtin Economics Centre, November 2019, p. 4.

The submission recommendations are summarised below, with further detail contained throughout the supporting sections of the submission. Summary positions on key elements of the industrial manslaughter offences are outlined in Appendix 1. The submission makes several recommended drafting amendments to the industrial manslaughter and Category 1 offences. These are outlined in detail in Appendix 2.

Summary of Recommendations

- CME has remained an active participant in the WHS reform landscape nationally and in Western Australia and supports the objectives of risk-based, outcomes-focused harmonisation and the current State Government's reform direction to amalgamate existing WHS legislation into a single Bill.
- CME's support for the WHS Bill is contingent on appropriate consideration through the parliamentary process of the new industrial manslaughter and amended Category 1 provisions. CME strongly supports the focus on this issue through current Inquiry.
- Acknowledging the recommendations from Boland's national review into WHS laws and moves to implement industrial manslaughter provisions in other jurisdictions, CME does not oppose the objective of their introduction in WA provided they are appropriately drafted and form part of a suite of compliance and enforcement mechanisms so as to not compromise objectives of the Act.
- CME does not oppose the proposed 'criminal' industrial manslaughter offence within the WHS Bill, which meets industry's expectations given the seriousness of industrial manslaughter as an offence. CME recommends drafting amendments to the offence to align to the WA Criminal Code's approach to manslaughter to remove the ability to cascade into other charges not initial listed on the charge sheet and clarify defences are available.
- CME strongly opposes the introduction of the proposed 'simple' industrial manslaughter offence and strongly recommends it be removed from the WHS Bill.
- If section the simple offence under 30B is retained, at an absolute minimum CME recommends it be amended to ensure the offence aligns to the recommendations of the Boland Review and appropriate legal process surrounds its use.
- CME opposes the amended Category 1 offence as drafted. Acknowledging findings from the Boland Review, CME recommends amendments to ensure the threshold aligns with 'gross negligence' as defined in the Boland Review.

Context

WHS reforms & harmonisation

The WA resources sector is committed to ensuring the safety and health of its workforce. On behalf of its members, CME helps facilitate a collaborative and innovative approach to safety and health to assist industry in driving leading practice outcomes in safety and health.

National harmonisation of workplace health and safety (WHS) laws has been a long-held aspiration in Australia. In 2008, COAG agreed to progress a national 'model' WHS Act. All states and territories have subsequently harmonised (with adaptations as necessary) to the Model WHS Act, with the exception of Victoria and WA who are currently progressing harmonisation.

The reform of WHS legislation in WA has been ongoing for a number of years. Currently in WA, mines safety and health legislation, the *Mines Safety and Inspection Act 1994* (WA) (MSI Act), is separated from but aligned to the general WHS legislation, the *Occupational Safety and Health Act 1984* (WA) (OSH Act). Separate legislation covers on and offshore petroleum and geothermal industries and dangerous goods.

In July 2017, the State Government confirmed reform of safety and health legislation in WA would be progressed in line with the national model WHS laws to ensure harmonisation and improve consistency with other jurisdictions. Under the approach general and resources WHS legislation is to be consolidated within a single Act – the WHS Bill.

Consultation on these reforms commenced in 2017 and included establishment of a Ministerial Advisory Panel (MAP) to progress 'pre-consultation' on the proposed content of the WHS Bill followed by public consultation on these proposals and later on the three proposed sets of regulations (general, mining and petroleum and geothermal operations).

From the outset CME has been a broad supporter and active participant in the harmonisation process and WA reforms, participating on the MAP and making a detailed submission to the public consultation process. The objective of these reforms must continue to focus on ensuring the regulatory environment delivers the highest level of protection for the workforce, supports a best practice risk-based approach to managing workplace hazards, and facilitates continuous improvement across all areas of safety and health.

At a national level, Safe Work Australia (SWA) in 2018 commenced an independent review of the model WHS laws, conducted by Marie Boland. Through submissions to the [initial review](#) and subsequent [Consultation Regulation Impact Statement \(RIS\)](#) CME expressed broad support for the principle of national harmonisation of WHS laws recognising the benefits for businesses who operate across jurisdictions in having a common understanding of WHS legislation. However, CME stressed the importance of not seeking to harmonise for harmonisation's sake and ensure WHS laws are non-prescriptive, risk-based and outcomes-focused to ensure hazards and risks specific to different industries are managed efficiently and effectively. Stakeholders are currently awaiting the release of the Decision RIS as part of this review.

CME has remained an active participant in the WHS reform landscape nationally and in WA and supports the objectives of risk-based, outcomes-focused harmonisation and the current State Government's reform direction to amalgamate existing WHS legislation into a single Act.

Work Health and Safety Bill 2019 (WA)

On 27 November 2019 the McGowan Government introduced the WHS Bill into the WA Legislative Assembly.

Upon the WHS Bill's entry into Parliament, CME reiterated industry's support for the Government's single Act approach noting the introduction of the WHS Bill to Parliament represented the culmination of several years of sustained efforts by State Government and related stakeholders to progress the reforms. In particular, CME welcomed a number of pleasing changes made to the Bill's final content further to public consultation including:

- confirmation the WHS Bill will not include the WHS entry provisions enshrined in Part 7 of the Model WHS Act, recognising that WA and federal industrial relations legislation already provide for a pathway for WHS entry.

- the decision to remove the proposed powers for third parties to bring prosecutions, a regulatory power which would have significantly undermined the integrity of the WA WHS regulator.

There were also a number of late changes made to the WHS Bill's final content which were not part of the WA consultation process on the WHS Bill. These include:

- The introduction of new 'criminal' (section 30A) and 'simple' (section 30B) industrial manslaughter offences.
- Amendments to the Category 1 (section 31) offence to depart from SWA's Model WHS Act in some respects.

