Submission No 3

INQUIRY INTO WORK HEALTH AND SAFETY AMENDMENT (REVIEW) BILL 2019

Organisation: Housing Industry Association

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HOUSING INDUSTRY ASSOCIATION

Submission to the
Portfolio Committee No. 1 – Premier and Finance

Inquiry into the provisions of the Work Health and Safety Amendment (Review) Bill 2019

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HOUSING INDUSTRY ASSOCIATION

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ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 60,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new building stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

> *"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over $150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional committees before progressing to the National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The association operates offices in 23 centres around the nation providing a wide range of advocacy, business support including services and products to members, technical and compliance advice, training services, contracts and stationery, industry awards for excellence, and member only discounts on goods and services.

1. INTRODUCTION

On 12 November 2019, the Work Health and Safety Amendment (Review) Bill 2019 (the Bill) was introduced into the NSW Parliament by the Minister for Better Regulation and Innovation, Kevin Anderson. The Bill seeks to amend the *Work Health and Safety Act 2011 (NSW)* (the WHS Act).

It follows a national review of the model Work Health and Safety Act, undertaken by Marie Boland. In December 2018 Marie Boland presented her final report (2018 Final Report) of the independent national review of the model Work Health and Safety (WHS) laws (the Review). This was the first review of the model WHS laws. Ms Boland made 34 recommendations aimed at improving the model WHS laws.

It should be noted that the national process has not yet been completed. Any amendments that may be made to the model WHS laws are not expected to be delivered until the end of 2020.

At the time of the introduction of the Bill Safe Work Australia was preparing a regulation impact statement (RIS). As part of RIS preparation, Safe Work Australia undertook a consultation; *Consultation Regulation Impact Statement for the Recommendations of the 2018 Review of the Model Work Health and Safety Laws* (the Consultation RIS). HIA provided a submission[1] to the Consultation RIS.

Although the 2018 Final Report contained 34 recommendations, the Consultation RIS considered that only 12 of those recommendations would have an impact, with the other 22 recommendations having 'minor or no impact.' In its submission, HIA was critical of this conclusion and argued, amongst other things, that the Consultation RIS did not 'accurately and appropriately meet the COAG Principles for a regulatory impact assessment.[2]'

Further, in HIA's submission to the Consultation RIS the 2018 Final Report failed to acknowledge and respond to a number of issues raised by HIA in its response to the Discussion Paper[3]. Those issues which HIA raised and which were not considered, or dealt with related to issues around 'duties of care, the concept of control, officer's duties, the provisions for health monitoring, the operation of the WHS obligations where multiple and concurrent duty-holders are involved, and the referencing of Australian Standards in codes of practice.'

According to the Minister's second reading speech the stated intent of the Bill is to amend the Act "to expedite implementation in NSW of 12 proposals based on recommendations" contained in the Review.

The Minister further stated:

> *"The reforms are intended to make workers in New South Wales safer and are being expedited ahead of completion of the national process to ensure that the issues in the Work Health and Safety Act identified by the national review do not continue to affect New South Wales workplaces."*

On 19 November 2019, the Bill was referred to the Portfolio Committee No. 1 – Premier and Finance (the Committee) for inquiry and report. HIA provides this submission to the Committee in response to the Inquiry.

HIA has a number of concerns with the Bill and it is unfortunate that the Bill was introduced without any prior consultation. It is also disappointing that the Bill has been introduced without any regulatory impact assessment being undertaken at the State level, or, despite its deficiencies, waiting for the results of the Consultation RIS and the national review process. This approach represents a lost opportunity to not only achieve a full understanding of the post-implementation issues associated with the Model WHS Laws on the residential building industry, but also a lost opportunity to develop practical options for reform. To that end, HIA recommends that this Bill progress no further until the outcomes of the national review process are known.

[1] https://engage.swa.gov.au/45489/documents/122265
[2] Ibid, page 5
[3] 2018 Review of the model WHS laws, Discussion paper. Marie Boland, February 2018

2. RESPONSE TO THE PROPOSED AMENDMENTS

HIA will limit its response to a select number of proposed amendments that will have an impact on our members and the industry in general.

2.1. ENHANCE CATEGORY 1 OFFENCE

HIA does not support the proposed amendment to s 31 of the WHS Act to include that a duty holder commits a Category 1 offence if the duty holder is 'grossly negligent' in exposing an individual to a risk of serious harm or death.

As noted in the Consultation RIS[4], 'the Review Report does not provide evidence that including gross negligence in the Category 1 offence would result in an overall increase in the number of matters prosecuted.' It is also observed in the Consultation RIS that if this change is made there may not be any increase in the number of Category 1 prosecutions 'because the high risk of serious harm required to prove gross negligence is potentially more difficult to establish than the substantial risk of harm required for recklessness[5].'

The existing rules that deal with serious injuries and incidents at a workplace are robust. The current framework of work, health and safety laws, supported by the regulations, codes of practice and compliance activities is the most appropriate and effective way of responding to incidents at the workplace.

There is no available information on any unsuccessful prosecution due to the recklessness test. There is also nothing to support the proposition that the Regulator would avail themselves of prosecutions for category 1 offences more readily with the proposed change. However, there is evidence of successful prosecution under the current category 1 offence. It would seem an improper regulatory approach to alter a compliance framework that does seem to be working.

