Submission No 6

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

Organisation: Australian Industry Group (Ai)

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Australian Industry Group

NSW Work Health and Safety Amendment (Review) Bill 2019

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NSW WORK HEALTH AND SAFETY

AMENDMENT (REVIEW) BILL 2019

SUBMISSION TO NSW LEGISLATIVE COUNCIL PORTFOLIO COMMITTEE NO 1 - PREMIER AND FINANCE

INTRODUCTION

The Australian Industry Group (Ai Group) is a peak industry association and has been representing business for nearly 150 years. Along with our affiliates, we represent the interests of businesses employing more than one million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of the Australian industrial sector.

Since 2008, Ai Group has been a member of Safe Work Australia and its sub-group Strategic Issues Group – Work Health and Safety (SIG-WHS), which had oversight of the development of the Model Work Health and Safety (WHS) Laws. We are also actively involved in consultative forums with most state and territory regulators in relation to the application of safety and workers' compensation legislation.

We have ongoing contact and engagement with members in NSW and other Australian jurisdictions on workplace safety issues, including informing them of regulatory changes, discussing proposed regulatory change, discussing industry practices as well as providing consulting and training services. We promote the importance of providing high standards of health and safety at work and building their organisational capacity to do so. We hear from members about their successes, issues and concerns related to workplace health and safety.

Ai Group welcomes the opportunity to make this submission to the Committee in relation to the Work Health and Safety Amendment (Review) Bill 2019.

A PREAMBLE ON WHS HARMONISATION

Ai Group, and our members generally, are strong supporters of harmonisation.

Whilst it is often suggested that harmonisation is only relevant to large businesses, many SMEs have a few staff outside their home state and the overwhelming majority of single-jurisdiction businesses, if not all, interact with suppliers and/or customers in other jurisdictions. A common regulatory framework and language for WHS helps to send a clear and consistent message about what needs to be done for effective risk management and reduce the level of injury and fatality within Australia. WHS legal jurisdiction may be state based but the markets and supply chains that they seek to regulate do not recognise state borders.

There is also a cost dividend - it makes no sense asking employers to comply with different requirements in different states that are essentially pursuing the same standard of safety. Prior to harmonisation, Ai Group members reported being required to spend up to $5-$7K per person to accredit high risk workers doing the same work in two different states, solely due to regulatory provincialism. That is money better spent on risk controls rather than unnecessarily duplicating a compliance burden.

The initial adoption of the laws did involve some necessary variations at jurisdictional level, as reflected by jurisdictional notes in the Model WHS Laws. These were designed predominantly to allow the Model to interact appropriately with other laws in each jurisdiction.

The political reality was that other amendments were made when the laws proceeded through individual jurisdictional legislative processes. These amendments included, but are not limited to: union right to prosecute in NSW; a modified approach to union right of entry in SA; QLD maintaining work related electrical safety provisions in separate legislation; and some jurisdictions not adopting the mines chapter of the Regulations.

In spite of this, for many years, the integrity of the key operational parts of the legislation remained largely intact - obligations of duty holders; consultation provisions; and penalty regimes. However, as the number of variations to the model mount, it puts at risk the collaborative approach to maintaining a harmonised system.

Maintaining the harmonised regime requires a lot of effort within the federation. There are constant local pressures for jurisdictions to break from the model, though they all profess to support the principle of harmonisation. The national WHS regulatory framework is a common asset that requires genuine joint stewardship to avoid decay and eventual collapse.

Ai Group continues to take the view that harmonisation of WHS laws is an important underpinning for the safety efforts of Australian businesses and workers. Ai Group will continue to work with Safe Work Australia and individual jurisdictions to promote and support the maintenance and development of harmonised model WHS laws that contribute to a greater understanding of WHS obligations, increased compliance and better outcomes in the form of reduced illness, injuries and fatalities.

RESPONSE TO THIS BILL

In light of the above, we note that the Bill seeks to give effect to a number of recommendations of the Boland review of harmonised WHS laws, commissioned by Safe Work Australia**.** The process for considering the Boland recommendations to amend the model laws has not been completed. Our preferred position is that jurisdictions seek national consensus on fundamental changes to the model laws before enacting unilaterally. This Bill gives clarity on the specifics of the NSW Government's proposals to give effect to some of the Boland recommendations. However, if the Bill is enacted before consensus emerges in respect of the proposals it contains, NSW should be open to amending the WHS Act further if necessary to reflect such consensus, even if this means some changes to wording, if not meaning.