These were not included as part of the WA public consultation process on the WHS Bill. However, at a national level Marie Boland's [Review of the model WHS Laws: Final report](#) made recommendations for amendments to the Category 1 offence and the inclusion of industrial manslaughter provisions in the Model WHS Act (despite the initial review not proposing these amendments). These recommendations are outlined in the below table.

	<i>Boland Recommendation</i>
<i>23a: Enhance Category 1 offence</i>	<i>Amend s 31 of the model WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is grossly negligent in exposing an individual to a risk of serious harm or death.</i>
<i>23b: Industrial Manslaughter</i>	<p><i>Amend the model WHS Act to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and include the following:</i></p> <ul style="list-style-type: none"> <i>the offence can be committed by a PCBU and an officer as defined under s 4 of the model WHS Act</i> <i>the conduct engaged in on behalf of a body corporate is taken to be conduct engaged in by the body corporate</i> <i>the body corporate's conduct includes the conduct of the body corporate when viewed as a whole by aggregating the conduct of its employees, agents or officers</i> <i>the offence covers the death of an individual to whom a duty is owed</i> <p><i>Safe Work Australia should work with legal experts to draft the offence and include consideration of recommendations to increase penalty levels (Recommendation 22) and develop sentencing guidelines (Recommendation 25).</i></p>

The WA changes, in particular the inclusion of industrial manslaughter offences, in the absence of public consultation is a significant decision. CME appreciates the Government has been working to tight timeframes to progress these important reforms, which were an election commitment. However, further to the WHS Bill's introduction to Parliament, CME expressed disappointment the drafting of such significant provisions wasn't part of the consultation before the Bill's introduction. CME has subsequently been a strong advocate for ensuring these provisions are given detailed consideration through the parliamentary process to ensure there are no unintended consequences.

The current Inquiry in the Legislative Council into the WHS Bill by the Standing Committee on Legislation is welcomed by CME. CME notes the current Inquiry's terms of reference (TOR) are:

- That the Work Health and Safety Bill 2019 be discharged and referred to the Standing Committee on Legislation for consideration of Part 2 of the Bill and report no later than Tuesday, 11 August 2020;
- The Committee has the power to inquire into and report on the policy of the Bill; and
- The Committee is to consider any government response to Report 126 of the Uniform Legislation and Statutes Review Committee.

The following submission provides a response to the two new industrial manslaughter offences and altered Category 1 offence, both within the TOR of the Inquiry. The submission makes a number of recommended drafting amendments. These are discussed in the body of the submission and outlined in detail in the Appendices.

CME's support for the WHS Bill is contingent on appropriate consideration through the parliamentary process of the new industrial manslaughter and amended Category 1 provisions. CME strongly supports the focus on this issue through current Inquiry.

Industrial manslaughter

CME recognises the need for consequences for breaches of WHS legislation. Penalties have a role in this regard and CME stresses the need for these to form part of a range of enforcement mechanisms to deal with non-compliance.

A key objective of the WHS Bill is to “provide a framework for continuous improvement and progressively higher standards of work health and safety” (s. 3(1)(g)). An effective penalty framework needs to strike a balance between deterrence and risk management flexibility to continue to facilitate health and safety improvements in line with the objectives of the WHS Bill. Unnecessary prescription, and an overemphasis on punitive compliance mechanisms promotes a culture of regulatory ‘tick the box’ compliance and impedes information sharing and the development of positive safety cultures, which directly undermines the WHS Bill's objective. This notion is supported by much commentary for example from the South Australian Coroners Court.⁶

CME's opposes overly punitive approaches to compliance and enforcement on the grounds they do not improve health and safety outcomes and are not supported by evidence as to their effectiveness.

Acknowledging national recommendations to introduce industrial manslaughter provisions, most notably the Boland Review, CME does not oppose the objective of the introduction of industrial manslaughter in WA, however cautions the offence must be appropriately defined and drafted within the penalty framework so as to not undermine key objectives of the WHS Bill. Industrial manslaughter offences are focused on outcomes rather than on managing risks. A more effective approach to achieving ongoing improvement in health and safety outcomes is for WHS legislation to remain focused on the prevention of incidents supported by a hierarchy of compliance mechanisms with a balanced risk-based emphasis on education, communication, and enforcement activities.

Poorly considered or rushed introduction of industrial manslaughter could have unintended consequences which impair, rather than enhance, health and safety outcomes and/or introduce inequities (e.g. creation of dual liability for individuals under two separate regimes, inequity in availability and type of defences and burden of proof) impacting on individual fundamental rights⁷. CME considers industrial manslaughter provisions must only apply to the most egregious behaviour where a PCBU and/or officer knowingly disregards their duties under WHS legislation, and this failure causes death.

WHS law should facilitate the creation of a collaborative workplace culture that puts an emphasis on the obligations of all duty holders reporting and dissemination of information, allowing people to freely report incidents and in doing so learn from these incidents. Poorly considered industrial manslaughter provisions may discourage the free flow of communication due to a fear of prosecution, resulting in less reporting and therefore, potentially more injuries and fatalities and undermine the duty of all duty holders to ensure a safe system of work.

While national reviews have indicated support for industrial manslaughter, CME notes these processes have not yet completed. The process associated with the Boland Review is ongoing, with the Decision RIS (containing WHS Ministers' responses to the review's recommendations) yet to be released. Despite a number of states seeking to introduce these, given the process at a national level has not concluded it is therefore not yet confirmed whether industrial manslaughter laws will feature in the model WHS laws. Further, while the Senate Inquiry into Industrial Deaths recommended industrial manslaughter laws be introduced, the Australian Government in their response did not support this recommendation⁸. This reinforces the need for states to carefully consider the drafting of any proposed industrial manslaughter offences.

