

Friday, 26 June 2020

Committee Secretary  
Standing Committee on Legislation  
Parliament House  
4 Harvest Terrace  
West Perth WA 6005

*via email to [lclc@parliament.wa.gov.au](mailto:lclc@parliament.wa.gov.au)*

Dear Sir/Madam

**Re: Work Health and Safety Bill 2019 (WA)**

Thank you for the opportunity to provide comment on the proposed Work Health and Safety Bill 2019 (WA) (the **Bill**).

The Australian Institute of Company Directors' (**AICD**) 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 reflects the diversity of Australia's director community: while 192 of the nation's ASX 200 companies have one or more AICD members serving on their board, our membership of more than 45,000 is drawn from directors and leaders of not-for-profits, large and small businesses and the government sector.

The AICD strongly supports robust and effective laws that ensure the health and safety of employees in the workplace, noting that laws in this area must be fair, balanced and consistent. 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.

In this submission we have limited our comments to the following aspects in the Bill, being (i) the industrial manslaughter offence – simple offence included in clause 30B; (ii) the strict liability nature of the Category 1 offence included in clause 31; and (iii) the prohibition of insurance for WHS fines for monetary penalties.

In our view, there are improvements which could be made without undermining the central policy objective of the Bill. These are outlined in detail below.

**1. Industrial manslaughter – simple offence**

The primary policy rationale of an industrial manslaughter offence is to achieve deterrence through the fear of criminal punishment. The AICD does not consider that both an 'industrial manslaughter – simple offence' and an 'industrial manslaughter – crime offence' is necessary to create any additional deterrent effect.

In our view, a single 'industrial manslaughter - crime offence', requiring a fault element of 'recklessness' would appropriately achieve the desired objective

Moreover, the introduction of a single industrial manslaughter offence would be consistent with other States and Territories that have legislated industrial manslaughter offences, including the ACT, Northern Territory, Queensland and Victoria.<sup>1</sup>

*Gross negligence as appropriate threshold for personal liability*

While we do not consider that the proposed 'industrial manslaughter – simple offence' is necessary in addition to the 'industrial manslaughter – crime offence', if it is deemed necessary, we consider it vital that the fault threshold of 'gross negligence' (rather than mere 'negligence') is reflected in cl 30B(3)(d)(i) in respect of an officer of a person conducting a business or undertaking (**PCBU**) for the purposes of the 'industrial manslaughter – simple offence'.

As currently drafted, the test of 'neglect' for conduct attributable to an officer of a PCBU in cl 30B(3)(d)(i) 'industrial manslaughter – simple offence' sets the lowest threshold for any industrial manslaughter offence in Australia. In other words, it would be inconsistent with:

- the definition of 'gross negligence' set out in the Boland Review of the Model Work Health and Safety Laws (**Model WHS Laws**)<sup>2</sup>;
- the threshold required in other jurisdictions' equivalent industrial manslaughter offences<sup>3</sup>; and
- consequently, the primary policy intent behind the Bill – namely, ensuring the harmonisation with the Model WHS Laws and improving consistency with the rest of Australia.

Indeed, the Boland Review of the Model WHS Laws acknowledged that “by adding a threshold for prosecution of gross negligence, a prosecutor can prosecute an offender for failing to conduct themselves safely or provide a safe environment for others, without having to establish this failure as being intentional [emphasis added].”<sup>4</sup> In other words, a standard of 'gross negligence' appropriately sets the bar higher than mere negligence, but still lower than that of 'recklessness' - where recklessness involves a person engaging in conduct that causes the death of an individual (i) knowing that the conduct is likely to cause the death of an individual; and (ii) in disregard of that likelihood.

However, we understand that a 'gross negligence' threshold in the 'industrial manslaughter – simple offence' may not be workable because the term 'gross negligence' is used and defined in the Occupational Safety and Health Act 1984 (WA) (**OSH Act**)<sup>5</sup> and Mining Safety and Inspection Act 1994 (**MSI Act**)<sup>6</sup>, requiring both 'knowledge' and 'disregard'. Accordingly, the consequence of this is:

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<sup>1</sup> Crimes (Industrial Manslaughter) Amendment Act 2003; Work Health and Safety (National Uniform Legislation) Amendment Act 2019; Work Health and Safety and Other Legislation Amendment Act 2017 No.38 (Qld); and Workplace Safety Legislation (Workplace Manslaughter and Other Matters) Act 2019.

<sup>2</sup> The Model WHS laws comprise the Model Work Health and Safety Bill, Model Work Health and Safety Regulations, and model Codes of Practice.

<sup>3</sup> As above in 1.

<sup>4</sup> Section 6.1, M Boland, Review of the model Work Health and Safety laws - Final Report, December 2018.

<sup>5</sup> Section 18A, OSH Act.

<sup>6</sup> Section 8B(2), MSI Act.

- the formulation of 'gross negligence' as understood in WA is more in line with the criminal law standard of 'recklessness' requiring the prosecution to prove an intentional and conscious choice to take an unjustified risk; and
- should it be introduced to the 'simple offence', the 'simple offence' would be too similar to the 'crime offence'.

Notwithstanding the inconsistency between thresholds, which we recognise is unique to WA, we consider a pragmatic solution is to retain the current drafting of cl 30B(3)(d)(i) and the term 'neglect', but clarify for the purposes of Division 5 in the cl 30 'Terms used' that 'neglect' on the part of the officer means (consistent with the High Court's interpretation in *Patel v The Queen*<sup>7</sup>):

*"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"*.

