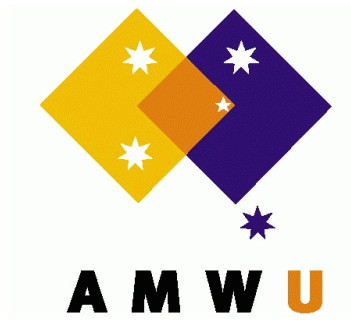


**Submission
No 8**

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

Organisation: Australian Manufacturing Workers' Union

Date Received: 6 February 2020



**INQUIRY INTO PROVISIONS OF THE
WORK HEALTH AND SAFETY AMENDMENT (REVIEW)
*BILL 2019***

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Organisation: Australian Manufacturing Workers' Union

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Introduction

1. The Australian Manufacturing Workers' Union (AMWU) welcomes the opportunity to make a submission with relation to the Inquiry into the provisions of the *Work Health and Safety Amendment (Review) Bill 2019*.
2. The full name of the AMWU is the Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union. The AMWU NSW Branch has a membership of over 13,000 workers. Our members are employed in the private and the public sectors, in blue collar and white collar positions, and in a diverse range of industries, vocations and locations.
3. While the AMWU supports most of the provisions contained in the Bill, we believe that the Legislative Council should take the initiative of including a provision that creates an offence of industrial manslaughter under the *Work Health and Safety Act 2012* ("the WHS Act") .

Summary

4. The AMWU does not oppose most of the provisions of the Bill and strongly supports some of the amendments proposed to the WHS Act, such as the amendments as outlined in section 72 which will hopefully provide the clarity needed to deliver the model legislations intention of Health and Safety Representatives (HSRs) having the right to choose their HSR training, an important feature in ensuring their capacity to act in the interest of the workers who elected them.
5. The union also welcomes the long overdue proposal for the indexation of financial penalties both within the NSW Work Health and Safety Act and Regulation and the approach to ensure automated indexation, it is hope that this will maintain the necessary deterrent to duty holders absconding from their responsibilities. We do take this opportunity to draw to the Committees attention that the value of the penalty unit as expressed in [18] c242B of the Bill, is inconsistent with the value of Penalty Units in NSW. The value of one **penalty unit** is prescribed in s17 Crimes (Sentencing Procedure) Act¹ and, currently, one **penalty unit** is equal to \$110. It is therefore recommended that a reference to

'\$100.00' as found in the Bill be replaced with reference to s17 Crimes (Sentencing Procedure) Act.

6. This submission has two aspects of the Bill which the AMWU is deeply concerned by:

- The referencing of provisions relating to manslaughter, rather than the creation of an offence of "industrial manslaughter"; and
- The offences pertaining to the taking of insurance policies and/or indemnities for penalties under the *Work Health and Safety* legislation.

7. The AMWU is recommending a number of amendments to the Bill, being:

- The deletion of the note proposed to be inserted at Schedule 1(5) of the Bill;
- The insertion of a provision introducing the offence of "Industrial Manslaughter" similar to the legislative provisions introduced in Victoriaⁱⁱ
- The deletion of the words "without reasonable excuse" in Schedule(1)(20) at proposed Section 272A(a); and
- Amendments that would require that policy holders take steps at the commencement of the provision to cancel any policies or parts of policies that are prohibited by that section.

Industrial Manslaughter not Manslaughter

8. A fundamental expectation of any worker is that they will be able to finish their shift and leave their workplace and return to their home and loved ones in the same condition as they arrived at work. The AMWU places workplace safety at the heart of its operations and will never apologise for seeking stronger regulations to ensure that this expectation is fulfilled.

9. The AMWU believes that this Bill provided the NSW Parliament with an opportunity to join with other States and Territories to create an offence of Industrial Manslaughter to properly address instances of gross negligence by corporations that lead to workplace deaths.

10. Manslaughter as defined in the *Crimes Act* is punishable acts of homicide that are not murderⁱⁱⁱ. At common law there must have been a breach of a duty of care that has caused the death of a person to whom that duty was owed; and the action or omission that breached that duty was so gross that warrants criminal prosecution.^{iv}
11. The nature of the employment relationship, however, makes it difficult to apply a charge of manslaughter when it comes to deaths in the workplace. The duty of care that arises from a contract of employment is owed by the employer to the employee. The employer, however, is not always a natural person and is more likely to be a corporate entity. Therefore the employer is placed outside the jurisdiction of section 18 of the *Crimes Act*.
12. In addition, the workers at a site may be employed by a number of employers – if they are employed at all. It is common for workers even within the same group of companies to be employed by separate entities, and to be working alongside employees of labour hire companies, independent contractors or employees of companies contracted to provide services to a particular worksite (such as cleaning or maintenance).
13. In its broad definition of “worker” and the designation of a “person controlling a business or undertaking” the WHS Act better captures the nature of today’s workplace. The statutory duties that the WHS Act contains also extend beyond those duties that are recognised at common law. It is also noted that the WHS Act also creates statutory duties for officers of companies that employ workers; which is in addition to their duties under other law to act in the best interests of the company and its shareholders.
14. The offences currently contained in the WHS, in the AMWU’s opinion, do not provide sufficient deterrent for employers who do not exercise the proper level of care and diligence towards making their workplaces safe. Putting it bluntly, the penalty for not meeting that responsibility has to be significant and the likelihood of spending many years in gaol is an appropriate penalty for failing to do your job.