⁶ South Australian Coroners Court, *Inquest into the death of Mr Jorge Castillo-Riffo*, 9/2018 (2071/2014)

⁷ Law Council of Australia submission: The framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia, 30 May 2018

⁸ Australian Government, Australian Government response to the Senate Education and Employment References Committee report: They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia, December 2018, available at: <https://docs.jobs.gov.au/documents/australian-government-response-they-never-came-home>

The premise for the introduction of industrial manslaughter provisions is that it will act as a deterrent, incentivising employers to improve safety standards within the workplace. There is no evidence the introduction of industrial manslaughter offences in other jurisdictions has improved safety outcomes or resulted in fewer workplace deaths in those jurisdictions. WHS offences under the Model WHS Act already include offences that can give rise to significant fines and jail sentences for those who recklessly cause death or even serious injury at a workplace, thus providing the required level of specific and general deterrence. CME also notes manslaughter offences are already available under general criminal law (for example under the WA Criminal Code).

Acknowledging the recommendations from Boland's national review into WHS laws and moves to implement industrial manslaughter provisions in other jurisdictions, CME does not oppose their introduction in WA provided they are appropriately drafted and form part of a suite of compliance and enforcement mechanisms so as to not compromise objectives of the Bill.

Section 30A: 'criminal' industrial manslaughter offence

CME considers industrial manslaughter offences must only apply to the most egregious behaviour where a PCBU and/or officer knowingly disregards their duties under WHS legislation, and this conscious failure causes death.

The proposed criminal offence (section 30A) in the WHS Bill meets industry's expectations given the seriousness of the offence and includes a fault threshold supported by an appropriate legal forum and process relative to the charge. This position is discussed in detail below. Appendix 1 provides an outline of CME's position on key elements of the offence and where relevant, drafting amendments recommended to address issues. Detailed drafting amendments are provided in Appendix 2.

The offence requires a high standard of culpability requiring the prosecution to establish that the person engaged in the conduct that caused the death of an individual knowing the conduct was likely to result in death, and in turn disregarded that likelihood. This is effectively recklessness. Practically, a person who engages in a breach of duty knowing it is likely to cause death and disregarding that likelihood, is open to criminal prosecution.

Only PBCUs and officers can be charged with this offence under the WHS Bill. CME considers this proposed scope appropriate and in line with the Boland Review recommendation.

The WHS Bill expressly states that if the requirements for the criminal industrial manslaughter charge are not met, a person can be convicted of an alternative offence (the simple industrial manslaughter offence), even if the alternative offence did not form part of the original charge. Similarly, if the requirements for the simple industrial manslaughter offence are not met, a person can be convicted of a Category 1, 2 or 3 offence. This differs from the position under the WA Criminal Code, where all potential offences must be listed on the initial charge unless an exception applies. In effect this means a defendant may need to change its defence during a prosecution. CME does not support this 'catch-all' approach and recommends amendments to remove this ability. At a minimum, amendments should be made to require all charges be listed on the sheet to ensure the defendant is clear on the charges with which they are required to mount a defence on.

CME has previously advocated all available defences under existing criminal laws should be incorporated or expressly reserved. As currently drafted, there is a lack of clarity on the application of defences, rights and immunities available. Individuals being investigated for possible breach of the industrial manslaughter offence should be entitled to the same rights and protections as under general criminal laws (e.g. a right to silence). CME notes section 3(1) of the WA Criminal Code on trial for indictable offences (such as 30A) expressly states, 'this section applies to offences in this Code and in any other written law'. Division 5, Part 2 of the WHS Bill however does not expressly clarify its interaction with criminal law defences, rights or immunities. CME recommends this Division be updated to expressly clarify defences available under the criminal code also apply.

CME does not oppose the proposed criminal industrial manslaughter offence within the WHS Bill, which meets industry's expectations given the seriousness of industrial manslaughter as an offence. Drafting amendments are recommended as outlined in Appendix 2 to align to the WA Criminal Code's approach to manslaughter and:

- **remove the ability to cascade into other charges not initial listed on the charge sheet; and**

- clarify defences are available.

Section 30B: 'simple' industrial manslaughter offence

CME has significant concerns with the proposed simple industrial manslaughter offence contained in section 30B of the WHS Bill and considers if introduced the provisions carry real potential to damage the way in which health and safety is managed.

The WHS Bill is the only proposed legislation that creates a simple industrial manslaughter offence in addition to the indictable criminal offence. Under the proposed simple offence, the prosecution must prove only that the person failed to comply with a health and safety duty that caused the death of an individual. In effect, an officer could be prosecuted under the simple industrial manslaughter offence for 'any neglect' of duty that causes death, there is no requirement for the conduct to disregard the known likelihood of death.

CME questions the need for this two-tiered industrial manslaughter approach when the presence of the criminal offence in section 30A meets expectations around industrial manslaughter as an offence. The proposed simple offence is in effect almost identical to the Category 1 offence in the WHS Bill, though with penalties twice as severe. As a person charged with the simple offence may also be charged with a Category 1 offence, this offence seems to be in effect 'double dipping' and capturing the same conduct with two different offences. CME is concerned the two-tiered industrial manslaughter approach is being proposed to provide for maximum usage of industrial manslaughter as an offence. In fact, as currently drafted, industrial manslaughter charges are the only option for prosecutors seeking to lay charges on a PCBU in respect of causing a fatality. This is because Category 1 is only available when a PCBU's conduct causes serious harm (not death). CME considers offences and penalties within legislation should be drafted to penalise an appropriate threshold of unacceptable behaviour, not drafted to pursue a prosecution agenda or incentivise use of industrial manslaughter as a charge.

