Submission No 4

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

Organisation: NSW Business Chamber

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4 February 2020

Ms Shelly Savage
Principal Council Officer
Upper House Committees
Legislative Council – Parliament of New South Wales

Dear Ms Savage

INQUIRY INTO THE PROVISIONS OF THE WHS AMENDMENT (REVIEW) BILL 2019

We refer to the above and confirm the NSW Business Chamber wishes to lodge a submission addressing the amendments to sections 31 and 72 of the *Work Health and Safety Act 2011* (the WHS Act).

Section 31

Attached is a copy of the Chamber's submission to the Consultation RIS for the Review for the Model WHS Laws. The Chamber wishes to rely on arguments raised in that document in relation to industrial manslaughter to support the NSW Government's decision not to introduce an industrial manslaughter offence into the WHS Act.

Section 72

The Chamber opposes the amendment to the provision which deals with the choice of Health and Safety Representative (HSR) training due to the adverse effect that such a provision would have on workplace productivity. A degree of choice needs to remain with the employer, as the training chosen by the worker may not be the best fit for the particular workplace.

If you wish to discuss any of these matters further, please don't hesitate to contact Elizabeth Greenwood, Policy Manager, Workers Compensation, WHS & regulation

Yours sincerely

Angela Fiumara
Director, Policy and Advocacy

AUGUST 2019

CONSULTATION RIS: 2018 REVIEW OF WHS LAWS

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OVERVIEW

The NSW Business Chamber ('the Chamber') welcomes the opportunity to make a submission to that part of the *Consultation RIS: 2018 Review of WHS laws* and specifically the proposed introduction of an industrial manslaughter offence (Recommendation 23b).

The Chamber is one of Australia's largest business support groups, with a direct membership of more than 20,000 businesses, providing services to over 30,000 businesses each year.

The Chamber works with thousands of businesses ranging in size from owner operators to large corporations, and spanning all industry sectors from product-based manufacturers to service provider enterprises.

For more information contact:
Elizabeth Greenwood
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INTRODUCTION

Safe Work Australia's *Consultation RIS: 2018 Review of WHS laws* (the CRIS) has been released to '*canvas stakeholder views, supported with evidence where possible, on those recommendations and alternative options to address the problems identified by the 2018 Review*. *The questions in the Consultation RIS (CRIS) aim to clarify the extent of identified problems, whether the proposed options address those problems, and to collect information and data about the relative costs and benefits of each option.'*

The Chamber's submission is focussed on the recommendation to introduce an industrial manslaughter offence

Recommendation 23b: Industrial manslaughter

Amend the model WHS Act to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and include the following:

- *The offence can be committed by a PCBU[1] and an officer as defined under s 4 of the model WHS Act.*
- *The conduct engaged in on behalf of a body corporate is taken to be conduct engaged in by the body corporate.*
- *A body corporate's conduct includes the conduct of the body corporate when viewed as a whole by aggregating the conduct of its employees, agents or officers.*
- *The offence covers the death of an individual to whom a duty is owed.*

The Chamber in this submission also provides some brief commentary on the importance of retaining the 24 hour notice period for right of entry permit holders.

[1] Person in control of a business or undertaking

SUBMISSION

Even one workplace fatality is one too many, having a profound and long-lasting effect on all concerned, whether it be the family of the deceased, colleagues, or first responders.

The Chamber is a strong advocate for improving safety in the workplace and adopting measures that actively reduce the risk of injury or death in the workplace. However, the CRIS does not provide sufficient evidence to conclude that the introduction of an industrial manslaughter offence will reduce risk or improve safety in the workplace.

How Significant is the Problem Being Addressed?

Reliance on 'Community Expectation'

The Final Report observes that the introduction of an industrial manslaughter offence into the model WHS laws was one of the Senate's recommendations and seems to regard the evidence given at that inquiry as evidence of 'community expectation' and therefore justifies, the introduction of an industrial manslaughter offence.

There is no evidence of the nature or extent of 'community expectation'. However, even if there were such evidence it is, by its very nature, subjective and should not be relied upon when creating new regulation as to do so is poor policy.

As observed by Norrish QC DCJ in (***R v Alex Cittadini*** [2009] NSWDC 179 @ [25]):

> "*the bitterness over the search for justice as it is described by the family of the victims is understandable. This extends to blaming the prisoner for consequences for which he is not responsible . . . but there must be, in any context, some limits to the extent of criminal liability which will fall within the limits of liability for damages, or liability under relevant Occupational Health and Safety legislation*".

This observation was included in the Chamber's submission to the 2018 Review. It also cited a well-known Criminal Law text which supports its view that the Queensland Government's decision to introduce an industrial manslaughter offence amounted to 'penal populism', being a form of political opportunism:

> "*which 'buys' electoral popularity by cynically increasing levels of penal severity because it is thought that there is public support for this, irrespective of crime trends . . . The consequences of penal populism are thus much more far reaching than politicians simply 'tapping' into the public mood as and when it suits them. It is not something they can turn off at will*."[2] .