We note that this was the approach Victoria took in the recently enacted Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Act 2019 (No. 50 of 2019)<sup>8</sup>, while both Queensland and the ACT provided the same clarification in the equivalent legislations' explanatory memorandum and parliamentary committee report.<sup>9</sup> Such an approach would also be consistent with the Boland Review's recommendation that there should be a "separate industrial manslaughter offence where there is a gross deviation from a reasonable standard of care that leads to a workplace death".

In our view, it is critical that the 'simple offence' does not capture an honest officer of a PCBU that takes steps to fulfil their due diligence obligations consistent with their health and safety duties.

### *Penalties*

If the 'industrial manslaughter – simple offence' is to proceed, the AICD does not object to the inclusion of the proposed imprisonment term as a penalty in cl 30B(1), provided the legislation clarifies that a fault threshold equivalent to 'gross negligence' applies to the 'simple offence' consistent with the suggested approach above.

We would otherwise strongly object to the imposition of a criminal sanction for a summary offence that requires only proof of mere 'negligence', i.e. a breach of a civil duty of care. It would offend fundamental justice principles for an individual to suffer criminal sanction for breach of a civil obligation.

## **2. The Category 1 offence**

The AICD is also concerned with the proposal to apply 'strict liability' to the Category 1 offence, without the need for the prosecution to establish any culpability on the part of the individual (including both an officer of a PCBU and a person other than a person conducting

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<sup>7</sup> *Patel v The Queen* [2012] 247 CLR 531, citing *Nydam v R*;

<sup>8</sup> Section 39E, *Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Act 2019* (No. 50 of 2019).

<sup>9</sup> Work Health and Safety and Other Legislation Amendment Bill 2017 (QLD) Explanatory Notes: <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2017/5517T1404.pdf>; Crimes (Industrial Manslaughter) Amendment Bill 2002 (ACT) Standing Committee on Legal Affairs, Report No 6, September 2003: [https://www.parliament.act.gov.au/\\_\\_data/assets/pdf\\_file/0006/375756/la06Crimes.pdf](https://www.parliament.act.gov.au/__data/assets/pdf_file/0006/375756/la06Crimes.pdf).

a business or undertaking). Legislative use of 'strict liability' requires strong justification and should only occur in limited circumstances.<sup>10</sup>

Accordingly, we urge the Category 1 offence be similarly amended to require a fault element threshold of 'gross negligence' (as set out above).

Should the term 'neglect' be defined for the purposes of Division 5 as per the Boland Review definition of 'gross negligence' (in line with the suggested approach above in section one), our view is that the Category 1 offence could therefore include a similar qualifier in cl 31(1) and cl 31(2) as cl 30B(3)(d) of the 'industrial manslaughter – simple offence' – namely that:

- the person's conduct that constitutes the failure –
  - is attributable to any neglect on the part of the individual; or
  - is engaged in with the individual's consent or connivance.

We acknowledge that a Category 1 offence retains real value as a deterrent and that the highest penalties are reserved for an industrial manslaughter offence in cases of the most egregious deviations from a reasonable standard of care that leads to a workplace death.

However, in our view, provided that 'neglect' is defined for the purposes of Division 5 of the Bill as per the definition set out in section one above, this approach will:

- adhere to the Boland Review recommendation to introduce a 'gross negligence' standard to the Category 1 offence of the Model WHS Laws;<sup>11</sup> and
- still enable a tiered-approach as to the severity between the industrial manslaughter offences relative to the Category 1 offence.

### 3. Prohibition on insurance

While the AICD supports strong penalties for directors and officers who fail to exercise their duties under WHS laws, we do not support the proposed blanket prohibition on insurance for fines in a WHS context.

There are clearly many types of offences under the WHS laws where the availability of insurance would be inappropriate, for example a Category 1 offence. However, such a prohibition in the WHS context will mean that insurance may not be 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.

The common law already adopts a carefully balanced approach to cases involving an insured seeking to claim under an insurance policy with respect to any alleged criminal liability, where the general rule is that a contract of insurance is not enforceable in respect of criminal acts.<sup>12</sup> We understand that insurance cover is available for WHS fines but is not available if the fine (i) is uninsurable at law; or (ii) arises from wilful, intentional or deliberate acts or omissions, or acts or omissions of gross negligence or recklessness.

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<sup>10</sup> Commonwealth Attorney-General Department's Guide to Framing Commonwealth Offences, 22 at [2.26].

<sup>11</sup> See Recommendation 23(a) in M Boland, *Review of the model Work Health and Safety laws - Final Report*, December 2018, [https://www.safeworkaustralia.gov.au/system/files/documents/1902/review\\_of\\_the\\_model\\_whs\\_laws\\_final\\_report\\_0.pdf](https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf).

<sup>12</sup> *Burrows v Rhodes* (1899) 1 QB 816 at 828.

In effect, the common law prohibits insurance for intentional criminal acts, but recognises that there are occasions where an honest person may unintentionally commit a criminal offence in the course of their professional duties.

The Corporations Act 2001 (Cth) (**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. 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.

Given that many offences impose strict liability without any fault element, or subject to a negligence-based test, there is the possibility that an individual could be held liable for certain acts or omissions because of their role with a company, for example directorship, without the need for some culpability to be established.

Accordingly, the AICD considers the existing approach under the common law and Corporations Act provisions is appropriate, providing a degree of flexibility for individuals to insure the risk of certain criminal (as well as civil) penalties arising unintentionally in the course of their professional or business undertakings, notwithstanding that the conduct may have been labelled criminal.

#### **4. Next steps**

We hope our comments will be of assistance as you consult on the passage of this important Bill. If you would like to discuss any aspects further, please contact Christian Gergis, Head of Policy, at [cgergis@aicd.com.au](mailto:cgergis@aicd.com.au) or Laura Bacon, Policy Adviser at [lbacon@aicd.com.au](mailto:lbacon@aicd.com.au).

Yours sincerely

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