The simple offence represents the broadest industrial manslaughter provision of any jurisdiction which has implemented or proposed industrial manslaughter offences. The proposal is the only one of its kind that proposes a simple offence. Whilst some jurisdictions have an alternative offence, this cross-refers to the Category 1, 2 and 3 offences, rather than defining a different offence. CME cannot identify any other offences that can be dealt with summarily that can attract a sentence of 10 years imprisonment.

Due to the significant issues discussed below, CME strongly opposes the introduction of the proposed simple industrial manslaughter offence and strongly recommends it be removed from the WHS Bill.

Critical issues with the simple offence are discussed below. Appendix 1 provides an outline of CME's position on key elements of the offence. Drafting amendments are provided in Appendix 2.

The simple offence – fault threshold

The simple offence proposes a minimum threshold for officers which is significantly lower than that proposed in the criminal offence in section 30A. It simply requires neglect, or consent or connivance by an officer. This terminology is new and largely untested. The WHS Bill does not define 'neglect'. The term is used in the MSI Act and OSH Act, but is not defined in either. How this threshold will be interpreted is unclear and there is significant concern it represents the lowest threshold for an industrial manslaughter offence in any Australian jurisdiction. This is concerning.

The kind of officers' conduct which a PCBU's breach might be attributable to could include:

- failing to ensure an appropriate safety resource (e.g. employing a safety professional) is available in the business; or
- failing to make appropriate inquiries during board meetings, failing to make site visits, or failing to take other steps to gain knowledge of hazards.

The proposed threshold in section 30B departs from the threshold of 'gross negligence' recommended in the Boland Review. CME considers 'gross negligence', as recommended by the Boland Review, should be the minimum threshold for any industrial manslaughter offence. CME acknowledges there are challenges in using the term 'gross negligence' in the WA context given current WHS legislation defines 'gross negligence' to be more in line with the criminal law standard of 'recklessness' and therefore, should it form part of the simple offence, this fault threshold would be very similar to the proposed criminal offence.

For the reasons stated, CME strongly recommends 30B be deleted in its entirety.

While not preferred, should 30B be retained CME suggests a potential approach to address inconsistency with the threshold recommended by Boland in 30B would be to either:

- remove section 30B(3)(d)(i) – “is attributable to any neglect on the part of an officer” – but retain section 30B (3)(d)(ii) – “is engaged in with the officer’s consent or connivance”; or
- retain the term ‘neglect’ in section 30B(3)(d)(i) and define this by directly referencing the definition of ‘gross negligence’ adopted in the Boland Review: “such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment”.

The simple offence – broad and inconsistent application

The simple industrial manslaughter offence for PCBU’s appears likely to capture all fatalities able to be prosecuted. Section 19 of the WHS Bill enshrines an overarching ‘primary duty of care’ for PCBU’s to ensure the health and safety of workers. To prosecute a ‘simple’ industrial manslaughter offence, the prosecution would simply need to prove there was a breach of this general duty and that this had a clear causal link to the death of the individual. Assessment of successful prosecutions by the Department of Mines, Industry Regulation and Safety (DMIRS) to date shows the similar duty in current legislation (section 9 and 9A(2) of the MSI Act) is regularly prosecuted, demonstrating the likely broad application of the simple industrial manslaughter offence.

While the simple offence as it applies to officers requires neglect or consent or connivance, the same is not the case for the simple offence as it applies to PCBU’s. This simply requires a duty failure that causes the death of an individual, it does not have the additional element requiring neglect or consent or connivance. CME considers the above suggested amendments to 30B (if it is retained) must be extended to the simple offence as it applies to PCBU’s.

As noted previously, to bring charges on a PCBU in respect of causing a fatality, industrial manslaughter charges are the only option under current WHS Bill drafting. This is because the Category 1 offence as currently drafted is only available when a PCBU’s conduct results in serious harm (and not death as per the Model WHS Act). This clearly incentivises use of the industrial manslaughter provisions, is overly punitive and goes far from providing an appropriate penalty framework as discussed above.

The simple offence – legal process

CME’s position is that the Director of Public Prosecutions (DPP) should have oversight of all industrial manslaughter charges under WHS legislation (not just the criminal industrial manslaughter offence) to ensure alignment with how manslaughter charges are prosecuted under the Criminal Code.

As presently drafted, section 230 of the WHS Bill allows for simple offences to be prosecuted by the WHS regulator or department with no oversight by the DPP, with charges being heard in the Magistrates Court. This does not reflect the seriousness of the offences and the gravity of the associated penalties. In CME’s view, prosecutions for the simple industrial manslaughter offence should be heard in the District or Supreme Court. CME considers this level of legal process critical in applying such significant charges: the simple offence attracts a maximum of 10 years’ imprisonment for individuals and fines of up to \$5 million for bodies corporate and \$2.5 million for individuals. CME is not aware of charges near the significance of this being heard in the Magistrates court.

In line with discussion above regarding the lack of clarity on whether defences available under the WA Criminal Code are also available to dependents of the criminal industrial manslaughter offence, this is also unclear for the simple offence. Further, section 232A of the WHS Bill allows for evidence unlawfully collected to be used in proceedings. In our view this should be left to judicial discretion, as is typically the case at general law. To align to criminal law, illegally obtained evidence is not admissible unless the judge determines otherwise.

Further, these provisions are accompanied by a proposed prohibition on indemnity and insurance arrangements for WHS fines, in section 272A of the WHS Bill. In the context of the higher penalties for industrial manslaughter offences in the WHS Bill relative to the most comparable provisions of the MSI Act and OSH Act, this is significant.

