



SHIRE OF CARNAMAH SUBMISSION TO THE LEGISLATION COMMITTEE REGARDING THE WORK HEALTH AND SAFETY BILL 2019

SHIRE OF CARNAMAH'S POSITION

The Shire of Carnamah (Shire) acknowledges the need for the implementation of the Work Health & Safety (WHS) Bill in Western Australia (WA) aligned with the harmonised model. This is supported by the Boland Review (Review of Model Work Health and Safety Laws-Final report) which confirmed that WHS is largely fit for purpose.

Workplace safety is paramount to all local governments and aligning with WHS, as proven in recent years in other jurisdictions, will only improve safety outcomes for local governments and the communities we service.

The primary concerns the Shire has with the WHS is WA's amendments to the industrial manslaughter (IM) provisions (WHS Bill 2019 sections 30A & 30B). The proposed IM provisions as detailed in those sections were not included in the original WHS consultation process; and deviate significantly from the established proven IM processes within the current WA Occupational Safety & Health Act 1984, the Criminal Code and the WHS models utilised in other jurisdictions.

Workplace safety is a primary responsibility of all in the workplace; the framing of the IM provisions as discussed below has broken the safety chain, with employers (PCBU and its officers) held responsible for the actions of employees irrespective of the employer's knowledge, conduct or negligence.

CHIEF EXECUTIVE OFFICER

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LACK OF CONSULTATION

Issues

1. Why were the proposed IM provisions not consulted on when the WHS Bill was open to consultation?
2. Was any consultation undertaken as part of the IM provisions development following the conclusion of the prior WHS Bill review period?
3. Was the Boland review considered as part of the development of the IM provisions?
4. Was there any consultation with the Government's Ministerial Advisory Panel on the proposed IM provisions?

Summary

The proposed IM provisions have significant impacts on WA. Broad consultation with all sectors is necessary to ensure that the laws are fit for purpose and to minimise any unintended and negative consequences.

INDUSTRIAL MANSLAUGHTER PROVISIONS FORM

Issues

1. What was the process for the development of the IM provisions which are not aligned to any other jurisdiction?
2. The OSH Act linking to the Criminal Code has IM processes, which were updated in 2018. How were the proposed IM provisions developed? What reports, investigations or studies were used to inform the IM provisions development?
3. Why do the IM provisions exclude employees? What was the process for making this determination?
4. Are there any reports, investigations or studies that informed this exclusion of employees from the IM provisions?
5. Why has WA broken the safety chain within the harmonised WHS legislation, which exists in all other jurisdiction and under the current OSH Act?
6. Why is WHS in WA framed as "*ensur[ing] that deaths at the workplace, caused by the conduct of **PCBUs and officers of PCBUs** are met with substantial penalties*" (Explanatory Memorandum page 2)? Why are employees excluded? If it stated "*deaths in the workplace are met with substantial penalties*" irrespective of which parties conduct caused the death then the safety chain would be maintained.

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7. Has the Government confirmed that Worksafe as the regulator has the necessary skillset and resources to manage and prosecute IM cases?
8. Has the Government considered the management of IM cases in the regions by Worksafe?
9. What process was followed that saw the IM provisions development so that the public prosecutor (who is highly skilled and experienced) would not be involved in the prosecution of IM?
10. The proposed IM provisions draws in all persons within a workplace; has a consideration of the consequences of this broad application been undertaken?
11. The proposed IM provisions state that individuals do not need to have had knowledge, be reckless or negligent to be charged under the IM provisions. Has a consideration of the consequences of this broad application been undertaken?
12. How does the Government envisage individuals may demonstrate they have managed safety in the workplace; in light of the fact that they may be charged under the IM provisions even if they have not been reckless or negligent and had no knowledge?
13. 97% of WA business is small business; the penalties will see many become insolvent. This is particularly concerning with the IM provisions now not requiring that the PCBU/officers need to have had knowledge, be reckless or negligent to be charged with IM. This coupled with the inability to insure, will cause major impacts to small business and the wider community reliant on business for employment. Was there any consideration of the business types and their actual capacity when undertaking the development of the IM provisions?
14. Has consideration been given to how employers will need to manage their workforce under the proposed IM provisions? Employers may have no recourse but to fire employees for minor safety breaches due to the significant penalties employers will incur in the event an incident occurs in future.

Summary

The Shire acknowledges the need for IM provisions, but it needs to be aligned to the WHS model, which was confirmed by the Government's Ministerial Advisory Panel and the Boland review.

The Shire is concerned that the proposed IM provisions has been developed without due consideration of the unintended consequences and without consultation with all stakeholders.

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All other jurisdictions have maintained the safety chain within the WHS legislation, which ensures that all persons in the workplace are responsible and accountable for their actions. WA is taking safety into untested and perilous waters with this approach.

ASSESSMENT OF THE IMPACT OF THE INDUSTRIAL MANSLAUGHTER PROVISIONS IN PROPOSED FORM

The broad nature of the IM provisions will have unintended consequences as deaths in the workplace take years to process through the coroner and courts. If a death is proven to have had nothing to do with the PCBU it will cause major stress and financial difficulties which will likely see businesses go bankrupt unnecessarily.

