

14 February 2020

Hon Bill Joseph Johnston MLA
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Via email: Minister.Johnston@dpc.wa.gov.au

By copy: Minister.Quigley@dpc.wa.gov.au

Dear Minister

Re: Work Health and Safety Bill 2019 (WA)

I am writing in relation to the proposed Work Health and Safety Bill 2019 (WA) (the **Bill**), which we understand was introduced into Parliament on 27 November 2019. In particular, we would like to share with you our views on certain aspects of the proposed reforms.

The Australian Institute of Company Directors (**AICD**) has a membership of more than 45,000 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.

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 letter the AICD has limited its comments to three of the proposals in the Bill, being (i) the industrial manslaughter offences included in clauses 30A and 30B; (ii) the strict liability nature of the Category 1 offence; 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.

1. Industrial manslaughter

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’ (where a person engages 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), would adequately increase deterrence and result in improved safety outcomes.

Moreover, the introduction of a *single* industrial manslaughter offence would be consistent with other States and Territories that either have, or are in the process of, legislating industrial manslaughter offences, including the ACT, Northern Territory, Queensland and Victoria.¹

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 is vital that the fault threshold of ‘gross negligence’ is reflected in the ‘industrial manslaughter – simple offence’ in line with the definition of ‘gross negligence’ set out in the Boland Review of the Model Work Health and Safety Laws² (**Model WHS Laws**), 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”.*³

It is important that ‘gross negligence’ does not capture an honest director that takes steps to fulfil their due diligence obligations under WHS laws.

2. The Category 1 offence

The AICD is 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 body corporate or individual officer. Legislative use of ‘strict liability’ requires strong justification and should only occur in limited circumstances.⁴

Given the seriousness of the proposed Category 1 offence, the degree of potential penalties and stigma of a conviction, the application of ‘strict liability’ to the offence is not adequately justified.

Accordingly, we urge the Government to consider amending the proposed Category 1 offence to include a fault element threshold of:

- ‘reckless conduct’ – which would be consistent with the equivalent work health and safety legislation of other States and Territories; or

¹ Crimes (Industrial Manslaughter) Amendment Act 2003; Work Health and Safety Amendment Bill 2019; Work Health and Safety and Other Legislation Amendment Act 2017 No.38 (Qld); and Workplace Safety Legislation (Workplace Manslaughter and Other Matters) Bill 2019.

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

³ *Patel v The Queen* [2012] 247 CLR 531, citing *Nydam v R*.

⁴ Attorney-General Department’s Guide to Framing Commonwealth Offences, 22 at [2.26].

- alternatively, 'gross negligence' (as per the definition set out above) – which would be in line with the Boland Review recommendation for the Model WHS Laws.⁵

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.⁶ 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.

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

⁵ 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.

⁶ *Burrows v Rhodes* (1899) 1 QB 816 at 828.

course of their professional or business undertakings, notwithstanding that the conduct may have been labelled criminal.

Finally, access to insurance generally is an important issue for directors. Prohibiting insurance for directors for monetary penalties 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.

4. Next steps

We hope our comments will be of assistance to you. 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 Laura Bacon, Policy Adviser at lbacon@aicd.com.au.

Yours sincerely



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