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Safe Work Australia
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Via email: 2018Review@swa.gov.au

Dear Safe Work Australia

Consultation RIS: 2018 Review of the WHS laws

Thank you for the opportunity to provide a submission on the Consultation Regulation Impact Statement (**Consultation RIS**) on the recommendations of the 2018 review undertaken by Marie Boland of the Model Work Health and Safety Laws (the **Model WHS Laws**).[1]

The Australian Institute of Company Directors (**AICD**) has a membership of more than 44,000 including directors and senior leaders from business, government and the not-for-profit sectors. The mission of the AICD 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 experience is that the overwhelming majority of company directors take health and safety matters very seriously. Aside from legal obligations and ethical expectations, it is critical that directors and officers pay particular attention to the health and safety of employees and others within the workplace, and this has a strong focus in the AICD's educational curriculum and materials. This strong focus on safety has been reflected in the halving of workplace deaths over the last decade.

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.

In this submission the AICD has limited its comments to two of the recommendations in the Consultation RIS, being (i) the Category 1 offence and industrial manslaughter (recommendation 23(a)-(b)) and (ii) the prohibition of insurance for WHS fines (recommendation 26).

1. Executive Summary

- The AICD agrees with Ms Boland's findings that the introduction of the Model WHS Laws has led to a greater focus on WHS issues and elevated discussions to the board level. Importantly, the AICD considers that the Model WHS Laws are working in accordance with their purpose and there is no need to change the overall framework;

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

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- Harmonisation across jurisdictions is crucial and the AICD continues to advocate for this, particularly for those organisations that operate across jurisdictional borders;

- The AICD is of the view that the introduction of an industrial manslaughter offence is not necessary given the existing criminal law offences and the Category 1 offence contained in the Model WHS Laws. The relevant regulators should be encouraged to prosecute individuals using these existing offences, rather than introducing new, potentially duplicative ones;

- WHS laws are rightly focused on prevention of workplace injuries and death rather than punishment for wrongdoing (being the focus of long-standing manslaughter offences);

- Although the AICD does not consider it necessary to amend the Category 1 offence to include gross negligence, the AICD would not oppose its inclusion provided the high standard of gross negligence (as defined below) is incorporated into the definition; and

- 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. For that reason, the AICD does not support the proposed blanket prohibition on insurance for fines in a WHS context. There is the possibility that an individual could be held liable because of their role with a company, for example directorship, without the need for some culpability to be established.

Our key comments are outlined in further detail below.

2. Overview of the Model WHS Laws

The AICD agrees with Ms Boland's finding that the introduction of the Model WHS Laws has led to a greater focus on WHS issues and elevated discussions to the board level. This has had an important and lasting impact on the governance of organisations and the health and safety of employees. Notwithstanding this, it is crucial to acknowledge that the role of non-executive directors in organisations is essentially one of oversight and that they are not ordinarily involved in the day-to-day management of companies. Directors should not be subject to criminal liability if they have exercised their due diligence obligations in accordance with Model WHS Laws.

The AICD is of the view that that the Model WHS Laws are achieving their stated purpose, which is to protect workers and other persons from harm by requiring duty holders to eliminate or minimise risks. In fact, between 2007 and 2017, the number of workplace deaths has halved.[2] For the vast majority of directors, a no harm approach is taken, and there is no appetite to expose their workers to serious workplace safety risks.

The AICD considers that the Model WHS Laws are appropriately focused on culpability and are operating well overall. Although the AICD agrees that it is critical that the public have confidence that the Model WHS Laws enable justice to be administered fairly and appropriately, changes to the existing framework should not be made unless there is clear evidence to suggest that the current framework is not fit for purpose.

[2] Work-related traumatic injury fatalities report 2017. The fatality rate for 2017 was 1.5 per 100,000 workers. In 2007, it peaked at 3.0 per 100,000 workers.

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Further, the AICD continues to support harmonisation of WHS regimes between States, Territories and the Commonwealth. Inconsistencies between jurisdictions creates unnecessary cost and complexity, which can undermine the efficacy of such legislation, and is ultimately to the detriment of workers.

While complete consistency and harmonisation has never been fully realised, it remains a vital objective to guide future reforms to the Model WHS Laws.

3. Industrial manslaughter

The AICD does not support the proposed amendment of the Model WHS Laws to provide for the inclusion of a new offence of industrial manslaughter as per Recommendation 23(b).

Deterrence over punishment

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 a specific industrial manslaughter offence needs to be introduced to create any additional deterrent effect, given existing criminal law offences and the Category 1 offence contained in the Model WHS Laws.

Longstanding manslaughter offences carry significant penalties – in NSW for instance, the maximum penalty is 25 years gaol – and have a wealth of jurisprudence. Alternatively, a person convicted of a Category 1 WHS offence faces a maximum penalty of $600,000, or 5 years imprisonment, or both.

The case is therefore not clear to us that there is a significant gap in the current regulatory framework.

Existing laws have been under-utilised

The AICD agrees with the point made in the Consultation RIS that the Model WHS Laws are relatively recent and have not yet been fully tested.

Instead of the introduction of a new offence, the AICD is of the view that the relevant regulators should be encouraged to prosecute individuals where they believe Category 1 or criminal law offences have been committed, rather than introducing new, potentially duplicative offences. Regulators should also take proactive steps to ensure the safety of workers by being proactive with investigative powers such as the issuing of section 155 notices and inspections under the Model Work Health and Safety Bill 2011. Greater resources should also be dedicated to education on safe practice.