These issues are of significant concern to CME’s members. For such a significant offence our expectation is these matters of procedural fairness must align to that under WA criminal law. There must be consequences for breaches of WHS legislation, particularly where those breaches result in death. However, it is highly questionable whether this application of industrial manslaughter (which differs so significantly

from how manslaughter under the WA Criminal Code is considered) and the lower bar of culpability under the simple offence meets community expectations and accepted standards for judicial fairness.

The simple offence – unintended consequences

The potential unintended consequences of the simple offence are significant, and CME considers there is a real risk that it will have fundamentally detrimental impacts to the way in which health and safety is managed.

Enforcement action is an essential element of the regulatory framework. However, to have its intended effect (to reduce and ultimately eliminate health and safety incidents) it must not operate to the detriment of the framework's other essential components. Where the severity of penalties and the breadth of the offence are not balanced, this in turn imbalances the regulatory framework. It may drive legally defensive behaviours, with a reluctance to acknowledge deficiencies or areas for improvement in health and safety management. This has real potential to weaken essential elements of regulatory and organisational health and safety frameworks.

The resources sector is committed to keeping its workforce safe and continues to achieve best practice in safety and health management, whilst recognising there will always be room to continuously improve. It is widely recognised that WHS laws which facilitate the creation of a collaborative workplace culture while also providing a hierarchy of risk-based compliance and enforcement mechanisms are most effective in facilitating improvements to health and safety. Overly punitive offences, such as the simple offence, could discourage proactive approaches and the free flow of communication due to a fear of prosecution, resulting in less reporting, less analysis and potentially more injuries and fatalities. Organisations in the sector invest considerably in fostering collaborative workplace cultures that encourage people to proactively assess and manage risk, freely report incidents, and apply robust root cause analysis of incidents (including 'near misses'), recognising the ability to learn from these is critical.

CME considers the nature of this provision may have detrimental (and unintended) impacts on senior leaders filling officer roles. For example:

- lead to the retirement of senior leaders, who would be considered 'officers' which could result in younger and less experienced workers filling those vacated roles.
- deter honest, risk-averse officers who thoroughly and diligently discharge their health and safety duties from accepting an officer position and less scrupulous individuals being more prepared to take on the responsibility.

Every workplace death is a tragedy and unacceptable. The devastating and irreparable effects of workplace fatalities are felt most acutely by family members of workers killed. Incomparable to the profound impact on family members are the wide-ranging ripple effects these incidents have on individual's lives more broadly.

All health and safety incidents are preventable, and we must all continue to strive to continuously improve health and safety practices to ensure workers go home to their families and friends in the same condition they entered the workplace in. It is important to acknowledge the contributing factors to WHS incidents are complex. Modern and industry-accepted accident prevention models confirm this and show a myriad of interacting factors (organisation, human and external) often contribute to an incident outcome. These investigations routinely look beyond the direct or root cause analysis to find organisational lessons that can be applied to continuously improve health and safety practices and prevent fatalities. These lessons are shared widely and repetitively within the workplace, and even externally, always in the interests of improving health and safety outcomes. There is likely to be a real reluctance to undertake such rigorous investigations, and to record and communicate those lessons.

As discussed above, industrial manslaughter offences punish an outcome. i.e. the preventative actions of PCBU's/officers could be the same but the outcome different (death versus serious injury). Incident investigations that compare actual and potential consequences for events demonstrate the fine line that often exists between a fatality, a serious injury and a 'near miss'. This demonstrates the problem with arguing that industrial manslaughter offences will incentivise improvements particularly given they are focused on a narrow class of duty holders and not on the active duty of all workers in addition to officers, in ensuring a safe system of work.

CME strongly recommends the removal of section 30B from the WHS Bill. While not preferred, if section 30B is retained, CME recommends the following amendments at an absolute minimum to ensure the offence aligns to the recommendations of the Boland Review and appropriate legal

process surrounds its use. Suggested drafting changes to give effect to these recommended amendments are contained in Appendix 2.

- Amend section 230(1) and insert a new 30D section to ensure DPP oversight in bringing the charge of simple manslaughter; and
- Amend section 30B in line with either Option 1 or 2 below:

Option 1	<ul style="list-style-type: none"> • define 'neglect' as an act involving "such a great falling short of the standard of care which a reasonable person would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merits criminal punishment," effectively ensuring the threshold of the simple offence aligns with recommendations from the Boland Review. • amend section 30B (1) to include a requirement that the failure be attributable to the PCBU's neglect (as defined above).
Option 2	<ul style="list-style-type: none"> • remove section 30B(3)(d)(i) – "is attributable to any neglect on the part of an officer" – but retain section 30B(3)(d)(ii) – "is engaged in with the officers consent or connivance". • amend section 30B (1) to include that the failure is "engaged in with the consent or connivance of the person conducting a business or undertaking".

Section 31: (amended) Category 1 offence

Section 31 of the WHS Bill proposes a new 'Category 1' offence relating to serious harm or death. CME holds concerns with the drafting and implications of this offence. This position is discussed in detail below. Appendix 2 outlines specific drafting amendments to address concerns.

The Model WHS Act includes a Category 1 offence which provides that a person commits such an offence if:

- (a) the person has a health and safety duty;
- (b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and
- (c) the person is reckless as to the risk to an individual of death or serious injury or illness.

CME supported this provision through the MAP process in 2017 and 2018 and did not raise any issues with this drafting in our 2018 submission.

CME notes this Model WHS Act provision been adopted in all states except Victoria and WA. The corresponding Victorian provision is similar but requires the conduct to be engaged in recklessly and without lawful excuse. As noted above, the Boland Review recommended that 'gross negligence' as well as recklessness, should be contained in Category 1 offence provisions. The NSW WHS Act, which took effect on 10 June 2020, enacted this recommendation in its Category 1 offence so that its elements now include recklessness or gross negligence.