What if the PCBU has done everything correctly and an employee simply does something in error which causes another employee's death? Under the proposed IM provisions, the PCBU can be prosecuted for IM but not the employee.

For example the following scenarios could arguably with hindsight have been risks that required management but in most cases are considered to be outside of an employer's ability to manage or mitigate.

1. If an elderly person has a medical episode (e.g. heart attack) and dies while taking part in a program within a workplace, will the PCBU be charged with IM?
2. If a worker working in a community scenario is physically assaulted and dies, will the PCBU be charged with IM?
3. If a member of the public ignores barricades, safety signage, etc. and enters a worksite and dies, will the PCBU be charged with IM?
4. If a member of the public within a worksite attacks and kills another member of the public, will the PCBU be charged with IM?
5. If a member of the public disregards traffic management signage on a worksite and hits and kills a worker, will the PCBU be charged with IM?
6. If a swimmer drowns in a pool despite the PCBU taking all reasonable measures to prevent drownings, will the PCBU be charged with IM?
7. If a child/member of the public climbs over a compliant balustrade and falls and dies, will the PCBU be charged with IM?
8. If well maintained equipment used as intended, fails and kills someone, will the PCBU be charged with IM?
9. If a worksite is built to required building regulations and standards and someone disregards signs or fails to take due care etc. and dies as a result, and the death is subsequently linked to the building feature, will the PCBU be charged with IM?

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10. If a worker crosses a business's carpark and an unrelated driver enters the carpark and hits and kills the worker, will the PCBU be charged with IM?
11. If someone chokes on food and dies in the workplace, will the PCBU be charged with manslaughter?
12. If a worker trips down a flight of stairs within a worksite and dies as a result, will the PCBU be charged with IM?
13. If a worker is working from home and is attacked and killed by another person, will the PCBU be charged with IM.
14. If a worker is working from home and trips down their own stairs or has some other kind of domestic misadventure and dies, will the PCBU be charged with IM?
15. If a worker is involved in a vehicle accident and dies, will the PCBU be charged with IM?
16. If a worker or volunteer fails to report a medical issue (deliberately or undiagnosed) and has an accident or medical episode and dies, will the PCBU be charged with IM?
17. If a violent individual enters a workplace and kills a worker, will the PCBU be charged with IM?
18. If a volunteer, worker, contractor, or visitor not following guidance and process does something non-compliant and dies, will the PCBU be charged with IM.
19. If food etc. is shared within the workplace between workers and due to allergies a worker dies, will the PCBU be charged with IM?
20. If a worker attends a work function and dies on the way home, will the PCBU be charged with IM?
21. If a worker, who is on medication which is reported and a doctor has provided written advice that they may undertake their substantive position, has an accident and dies, will the PCBU be charged with IM?
22. If a husband and wife run a farm or business as a partnership and the husband is killed in a machinery incident, will the wife as an officer/ PCBU be charged with IM?
23. If a business engages a specialist contractor (electrician, confined spaces, etc.) and they kill themselves through failing to follow required processes, will the PCBU be charged with IM?

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24. If a PCBU brings in an organisation (training, volunteer, work for the dole etc.) to undertake activities and a death occurs, will the PCBU be charged with IM?
25. If a farmer authorised under the Bushfire Act by the onsite Fire Chief to fight a fire dies, will the Local Government, as the PCBU (as LGs operate bushfire brigades) with no control or knowledge of the farmers, be charged with IM?
26. If a member of the public accessing a public open facility without the knowledge or involvement of onsite workers dies, will the PCBU be charged with IM?
27. If someone has an asthma attack and dies within the workplace, will the PCBU be charged with IM?
28. If in a performing arts venue (workplace) a performer working without restraints falls (trapeze artist, trampoline, etc.) and dies, will the PCBU be charged with IM?
29. If a local government (PCBU) is conducting a fair or event which includes a travelling carnival (who has the required Worksafe plans, engineering certification, etc.) and a patron dies on an amusement ride, will the PCBU be charged with IM?
30. If a delivery company engaged by a PCBU to drive/deliver items is involved in a traffic accident and a death occurs, will the PCBU be charged with IM?
31. If a PCBU buys equipment which is maintained and used correctly but which causes a death and is subsequently recalled, will the PCBU be charged with IM?
32. If a principal contractor who has control of a worksite with federal safety and ISO accreditation and all required documented safety plans and processes has a death on site, will the PCBU be charged with IM?
33. If someone breaks into a worksite illegally and is killed, will the PCBU be charged with IM?
34. If a worker is bitten by an insect or snake on a worksite and dies, will the PCBU be charged with IM?
35. If a tree on a worksite drops a limb or falls and kills someone, will the PCBU be charged with IM?
36. If a utility pole maintained by Western Power connecting to a worksite falls or fails and kills someone on a worksite, will the PCBU be charged with IM?
37. If an employee driving in remote areas impacts an animal (kangaroo, etc.) and dies, will the PCBU be charged with IM?

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38. If an employee taking part in a workplace wellness low impact fitness program has a heart attack and dies, will the PCBU be charged with IM?
39. If a member of the public or another worker follows a worker home in a PCBU marked vehicle and kills them, will the PCBU be charged with IM?