NO EVIDENCE SUPPORTING A CHANGE OF APPROACH FROM THE 2008 REVIEW

The Final Report acknowledges that the following statement was made during the 2008 National Review (which led to the inception of the model laws):

> *'Our approach in dealing with non-compliance with duties of care has been to ensure that the statutory responses are consistent with the graduated*

enforcement of the duties. We are concerned that the natural abhorrence felt towards work-related deaths should not lead to an inappropriate response. The seriousness of offences and sanctions should relate to the culpability of the offender and not solely to the outcome of the non-compliance. Otherwise, egregious, systemic failures to eliminate or control hazards and risks might not be adequately addressed.'[3].

However, neither the CRIS nor the Final Report explains why it is now appropriate to deviate from that approach.

No Evidence to Counter the Downward Trend of Workplace Fatalities

Recent data (released 23 August 2018[4]) confirms the trend of workplace fatalities is continuing on a downward trajectory (refer to ***FIGURE 1***), although recognised in the CRIS, evidence showing a nexus (if any) between this trend and the role of prosecutions (as opposed to enforceable undertakings) need to be fully explored.

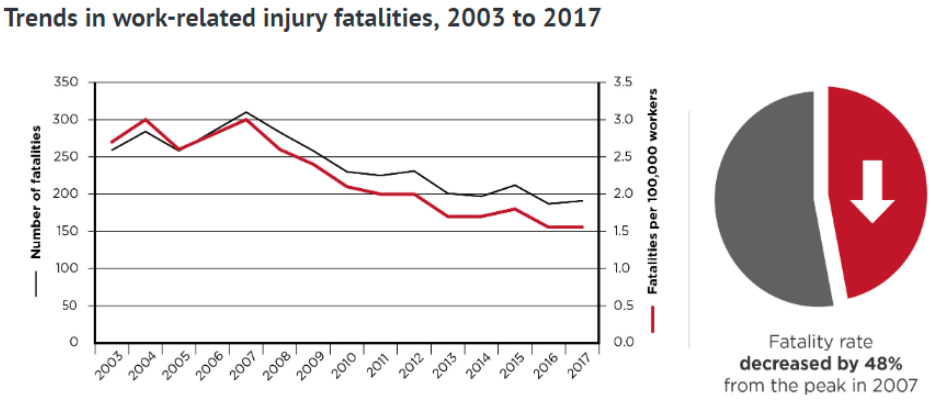

FIGURE 1

No Evidence to Support the Underlying Assumption

The three issues identified in the CRIS imply that there is a concerning trend of causality between fatalities occurring at a larger organisation's workplace and the 'high level' decisions being made by individuals within those organisations and both the larger corporations and the individuals making those decisions are not being 'appropriately' punished. However, there is no evidence in the CRIS to support either of these assumptions.

The CRIS does not contain sufficient credible evidence to support a conclusion that the problem alluded to by the CRIS is significant.

[4] https://www.safeworkaustralia.gov.au/book/work-related-injury-fatalities-key-whs-statistics-australia-2018#trends-in-work-related-injury-fatalities

What Are the Costs, Risks or Benefits of Maintaining Status Quo?

The Benefit of Maintaining the Status Quo

The benefit of maintaining the status quo is clearly evidenced by Safe Work Australia's updated information about the downward trajectory of workplace fatalities as shown above.

The Costs and/or Risks of Failing to Maintain the Status Quo

The Risk of Potential Inconsistencies Between Jurisdictions

By including the 'issue' of a '*potential inconsistency between jurisdictions as each seeks to impose its own industrial manslaughter offence*', the CRIS is implying that this is a risk of failing to maintain the status quo.

The argument that there is a 'risk' of potential inconsistencies between jurisdictions operating within the model WHS laws is not addressed by the proposed legislation:

- A level of inconsistency between the jurisdictions using the model WHS laws already exists in relation to how each jurisdiction deals with the problem of workplace fatalities and failing to maintain the status quo will not make any different to this 'inconsistency'.

- There is a risk that such a measure will add to the current level of inconsistency within the jurisdictions operating under the model WHS laws. For example, NSW relies on its criminal law system for all types of manslaughter, introducing an industrial manslaughter offence in the model WHS laws (if accepted) will create a conflict within its common law criminal system and between this system and NSW's statute-based WHS system.

- Some of the potential 'inconsistencies' will no longer eventuate – for example, the incumbent governments in both NSW and Victoria won their respective elections (and Victoria never adopted the model WHS laws).

- The federal government expressly rejected the Senate's recommendation to introduce an industrial manslaughter offence based on the Queensland provision.