In contrast to the Model WHS Act, recommended through the MAP process, the WHS Bill states that a person commits a Category 1 offence if:

- (a) the person has a health and safety duty; and
- (b) the person fails to comply with that duty; and
- (c) the failure causes serious harm to an individual.

In other words, the amended Category 1 offence in the WHS Bill removes the 'recklessness' threshold and the requirement in the Model WHS Act for the contravening conduct to be 'without reasonable excuse'. The Category 1 offence in the WHS Bill would also capture conduct in breach of duty which has the prescribed impact on any individual, while the Model WHS Act Category 1 offence only applies to conduct

in breach of duty which has the proscribed impact on a person to whom the duty is owed. This departs from all other model Australian jurisdictions. This means that any failure to comply with a duty, whether accidental, unintentional or done without knowledge or negligence, will constitute a Category 1 offence.

CME reiterates our opposition to overly punitive approaches to compliance and enforcement for the above discussed reasons.

CME notes the Boland Review provided no quantitative evidence that lowering this threshold will lead to improved health and safety outcomes. Despite this, CME acknowledges the recommendations of the Boland Review. CME is concerned that as currently drafted, the Category 1 offence contained in the WHS Bill does not align with the threshold recommended in the Boland Review of 'gross negligence'. Essentially Category 1 is a strict liability offence as it imposes liability where a person 'fails' to comply with a duty, and where that failure 'causes' serious harm. Liability is not contingent on a particular state of mind or knowledge. Positively, CME understands the usual criminal law defences are available to defend any charge.

CME opposes the amended Category 1 offence as drafted. Acknowledging findings from the Boland Review, CME recommends amendments to ensure the threshold aligns with 'gross negligence' as defined in the Boland Review.

Conclusion

CME continues to support the WHS Bill and its timely progress through Parliament, provided key concerns with the offences provisions outlined in the above submission are addressed.

Acknowledging national moves to implement industrial manslaughter provisions in WHS laws, the WA resources sector is not opposed to their introduction in WA. However, the sector holds genuine concerns the proposed 'simple' industrial manslaughter offence carries real potential to damage the way in which health and safety is managed. CME strongly recommends the simple provision be removed from the WHS Bill.

CME has concerns with elements of the Category 1 offence which departs from the Model WHS Act and introduces a threshold lower than that recommended in the Boland Review. CME recommends amendments to ensure alignment to the threshold recommended by Boland and ensure the offence sits appropriately within the penalty framework.

CME welcomes the current Inquiry and the opportunity to comment on these important provisions in detail.

If you have any further queries regarding the above matters, please contact Ms Elysha Millard, Manager – Workplace Health and Safety on 0429 945 893 or e.millad@cmewa.com.au.

Authorised by	Position	Date	Signed
Rob Carruthers	Director – Policy and Advocacy	26/06/2020	
Document reference	C:\Users\e.millard\CMEWA\Capability - Workplace Health & Safety - Documents\General\Projects & Issues\Legislation\Labor Harmonisation\WHS WA Bill\Bill into Parliament\Standing Committee on Legislation		

Appendix 1 – Summary of industrial manslaughter offences, CME position and recommended drafting amendments

	30A 'criminal' offence	30B 'simple' offence	CME summary position	Summary recommended drafting amendment (see Appendix 2 for full drafting amendment)
Fault threshold	Recklessness	Officer: 'any neglect' or consent or connivance While the simple offence as it applies to officers requires neglect or consent or connivance, the same is not the case for the simple offence as it applies to PCBUs. This simply requires a duty failure that causes the death of an individual, it does not have the additional element requiring neglect or consent or connivance	As drafted section 30A meets CME's expectations. However, section 30B does not and represents the broadest of all industrial manslaughter provisions implemented (or proposed to be implemented) in Australian jurisdictions. The standard for individuals should be recklessness. Failing that, the standard that should be applied should be 'gross negligence' for both companies and individuals, and the simple industrial manslaughter offence should be removed. At the very least, if the simple industrial manslaughter offence is retained, it should be made clear that a legal standard of criminal neglect applies in both the PCBU and officer simple offences.	Removal of section 30B. While not preferred, if section 30B is retained, at a minimum either: <ul style="list-style-type: none">Amend section 30B(1) to include a requirement that the failure be attributable to neglect by the PCBU. Amend section 30B to define 'any neglect' in line with the definition adopted in the Boland Review; orRemove subsection 30B(3)(d)(i) – <i>is attributable to any neglect on the part of an officer</i> – but retain subsection 30B(3)(d)(ii) – <i>is engaged in with the officer's consent or connivance</i>. For each option ensure an amendment is reflected in the PCBU component of the simple offence. See drafting amendments in Appendix 2 (if 30B is retained).
Scope	Officer and/or PCBU	Officer and/or PCBU	CME supports the scope of industrial manslaughter offences being limited to PCBUs and/or officers under the Act.	None.
Proper prosecution	Charges to be brought by DPP and heard in the District/Supreme Court	Charges to be brought by WHS Regulator and heard in the Magistrates Court	CME supports DPP oversight of industrial manslaughter offences with charges being heard in the District or Supreme Court. CME strongly opposes the simple industrial manslaughter offence, with its significant penalties, being able to be brought by the WHS regulator alone (with no DPP oversight) and heard in the Magistrates Court.	Removal of section 30B. While not preferred, if section 30B is retained, amendments to ensure at a minimum DPP oversight in the bringing of charges. See drafting amendments in Appendix 2 (if 30B is retained).
Defences, immunities and rights	The proposal does not expressly clarify its interaction with criminal law defences, rights or immunities.	The proposal does not expressly clarify its interaction with criminal law defences, rights or immunities.	All available defenses under existing criminal laws should be incorporated or expressly reserved. Individuals being investigated for possible breach of the industrial manslaughter offence should be entitled to the same rights and protections as under general criminal laws (e.g. right to silence and privilege against self-incrimination). If protections are abrogated, broad derivative use immunities should expressly apply.	Expressly clarify defences under existing criminal laws are available. See drafting amendments in Appendix 2 (if section 30B is retained).