15. The threat of a criminal prosecution for manslaughter under the *Crimes Act* is also not likely to provide such a deterrent. If an “employer” is not on the workshop floor or in the building, they are likely to be removed from actions or omissions that directly lead to the occurrence of the tragedy – they did not direct the person to work in unsafe conditions; they did not fail to cut the power, they did not fail to supervise the apprentice. It is therefore difficult to make out the gross negligence on their part, making it unlikely that a charge of manslaughter would even be contemplated, let alone prosecuted.
16. The prevention of serious incidents in the workplace have a solid foundation of training, provision of relevant personal protective equipment, policies and procedures that deal with risk factors and regular assessments of the quality of these preventative measures used in the workplace and taking remedial action when needed. Ultimately workplace safety involves the collective actions of employees – both workers and their managers, whether at the site or in corporate offices – however it is the overall responsibility of the employer to ensure that it occurs. It is this collective action and responsibility that is enforced through the WHS Act.
17. Given the stronger and broader obligations placed on employers by the WHS Act, the AMWU believes that offences that deal with workplace deaths are best dealt with through offences in the WHS Act. Those with the responsibility for making decisions – whether they are officers of the company, senior managers of the company or trustees of a trust – should also be required to face the consequences if the actions they took, or failed to take, resulted in the death of a worker. However the penalty attached to the current offences do not fully capture the gravity of the negligence that has led to the loss of life and the lasting impact on the family, friends and workplace colleagues of the deceased.
18. With this in mind the AMWU recommends that the Committee consider the provisions that were passed by the Victorian Parliament last November as a starting point for creating an offence of industrial manslaughter. The Victorian provisions (attached to this submission) builds on the existing obligations contained in the OHS Act and reinforces an expectation that those with the responsibility for making decisions in a workplace will be held accountable for

their actions (or failure to take action) if it resulted in the death of a worker. The provisions are not confined to natural persons. Importantly the provisions do not cover the actions of employees, so it cannot be used to punish those who may have the least control over what has occurred.

19. Other jurisdictions such as the Northern Territory and Queensland have also introduced an offence of industrial manslaughter, however it is the view of the AMWU that the Victorian provisions best express how the offence should be formulated.

Creation of offences relating to insurance policies

20. The AMWU supports the creation of an offence that prohibits the ability to have insurance policies cover penalties or indemnifies for penalties that could be levied under the WHS Act. The AMWU believes that such policies are abhorrent and are a means of discouraging meaningful compliance with the WHS Act.

21. The wording of the provisions however, in the AMWU's opinion, needs to be strengthened. The proposed Section 272A should be one of strict liability – you either hold a policy or you do not; there should be no reasonable excuses for holding a policy that contains prohibited elements.

22. The AMWU notes that the proposed commencement for this Amendment is the date of Royal Assent and acknowledges that policy holders may not be aware that the policy that they have may contain aspects that are prohibited. However the passive solution proposed in the legislation that a policy holder has an effective amnesty until the policy expires is, in the AMWU's view, unsatisfactory and works against the principle of strict liability underpinning much of the WHS Act.

23. Ideally the solution would be that the proposed Bill would nullify those provisions in insurance policies from commencement. The AMWU also suggests an amendment that requires a policy holder to take all reasonable steps to cancel

that policy or modify the coverage under that policy from the date of commencement.

Conclusion

24. While the AMWU welcomes many of the amendments proposed to the WHS Act in this Bill, the measures noting the existence of a charge of manslaughter is an insufficient and dangerous response to dealing with the failures of safety that lead to the death of workers, likely leading to only workers, those with the least amount of control, ever being charged. The AMWU believes that this is an opportunity to introduce an offence of Industrial Manslaughter and urges the Legislative Council to do so. The AMWU would be happy to contribute via verbal submissions and representations to support our written submission if the Committee views this would assist in its deliberations.

END

ⁱ http://www5.austlii.edu.au/au/legis/nsw/consol_act/cpa1999278/s17.html

ⁱⁱ

[http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/81339ABA775DF270CA2584A2007C3AF1/\\$FILE/591078bs1.pdf](http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/PubPDocs.nsf/ee665e366dcb6cb0ca256da400837f6b/81339ABA775DF270CA2584A2007C3AF1/$FILE/591078bs1.pdf)

ⁱⁱⁱ Section 18 of the *Crimes Act 1900*

^{iv} *R v Moore* (2015) 91 NSWLR 276 at paragraph 142-144

Authorised Version

Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Act 2019

No. 50 of 2019

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Authorised by the Chief Parliamentary Counsel

Authorised Version



Victoria

**Workplace Safety Legislation
Amendment (Workplace Manslaughter
and Other Matters) Act 2019[†]**

No. 50 of 2019

[Assented to 3 December 2019]

The Parliament of Victoria enacts:

Part 1—Preliminary

1 Purposes

The purposes of this Act are—

- (a) to amend the **Occupational Health and Safety Act 2004**—
 - (i) to provide for offences of workplace manslaughter; and

Workplace Safety Legislation Amendment (Workplace Manslaughter and
Other Matters) Act 2019
No. 50 of 2019

Part 1—Preliminary

- (ii) to provide for the establishment of the Workplace Incidents Consultative Committee; and
- (b) to make consequential amendments to other Acts in relation to workplace manslaughter; and
- (c) to amend the **Workplace Injury Rehabilitation and Compensation Act 2013** in relation to the Board of Management of the Victorian WorkCover Authority.