Our comments on specific provisions of the Bill are as follows:

Schedule 1[1] and [2]

Boland Recommendation 4: Clarify that a person can be both a worker and a PCBU

Amend s 5(4) of the model WHS Act to make clear that a person can be both a worker and a PCBU, depending on the circumstances.

A sensible amendment to reflect the overlapping duties along a supply chain or contract hierarchy, which we support.

Schedule 1[3]
Note on manslaughter

This amendment in part addresses Boland Recommendation 23b, for the introduction of industrial manslaughter. We support this provision of the Bill.

Ai Group has long argued that there is no need for a separate offence of industrial manslaughter. We do not intend to restate our views in detail in this submission as a separate offence of industrial manslaughter is not included in the Bill. However our reasons have most recently been articulated in our submissions to the Discussion Paper for the 2018 Review of the Model WHS Laws and the Senate Inquiry into Industrial Deaths.

Drawing attention to the applicability of the crime of manslaughter to workplace incidents is appropriate and fair. The crime applies at all persons, not just to a subset of workplace players. To that extent, it better satisfies the call from families that those that are responsible (if there are any such persons) are held to account for deaths occurring at a workplace, regardless of their status.

Schedule 1[4] and [5]
Gross Negligence in Category 1 offence

Boland Recommendation 23a: Enhance Category 1 offence

Amend s.31 of the model 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.

We understand the difference between recklessness and gross negligence to be:

- recklessness in criminal law is intentional and requires the prosecution to prove a conscious choice to take an unjustified risk.
- gross negligence is usually regarded as not requiring intent but relies on an objective standard of culpability.

We acknowledge that gross negligence was the standard of culpability for category 1 offences proposed in the 2008 Review of national WHS laws that preceded the introduction of the model laws. We also note that it was recommended on that basis as an alternative to industrial manslaughter.

It is argued that recklessness (the existing level of culpability for a Category 1 offence) sets too high a bar for prosecutors and gross negligence would be a more appropriate test. It is difficult for those who are not prosecutors and evidence gatherers to know if that is actually the case. We note that Victoria successfully prosecuted an employer in December 2018 resulting in a sentence if imprisonment, using its highest level offence, based on reckless endangerment.

We are not convinced that this amendment is necessary or that the limits of effectiveness in the current legislation has been reached. We believe there is an overemphasis on post-incident regulatory action, and the debate over offences and penalties reflects this. The legislation contains a powerful but underutilised regulatory tool in the form of the Officer Duty of Due Diligence which can be applied even in the absence of a physical incident.

Schedule 1[6] – [10]

HSR choice of training

Boland Recommendation 10: HSR choice of training

Amend the model WHS Act to make it clear that for the purposes of s.72:

- *the HSR is entitled to choose the course of training; and*
- *if the PCBU and the HSR cannot reach agreement on time off for attendance, payment of fees or the reasonable costs of the training course chosen by the HSR, either party may ask the regulator to appoint an inspector to decide the matter.*

We understand this issue has arisen due to the decision in *Sydney Trains v SafeWork NSW [2017] NSWIRComm 1009.* In that case it was determined that an inspector could not direct which course the HSR attended because there needed to be agreement between the HSR and PCBU (based on reference to consultation).

We support measures to reduce unproductive disputation and deadlocks about HSR training, however we are cautious about the effect of the amendment to s72. It has the potential to significantly reduce competition in respect of training, especially that provided by unions to their members who are HSRs. If the employer cannot object to the choice of training, despite having to pay for it, what leverage does the employer have over the cost of that training? Indeed, what leverage will employers generally have if unions exploit what is for practical purposes a statutory market share guarantee?

The amendments preserve the ability of the parties to request an inspector to decide such matters but it is not clear how that will work if the HSR is fixed in their choice of trainer. What happens if the trainer does not accept the inspector's recommendation on the fee it should receive from the employer?

The construction of the amended section 72 is ambiguous around this point. The amendments could be improved by making explicit that:

- A *matter* referred to in s72(6) "includes when time off will be taken, the amount of course fees and other reasonable costs"

- If a chosen trainer does not accept the fee determined by an inspector, the HSR must make another choice.

We note on HSR training generally that some of our members report HSRs who return from union-run training have a good grasp of their *rights* as HSRs but there appears to be less emphasis in the training on their *role* as effective representatives in the workplace. Whilst the regulator may accredit the nominal content of all HSR training, they struggle to regulate actual learning outcomes. This adds to our caution on this amendment and call for clarity on how it will work in practice.