The current legislation ensures that all individuals at a workplace have work, health and safety responsibilities. This supports the development of a safety culture which is pivotal to better work, health and safety outcomes and supports the spirit of the work, health and safety laws.

The current penalty regime and enforcement approach has seen appropriate and commensurate actions taken in response to work, health and safety incidents. The imposition of significant penalties, including gaol terms, suggest the courts will hold officers accountable for their role in serious WHS incidents under the existing regulatory arrangements.

For these reasons, HIA submits that the current approach remains appropriate.

2.2. HSR CHOICE OF TRAINING COURSE

The proposed amendments to s 72 of the WHS Act will mean that a health and safety representative (HSR) would be entitled to choose their own course of training. HIA opposes these amendments. HIA submits that the status quo should remain.

The Bill seeks to adopt Option 2 of the Consultation RIS and follow recommendation 10 of the 2018 Final Report.

If the Government is seeking to avoid having the Regulator becoming embroiled in a dispute about the choice of course, other options are, HIA submits, available. As the amendments only go to the choice of course, it is still possible that the Regulator will have to spend time and resources dealing with disputes in respect of time off for attendance, payment of fees or the reasonable costs of the training course and could risk making matters worse, increasing disputes rather than reducing them.

This appears to be a poorly substantiated basis for making such a potentially disruptive change. The Consultation RIS acknowledges that the extent of disagreement between HSRs and PCBUs about the choice of training course, and the associated delays are unknown.

[4] Consultation RIS Page 37
[5] Ibid

If the proposed amendments are progressed a PCBU, at first instance, will have no say over the location, quality, relevance or reasonable costs of that training and will instead have to escalate the matter to a dispute for the Regulator to deal with. This is unreasonable. For example, if a HSR decides they would prefer to attend training at a remote location, instead of undertaking the training with another approved training provider in close proximity to the workplace this could result in unjustifiable and significant travel and other costs for the PCBU.

The proposed amendments will also create opportunities for undesirable conduct and anti-competitive outcomes, for example, if a HSR is aligned with certain training providers.

2.3. Inspector Powers

HIA opposes the proposed amendments to s 171 of the WHS Act. The proposed amendments align with Option 2 of the Consultation RIS and follow recommendation 17 of the 2018 Final Report, in requiring production of documents and answers to questions after entry by a WHS inspector.

HIA is concerned that the proposed amendments:

- Would result in increased costs to PCBUs. This is particularly the case when a PCBU may be required to deal with multiple requests for information, and/or multiple inspectors seeking the same information repeatedly.
- Could potentially be abused by inspectors 'fishing' for information and by unions requesting multiple inspectors to attend a workplace over an issue if they disagree with an inspector's approach.

HIA considers that the WHS Act already provides inspectors with broad powers to enter workplaces to inspect and examine documents, make enquiries, and require the production of documents and the answering of questions. If, after leaving a previously entered workplace the inspector needs to obtain further information, the inspector can re-enter that workplace in order to obtain the information.

The Regulator's coercive powers to obtain information under s 171 of the WHS Act, (and Subdivision 4 *Specific powers on entry* under Division 3 *Powers relating to* entry) are already broad and can be used in cases where there is a need and a reasonable belief that the person is capable of giving the required information.

HIA considers that the proposed amendments are not needed nor justified and if progressed will have the potential to impose significant burdens on PCBUs.

2.4. Expansion of the category of duty holders

The Bill contains amendments in the form of notes to sections 5 and 7 of the WHS Act to 'clarify' that under the Act a worker can also be a duty holder. The intent of the amendments is to capture those situations where a contractor or subcontractor can be both a worker who is owed a duty of care by persons conducting a business or undertaking (PCBU) further up the contract chain, and at the same time can be a PCBU who owes workers further down the contract chain a duty of care.

While in principle HIA supports these amendments and does not dispute the Minister's comments that the amendments better reflect 'the way that worksites in New South Wales are operating and makes duty holders' obligations clear' HIA's preferred approach is that existing guidance material be updated to clarify the operation of these obligations.

2.5. Insurance indemnity arrangements for WHS Fines

The Bill creates offences for the providing of, or entering into, or benefiting from, insurance or indemnity arrangements for liability for a monetary penalty for an offence under the Act. At present it is possible for companies and their officers to take out insurance for breaches of the Act. As such, the proposed amendments will offend the rights and liberties of individuals as what is currently lawful conduct becomes unlawful.

While HIA does have some concern regarding the discretion that can be exercised by a court in relation to the validity of an insurance policy there is no evidence to support the proposition that adopting this recommendation would improve safety outcomes. There are also no examples provided of businesses avoiding their safety responsibilities because an insurer has paid a penalty on their behalf.

Insurance of this form responds to the reasonable expectation that an individual working for a company should have a level of protection for their conduct in carrying out their role. In the event of a safety breach, the company should then take action against a recalcitrant employee should that be the cause of the breach.

2.6. PENALTIES

Penalties under the Bill are being drastically increased.

HIA is opposed to this approach and specifically objects to such a large initial increase in penalties.

Fixed dollar amounts are being replaced by penalty units and a somewhat peculiar formula for indexing the amount of a penalty unit is also proposed to be inserted into the Act. The indexing is fixed to increases in Consumer Price Index. Given the use of a formula in the Act, the proposal that the Secretary is to publish the actual dollar amounts on a government website is sensible.

HIA also sees no need to index the penalties in the manner that is being advanced. There is no justification for treating penalties in this Act in a different manner to those contained in other Acts.