Instead of creating more criminal offences, the AICD is highly supportive of practical measures that help prevent industrial deaths. For instance, given the large number of industrial deaths occurring in the transport, postal and warehouse sector, the AICD strongly supports government programs to address underlying, industry-specific causes and factors. Such practical and forward-looking measures should be preferred to introducing new and unnecessary criminal offences.

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The ACT and Queensland position

In addition to Category 1-3 offences, an industrial manslaughter offence was introduced in the ACT in 2004 and in Queensland in 2017. There are key differences between the offences in the two jurisdictions; for example, the ACT offence requires reckless conduct causing death whereas the Queensland offence simply requires negligence. This gives rise to a number of concerns including harmonisation (discussed in further detail below).

Of significance, to date there has not been a successful prosecution under either offence. This raises further doubt over the need to introduce a similar offence in the Model WHS Laws.

Requirements for an industrial manslaughter provision

Notwithstanding our objection, should an industrial manslaughter offence be considered necessary to introduce into the Model WHS Laws, the AICD agrees with Safe Work Australia that further consideration of the current manslaughter laws that apply in each jurisdiction is required, including as to the potential overlap between the existing criminal law manslaughter offences and both the Queensland and ACT industrial manslaughter offences.

In addition, the AICD is of the view that any industrial manslaughter prosecution should be managed by the applicable State Director of Public Prosecutions (and not the relevant regulator) and any new offence should be subject to the following safeguards:

- A workable and reasonably practicable due diligence defence.
- Fundamental principles of criminal law should apply, especially:
    - The presumption of innocence in criminal matters; and
    - The common law right against self-incrimination which entitles a person to refuse to answer any question, or produce any document, if the answer or the production would tend to incriminate that person.
- If an investigation is underway, an individual or entity should be issued with sufficient details of the investigation in a timely manner so as to allow them to fairly defend the allegation.

4. The Category 1 offence and gross negligence

The AICD does not consider it necessary to amend the Category 1 offence to include 'gross negligence' as per Recommendation 23(a). The AICD is of the view that the current offence is working as intended and notes that there is a lack of evidence to suggest that the proposed change is required to increase deterrence and will result in improved safety outcomes. Notably, there have been several successful Category 1 prosecutions in NSW and South Australia as set out in the Consultation RIS demonstrating the efficacy of the offence.[3]

[3] Since the introduction of the Model WHS Laws, there were successful prosecutions in the NSW case of *Stephen James Orr v Cudal Lime Products Pty Ltd* [2018] NSWDC 27 and the South Australia case of *Martyn Campbell v Jeffry Rowe* [2019] SAET 104.

While we do not consider this amendment necessary, we would not oppose inclusion of 'gross negligence' as the fault element in the Category 1 offence provided that the definition of 'gross negligence' set out in the Boland review and the Consultation RIS was adopted, requiring proof of:

> *"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".*[4]

It is important that 'gross negligence' does not capture an honest and reasonable director that takes reasonable steps to fulfil their due diligence obligations under the Model WHS Laws.

5. Prohibition on insurance

The AICD supports strong penalties for officers who fail to exercise their duties under WHS laws. 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.

There is the possibility that an individual could be held liable because of their role with a company, for example directorship, without the need for some culpability to be established.

In particular, the AICD queries whether any change to the Model WHS laws is necessary, noting that there are already several limits on the availability and enforceability of insurance under common law, and the *Corporations Act 2001* (Cth) (**Corporations Act**), reflecting a balancing of public policy considerations.

Under the common law, the general rule is that a contract of insurance is not enforceable in respect of criminal acts.[5] This rule reflects the long-held principle that the availability of such insurance is contrary to public policy. 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. To the extent that insurance policies are being sold which provide insurance for this type of conduct, they may be deemed unenforceable.

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. Given that many offences impose liability without any fault element, or subject to a negligence-based test, the common law has developed a degree of flexibility by providing capacity for individuals to insure the risk of certain criminal (as well as civil) penalties arising in the course of their professional or business undertakings, notwithstanding that the conduct may be criminal.

Therefore, it has become an established legal principle that where a criminal act was unintentional the common law will, in certain circumstances, permit recovery from an insurer.

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[4] *Patel v The Queen* [2012] 247 CLR 531, citing Nydam v R.
[5] *Burrows v Rhodes* (1899) 1 QB 816 at 828.

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In determining whether the contract of insurance is enforceable, an assessment is undertaken with regard to a number of factors, including the seriousness of the offence, the extent to which a person was involved in the offence, the likelihood that the indemnity will prevent deterrence, the likelihood that enforceability of the contract would promote the interests of innocent victims, and the public interest in the observance of contracts.[6] This multi-factorial test thereby grants the court flexibility to undertake a considered assessment of the specific, often complex, facts before it.

In particular, the public policy reasons for disallowing insurance in relation to fines and penalties has rested on there being some culpability on the part of the insured.[7] In relation to Category 1 and 2 WHS offences, in particular, there is the possibility that an honest and well-intentioned individual can nonetheless incur personal liability
The *Corporations Act 2001* (Cth) 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.

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

6. Next steps

We hope our comments will of assistance when considering this complex area of law and policy.

If you would like to discuss any aspect of this submission further, please contact Christian Gergis, Head of Policy at cgergis@aicd.com.au or Christie McGrath, Senior Policy Adviser at cmcgrath@aicd.com.au.

Yours sincerely

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[6] *Fire and All Risks Insurance Co Ltd v Powell* [1966] VR 513.
[7] *Burrows v Rhodes* (1899) 1 QB 816 at 828.