Schedule 1 [13]
Inspectors' subsequent requests for production of documents and answers to questions

Boland Recommendation 17: Require the production of documents and answers to questions after entry

Provide the ability for inspectors to require production of documents and answers to questions for 30 days after the day they or another inspector enter a workplace.

Ai Group provides conditional support for this provision. It would appear to be appropriate for an inspector who has visited the site to contact an employer to seek additional information.

There is a risk that the ability to keep asking for extra information will allow an inspector to be lazy in their initial or subsequent request for information. It is much more efficient for a PCBU to interrogate their records once to provide answers for an inspector. It is Ai Group's view that the amendment, whilst currently limited to 30 days, should also be limited to one additional request for information.

Schedule 1[15], [18] and [21]
Schedules 2 and 3

Indexing penalty levels

Boland Recommendation 22: Increase penalty levels

- *Amend the penalty levels in the model WHS Act to reflect increases in consumer price index and in the value of penalty units in participating jurisdictions since 2011, and*

- *Review the increased penalty levels as part of future reviews of the model WHS Act and model WHS Regulations to ensure they remain effective and appropriate*

Between them, these amendments increase all penalties now, and in the future, to reflect increases in the CPI since the Act was passed in 2011.

Provided offences are properly constructed and effective, maintenance of the real value of monetary penalties over time is appropriate.

Schedule 1[16]
Increase time limit for requests under s231

Boland Recommendation 24: Improve WHS regulator accountability for investigation progress

Amend the model WHS Act to remove the 12-month deadline for a request under s 231 that the regulator bring a prosecution in response to a Category 1 or Category 2 offence and to ensure ongoing accountability to the person who made the request until a decision is made on whether a prosecution will be brought.

Section 231 of the Act relates to Category 1 and 2 offences. It allows for a person to make a written request to the regulator to commence a prosecution if "no prosecution has been brought in relation to the occurrence of the act, matter or thing after 6 months but not later than 12 months after that occurrence".

The Bill proposes to increase the 12-month limitation to 18 months due to anomalies that may arise when there is a protracted investigation by the regulator.

Ai Group is not opposed to increasing the time frame and supports 18 months. We would be concerned about an open-ended ability to seek review that could be initiated many years after an incident to the deep prejudice to a potential defendant.

18 months still allows for some level of certainty for all parties involved in the situation, including witnesses and others affected by an incident.

Schedule 1[20] and [25]
Prohibit insurance for WHS fines

Boland Recommendation 26: Prohibit insurance for WHS fines

Amend the model WHS Act to make it an offence to:

- *enter into a contract of insurance or other arrangement under which the person or another person is covered for liability for a monetary penalty under the model WHS Act*
- *provide insurance or grant an indemnity for liability for a monetary penalty under the model WHS Act, and*
- *take the benefit of such insurance of indemnity*

Ai Group recognises the perception of incongruity associated with organisations being able to access insurance coverage for fines applied when there is a serious breach of WHS/OHS laws and do not object to the intent of the provision.

Businesses, and their officers, have a higher exposure to potential prosecution than the average person, and liability may arise from the acts or omissions of others. There should be an ability to access insurance to support the defence of such actions and we interpret the provision as continuing to allow such cover for legal and other defence costs, but not for monetary penalties.

We do hold concerns abut the level of protection that the term “without reasonable excuse” may afford companies who inadvertently hold the type of cover prohibited by the proposed s272A, particularly in the following circumstances:

1 Where the insurance policy is vague and nuanced as to the extent of cover being offered. Our examination of such documents reveals significant ambiguity, and some internal contradiction, as to whether such cover is indeed provided or not. An insurer may be found to have offered such cover in circumstances where the insured could genuinely not know that was the case.

2 Where local arms of multi-national companies are covered by such insurance as part of global insurance bundles negotiated by their parent company overseas. The Bill would make such insurance ineffective upon enactment, however we are concerned that the local arm of the company may be found to be in breach of the proposed s272A(a) despite (1) not taking out the insurance themselves and (2) not knowing that the insurance taken out on their behalf provided the offending level of cover.

The above concerns could be avoided if s272A(a) were deleted and the provision relied only on rendering the insurance unlawful to offer or take the benefit of. We do not believe this would weaken the intent or effect of the provision.