Penalties:	The proposal expressly states that, if the requirements for the criminal industrial manslaughter charge are not met, a person can be convicted of an alternative offence (an industrial manslaughter simple offence), even if the alternative offence did not form part of the original charge.	The proposal expressly states that a person charged with the simple offence may also be convicted of a Category 1 offence, a Category 2 offence or a Category 3 offence.	<p>CME is opposed to this 'double dip' approach to penalties. CME notes this differs from the position under the WA Criminal Code, where all potential offences must be listed on the initial charge (unless an exception applies).</p> <p>As currently drafted CME notes that to bring charges against PCBU with respect to causing a fatality, the only option is an industrial manslaughter charge. This is because the Category 1 only provides for charges to a PCBU when the conduct results in serious harm (not death).</p>	<p>Remove this clause. If retained, expressly state all charges should be listed on the charge sheet.</p> <p>Amend s31(1)(c) to read "the failure causes serious harm <i>or death</i> to an individual".</p> <p>See drafting amendments in Appendix 2.</p>
Limitation period	No limitation period	2 years	CME does not oppose the lack of limitation period for the criminal industrial manslaughter offence, given its consistency with how manslaughter is dealt with under the Criminal Code.	None.

Appendix 2 – detailed drafting amendments 30A, 30B (if retained), 31

Mark up of proposed WHS Bill provisions **Division 5 -** **Subdivision 1 - Preliminary**

30 Terms used

In this Division-

conduct includes an act or omission;

health and safety duty means a duty imposed under
Division 2, 3 or 4 of this Part;

Neglect and negligence mean conduct which merits criminal punishment
because it involves —

- (a) such a great falling short of the standard of care that a reasonable
person would exercise in the circumstances; and
- (b) such a high risk that death or grievous bodily harm would follow from
the conduct.

Subdivision 2 - Industrial manslaughter

30A Industrial manslaughter - crime

(1) A person commits a crime if —

- (a) the person has a health and safety duty as a person
conducting a business or undertaking; and
- (b) the person engages in conduct that causes the death of
an individual; and
- (c) the conduct constitutes a failure to comply with the
person's health and safety duty; and
- (d) the person engages in the conduct -
 - (i) knowing that the conduct is likely to cause the
death of an individual; and
 - (ii) in disregard of that likelihood.

Penalty for this subsection:

- (a) for an individual, imprisonment for 20 years and a
fine of \$5 000 000;
- (b) for a body corporate, a fine of \$10 000 000.

(2) ~~A person charged with a crime under subsection (1) may be convicted of an offence under section 30B~~

(3) An officer of a person (the **PCBU**) commits a crime if —

- (a) the PCBU has a health and safety duty as a person conducting a business or
undertaking; and
- (b) the PCBU engages in conduct that causes the death of an individual; and
- (c) the PCBU's conduct constitutes a failure to comply with
the PCBU's health and safety duty; and
- (d) the PCBU's conduct -
 - (i) is attributable to any neglect on the part of the
officer; or

- (ii) is engaged in with the officer's consent or connivance;
and
- (e) the officer engages in the officer's conduct referred to in paragraph (d)(i) or (ii) -
 - (i) knowing that the PCBU's conduct is likely to cause the death of an individual; and
 - (ii) in disregard of that likelihood.

Penalty for this subsection: imprisonment for 20 years and a fine of \$5 000 000.

~~(4) A person charged with a crime under subsection (3) may be convicted of an offence under sect 30B(3).~~

~~30B. Industrial manslaughter - simple offence~~

~~(1) A person commits an offence if -~~

- ~~(a) the person has a health and safety duty as a person conducting a business or undertaking; and~~
- ~~(b) the person fails to comply with that duty; and~~
- ~~(c) the failure causes the death of an individual.~~

Penalty for this subsection:

- ~~(a) for an individual, imprisonment for 10 years and a fine of \$2 500 000;~~
- ~~(b) for a body corporate, a fine of \$5 000 000.~~

~~(2) A person charged with an offence under subsection (1) may be convicted of a Category 1 offence, a Category 2 offence or a Category 3 offence.~~

~~(3) An officer of a person (the **PCBU**) commits an offence if-~~

- ~~(a) the PCBU has a health and safety duty as a person conducting a business or undertaking; and~~
- ~~(b) the PCBU fails to comply with that duty; and~~
- ~~(c) the failure causes the death of an individual; and~~
- ~~(d) the PCBU's conduct that constitutes the failure -

 - (i) is attributable to any neglect on the part of the officer; or
 - (ii) is engaged in with the officer's consent or connivance.~~

~~Penalty for this subsection: imprisonment for 10 years and a fine of \$2 500 000.~~

~~(4) A person charged with an offence under subsection (3) may be convicted of a Category 1 offence, a Category 2 offence or a Category 3 offence.~~

30C Application of this subdivision

- (1) Chapter V of the Schedule to the Criminal Code Act Compilation Act 1913 (WA) applies to the offences in this subdivision.
- (2) For the avoidance of doubt, despite any provision of this Act to the contrary, a

person charged with an offence under this subdivision may refuse to answer a question or produce a document under Part 9 of this Act if that request would tend to incriminate the person or expose the person to a penalty under this subdivision.

30D Prosecution of offences under this subdivision

- (1) An offence charged under this subdivision may only be prosecuted by the Director of Public Prosecutions.

