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6 September 2018

Stephanie Mayman
Chairperson
Ministerial Advisory Panel
WHS Reform
Locked Bag 14
CLOISTER SQUARE WA 6850

via email to WHSreform@dmirs.wa.gov.au

Dear Ms Mayman

Modernising Work Health and Safety laws in Western Australia

Thank you for the opportunity to provide a submission to the proposals of the Western Australian Government to modernise Western Australia's Work Health and Safety (**WHS**) laws in the state.

The Australian Institute of Company Directors (**AICD**) is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 43,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

The AICD welcomes the government's commitment to the development of a modernised WHS Act for Western Australia (**WA**) which is based on the national model WHS laws. The AICD has limited its comments in this submission to the following key issues: the national harmonisation of WHS laws; industrial manslaughter offences; and the use of enforceable undertakings by the WHS regulator.

1. Executive summary

In summary, the AICD:

- Supports the introduction of the model WHS Bill 2016, or where appropriate, the model WHS Bill 2011 (where required to achieve consistency with other jurisdictions).
- Does not support the inclusion of a new "industrial manslaughter" offence into WA's WHS laws; and
- Recommends against the removal of the ability for the regulator to make use of enforceable undertakings, in certain circumstances, as an alternative to prosecution for contraventions of WHS laws which involve a fatality.

Further detail on each of these issues is outlined below.

2. The introduction of a modern WHS Act in WA

The AICD supports the objective of reforming WA's WHS laws to ensure they are fit for purpose and are, as far as is possible and desirable, consistent with other Australian jurisdictions.

Inconsistency between jurisdictions creates unnecessary costs and complexity, particularly for those businesses that operate across jurisdictions. The AICD agrees with the government that the time has come to modernise and harmonise WA's WHS laws to ensure they keep pace with modern work practices. The AICD strongly endorses the government's efforts to prioritise this important reform.

The AICD appreciates that there are elements of the model WHS laws which will not be suitable for WA's unique circumstances. For this reason, the AICD supports common sense departures from the model WHS laws where necessary. However, these departures should be kept to a minimum so that the principle of harmonisation is not diluted.

3. Industrial manslaughter offence

The Safe Work Australia Model Work Health and Safety Bill 2016 (**WA WHS Bill**) does not include any industrial manslaughter offence. The AICD supports this approach.

The AICD considers the specific criminal offences in the model WHS laws sufficient to achieve the policy objective of deterrence and punishment for wrongdoing. For instance, section 31 of the WA WHS Bill provides for a maximum penalty of $600,000 or 5 years imprisonment, or both, for an individual who commits a Category 1 offence for officers of a person conducting a business or undertaking. The AICD is not convinced that an additional industrial manslaughter laws would achieve any greater deterrence effect. Nor should it be assumed that a specific manslaughter offence would be any easier to successfully prosecute than existing offences.

The AICD also considers a specific industrial manslaughter law to be unnecessary, given that WA's pre-existing manslaughter offence in s 180 of the WA Criminal Code 1913 can be used against corporations and individuals in circumstances where a workplace fatality has occurred as a consequence of gross negligence. The offence carries a maximum penalty of imprisonment for life, and a prosecution can be brought against both persons and corporations.

In addition, the AICD has previously expressed concern that law reform in the area of WHS laws which focusses on punishing wrongdoing can ultimately distract from the core object of WHS laws, which is to protect workers and other persons from harm by requiring duty holders to eliminate or minimise risks.

Finally, the AICD is concerned that the creation of more criminal offences risks diverting scarce government resources and attention from more practical measures which will reduce or eliminate industrial deaths. For instance, given the large number of industrial deaths

occurring in the transport, postal and warehouse sector, the AICD strongly supports practical government programs which will help address the factors contributing to this serious issue. Innovative technologies are already available that can reduce instances of vehicle collisions, and government programs that encourage uptake of these technologies could reduce fatalities in this sector.[1] Such practical and forward-looking measures should be preferred to introducing new and unnecessary criminal offences.

4. Enforceable undertakings for incidents involving a worker fatality

The AICD recommends against the removal of the ability for the regulator to make use of enforceable undertakings, in certain circumstances, as an alternative to prosecution for category 2 contraventions of WHS laws which involve a fatality.

The AICD is of the view that the determination of whether an enforceable undertaking is appropriate should be made after careful examination of the breach which gave rise to the fatality. This will ensure that the regulator has the flexibility to pursue the most appropriate enforcement remedy in all the circumstances, on a case by case basis, having regard to the views of the family of the deceased worker, and the remedy that will most likely deliver a superior WHS outcome. There would be little value in removing this important discretion from the regulator.

5. Next steps

We hope our comments will be of assistance to you. If you would like to discuss any aspect of this submission, please contact Matt McGirr, Policy Adviser, on (02) 8248 8431 or mmcgirr@aicd.com.au.

Yours sincerely,

LOUISE PETSCHLER
General Manager, Advocacy

[1] David Health, Dr Michael A Regan, Professor Claes Tingvall, and Laurie Williams, 'Investing in new technology to reduce accidents and improve safety in transport', *Proceedings of the Road Safety Research, Policing and Education Conference,* (2002) Australia.