The Cost of Failing to Maintain the Status Quo

It is already accepted that further consultation will be required to develop a suitable industrial manslaughter offence to be introduced into the model WHS laws. This will clearly be an expensive exercise.

The benefits of maintaining the status quo clearly outweighs the costs of and risks relating to the introduction of an industrial manslaughter offence into the model WHS laws.

Why Is Government Action Needed to Correct the Problem?

The CRIS fails to provide evidence to support the introduction of such an offence, namely:

- that there is a causal link between workplace deaths and 'high level' decisions being made by individuals within a larger organisation;

- that adopting or imposing this offence will make workplaces safer;
- that current penalties is 'inappropriate'; or
- the threat of being charged or convicted of such an offence will deter individuals within larger organisations form making the types of decisions being complained of (which have not been identified) or act as an incentive for those individuals to start making different decisions which will then lead to a reduction of fatalities in the workplace.

The CRIS does not provide sufficient evidence to support a conclusion that government action is needed to correct the problem.

Is There Relevant Regulation Already in Place?

NSW's Enforceable Undertaking Regime

In NSW, the reduction of workplace fatalities is one of the three targets described in SafeWork NSW's *Work Health and Safety Roadmap for NSW 2022* (the Roadmap) and an enforceable undertaking regime (which applies to workplace fatalities occurring in circumstances where recklessness is not an element) is currently in place.

The Roadmap was revised in August 2018 and shows (refer to ***FIGURE 2***) how, in relation to workplace fatalities, SafeWork NSW is ahead of its target. It also attributes[5] this result to the 'new enforcement approaches', including the use of enforceable undertaking as an alternative to prosecution.

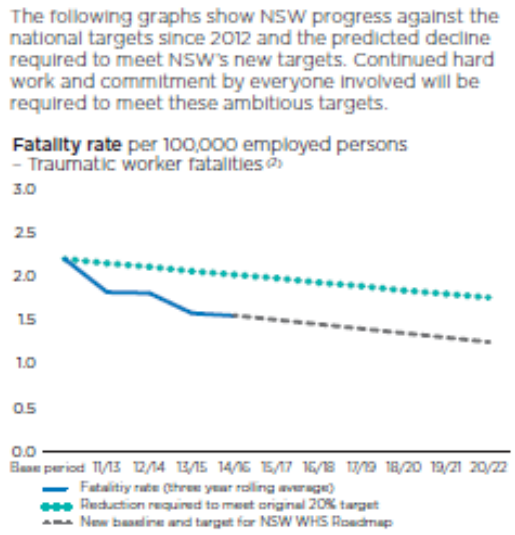

FIGURE 2

Despite being referred to in the Chamber's submission to the 2018 Review, neither the CRIS nor the Final Report include a consideration of the undertaking regime in their assessment of whether or not there is a case for action for the introduction of an IM offence.

[5] At page 5.

South Australia's Alternative to An Industrial Manslaughter offence

South Australia recently expressly rejected the introduction of an industrial manslaughter offence, instead preferring to strengthen ties between the police and its WHS regulators.

Options to Industrial Manslaughter Offence

Industrial accidents, including those resulting in fatalities, should remain subject to existing formulations and tests under criminal law and do not require the creation of bespoke or dedicated new offences such as industrial manslaughter. Alternatives include:

- Industry-specific options – given that '*almost 70 per cent of fatalities occur in just three industries*'.
- Prioritising the sharing of lessons learnt and better practice in the workplace.
- Improving the timeliness and reach of guidance and alerts from regulators to industry and business.
- Increased reliance on the enforceable undertaking regime – given its success in NSW.
- A closer examination of the South Australian model

In its review of effective WHS interventions, Safe Work Australia (2013) concluded that different approaches work better for some companies than for others. In line with the above it is recommended that any new legislation remain mindful of the need for industry and business specific solutions based on evidence.

WHS Entry Permit Holders – Prior Notice of Entry

The Chamber supports notification of 24 hours prior to entry or access to a workplace. This should be the minimum allowable standard to provide both consistency with other provisions in the WHS Act and Fair Work Legislation, and gives reasonable notice to a PCBU to ensure than can appropriately respond.

Option 1, the status quo as identified in the CRIS should remain the established position in WHS laws. It has been previously identified through COAG that 24 hours was necessary to reduce business disruption and associated costs; reduce costs for regulators in investigating disputes relating to rights of entry; and enhances clarity and consistency for all parties in terms of rights of entry for all purposes.

Removing the requirement to provide notification of 24 hours prior to entry would see an increases in costs in legal and other professional advice and could impose a significant negative impact on operations and productivity. It is also expected that removing this obligation would invite a 'gaming' of right of entry which would be used for purposes well outside any direct concern or associated WHS issue.