First alternative to section 30B – Insertion of Boland Review definition of ‘gross negligence’ (see the proposed amendments to section 30 above) and include requirement of neglect in PCBU simple industrial manslaughter offence

30B. Industrial manslaughter - simple offence

- (1) A person commits an offence if -
- (a) the person has a health and safety duty as a person conducting a business or undertaking; and
 - (b) the person fails to comply with that duty; ~~and~~
 - (c) the failure causes the death of an individual; ~~and~~
 - (d) the failure is:
 - (i) attributable to neglect of on the part of the person conducting a business or undertaking; or
 - (ii) engaged in with the consent or connivance of the person conducting a business or undertaking.

Penalty for this subsection:

- (a) for an individual, imprisonment for 10 years and a fine of \$2 500 000;
 - (b) for a body corporate, a fine of \$5 000 000. .
- ~~(2) A person charged with an offence under subsection (1) may be convicted of a Category 1 offence, a Category 2 offence or a Category 3 offence.~~
- (3) An officer of a person (the **PCBU**) commits an offence if-
- (a) the PCBU has a health and safety duty as a person conducting a business or undertaking; and
 - (b) the PCBU fails to comply with that duty; and
 - (c) the failure causes the death of an individual; and
 - (d) the PCBU's conduct that constitutes the failure –
 - (i) is attributable to any neglect on the part of the officer; or
 - (ii) is engaged in with the officer's consent or connivance.

Penalty for this subsection: imprisonment for 10 years and a fine of \$2 500 000.

- ~~(4) A person charged with an offence under subsection (3) may be convicted of a Category 1 offence, a Category 2 offence or a Category 3 offence.~~

Second alternative to section 30B – removal of ‘neglect’ as a basis for imposing liability on officers

30B. Industrial manslaughter - simple offence

- (1) A person commits an offence if -
- (a) the person has a health and safety duty as a person conducting a business or undertaking; and
 - (b) the person fails to comply with that duty;
 - (c) the failure causes the death of an individual; ~~And~~

(d) **the failure is:**

- (i) ~~is attributable to any neglect on the part of the officer; or~~
- (ii) **engaged in with the consent or connivance of the person conducting a business or undertaking.**

Penalty for this subsection:

- (a) for an individual, imprisonment for 10 years and a fine of \$2 500 000;
- (b) for a body corporate, a fine of \$5 000 000. .

(2) A person charged with an offence under subsection (1) may **only** be convicted of a Category 1 offence, a Category 2 offence or a Category 3 offence **if such offence is pleaded and particularised in the prosecution notice.**

(3) An officer of a person (the **PCBU**) commits an offence if-

- (a) the PCBU has a health and safety duty as a person conducting a business or undertaking; and
- (b) the PCBU fails to comply with that duty; and
- (c) the failure causes the death of an individual; and
- (d) the PCBU's conduct that constitutes the failure –
 - (i) ~~is attributable to any neglect on the part of the officer; or~~
 - (ii) ~~is engaged in with the officer's consent or connivance.~~

Penalty for this subsection: imprisonment for 10 years and a fine of \$2 500 000.

(4) A person charged with an offence under subsection (3) may **only** be convicted of a Category 1 offence, a Category 2 offence or a Category 3 offence **if such offence is pleaded and particularised in the prosecution notice.**

Amendments to Category 1 offence

Subdivision 3 - Other offences and penalties

31. Failure to comply with health and safety duty - Category 1

(1) A person commits a Category 1 offence if -

- (a) the person has a health and safety duty as a person conducting a business or undertaking; and
- (b) the person, **without reasonable excuse**, fails to comply with that duty;
- (c) **the person –**
 - **(i) is reckless as to the risk to an individual of serious harm; or**
 - **(ii) engages in the conduct with negligence; and**
- (d) the failure causes **the death of or** serious harm to an individual.

Penalty for this subsection:

- (a) for an individual, imprisonment for 5 years and a fine of \$680 000;
- (b) for a body corporate, a fine of \$3 500 000.

(2) A person commits a Category 1 offence if —

- (a) the person has a health and safety duty otherwise than as a person conducting a business or undertaking; and
- (b) the person, **without reasonable excuse**, fails to comply with that duty;
- (c) **the person –**
 - **(i) is reckless as to the risk to an individual of serious harm; or**

- (ii) engages in the conduct with negligence; and

(d) the failure causes the death of, or serious harm to, an individual.

Penalty for this subsection:

- (a) for an individual, if the offence is committed by the individual as an officer of a person conducting a business or undertaking, imprisonment for 5 years and a fine of \$680 000;
 - (b) for an individual, if paragraph (a) does not apply, imprisonment for 5 years and a fine of \$340 000;
 - (c) for a body corporate, a fine of \$3 500 000.
 - (d)
- (3) For the purposes of subsections (1)(c) and (2)(c), the failure causes serious harm to an individual if it causes an injury or illness to the individual that —
- (a) endangers, or is likely to endanger, the individual's life; or
 - (b) results in, or is likely to result in, permanent injury or **grievous bodily** harm ~~to the individual's health~~.
- (4) A person charged with a Category 1 offence may **only** be convicted of a Category 2 offence or a Category 3 offence **if such offence is pleaded and particularised in the prosecution notice**.

230. Prosecutions

- (1) Subject to subsection (3), proceedings for an offence against this Act, other than an industrial manslaughter offence under section 30A or **section 30B**, may only be brought by —
 - (a) the regulator; or
 - (b) a public service officer working in the WHS department with the written authorisation of the regulator (either generally or in a particular case).
- (2) The regulator must issue, and publish on the regulator's website, general guidelines for or in relation to —
 - (c) the prosecution of offences under this Act; and
 - (d) the acceptance of WHS undertakings under this Act.
- (3) Nothing in this section affects the ability of the DPP, or any member of the DPP's staff, to bring proceedings for an offence against this Act.