2 Commencement

- (1) Subject to subsection (2), this Act comes into operation on a day or days to be proclaimed.
- (2) If a provision of this Act does not come into operation before 1 July 2020, it comes into operation on that day.

Part 2—Workplace manslaughter

Division 1—Amendments to Occupational Health and Safety Act 2004

3 New Part 5A inserted

After Part 5 of the **Occupational Health and
Safety Act 2004** insert—

"Part 5A—Workplace manslaughter

Division 1—Preliminary

39A Objects of Part 5A

The objects of this Part are—

- (a) to prevent workplace deaths; and
- (b) to deter persons who owe certain duties under Part 3 from breaching those duties; and
- (c) to reflect the severity of conduct that places life at risk in the workplace.

39B Definitions

In this Part—

applicable duty means a duty imposed by a provision of Part 3 other than—

- (a) the duty imposed by section 25; or
- (b) a duty imposed by section 32 on a person who is an employee, but not an officer, at the workplace in relation to which the duty is imposed;

conduct has the meaning given in section 39C;

constitute a breach of an applicable duty
has the meaning given in section 39D;

negligent has the meaning given in
section 39E;

owes an applicable duty to another person
has the meaning given in section 39F.

39C What does *conduct* mean?

- (1) For the purposes of this Part, ***conduct*** means—
 - (a) an act; or
 - (b) an omission to perform an act.
- (2) An omission to perform an act on or after the commencement of this Part is ***conduct*** for the purposes of this Part regardless of whether an occasion for performing that act arose before that commencement.

39D When may *conduct* constitute a breach of an applicable duty?

Conduct may ***constitute a breach of an applicable duty*** for the purposes of this Part—

- (a) whether or not any other conduct also contributed to the breach; and
- (b) whether or not any proceeding has been commenced in respect of that breach.

39E When is *conduct* negligent?

- (1) Conduct is ***negligent*** for the purposes of this Part if it involves—
 - (a) a great falling short of the standard of care that would have been taken by a reasonable person in the circumstances in which the conduct was engaged in; and

Part 2—Workplace manslaughter

- (b) a high risk of—
 - (i) death; or
 - (ii) serious injury; or
 - (iii) serious illness.
- (2) In determining whether conduct engaged in by a body corporate is *negligent* for the purposes of this Part—
 - (a) what matters is the conduct engaged in by the body corporate itself; and
 - (b) it does not matter whether the conduct is, or is not, conduct imputed to the body corporate under section 143; and
 - (c) it does not matter whether any of the body corporate's officers were involved in all or any part of the conduct; and
 - (d) the standard to be applied under subsection (1)(a) is the standard of care that would have been taken by a reasonable body corporate in the circumstances in which the conduct was engaged in.

39F When does a person owe an applicable duty to another person?

- (1) A person (*A*) *owes an applicable duty to another person (B)* for the purposes of this Part if—
 - (a) Part 3 imposes an applicable duty on A; and
 - (b) it is either explicit or implicit that B is a person to whom the duty is owed.

Part 2—Workplace manslaughter

- (2) It is explicit that B is a person to whom the duty is owed if—
- (a) the provision that imposes the duty expressly specifies the class of person—
 - (i) to whom the duty is owed; or
 - (ii) for whose benefit A must perform the duty; and
 - (b) B belongs to that class.
- (3) It is implicit that B is a person to whom the duty is owed if—
- (a) the provision that imposes the duty does not expressly specify the class of person—
 - (i) to whom the duty is owed; or
 - (ii) for whose benefit A must perform the duty; and
 - (b) the purpose of that provision is to ensure the health and safety of persons of a particular class; and
 - (c) B belongs to that class.

Division 2—Offences

39G Workplace manslaughter

- (1) A person who is not a volunteer must not engage in conduct that—
- (a) is negligent; and
 - (b) constitutes a breach of an applicable duty that the person owes to another person; and

Workplace Safety Legislation Amendment (Workplace Manslaughter and
Other Matters) Act 2019
No. 50 of 2019

Part 2—Workplace manslaughter

(c) causes the death of that other person.

Penalty: Imprisonment for 20 years for a
natural person;
100 000 penalty units for a body
corporate.

(2) A person who is an officer of an applicable
entity, and who is not a volunteer, must not
engage in conduct that—

(a) is negligent; and

(b) constitutes a breach of an applicable
duty that the entity owes to another
person; and

(c) causes the death of that other person.

Penalty: Imprisonment for 20 years.

(3) An entity is an *applicable entity* for the
purposes of subsection (2)—

(a) if it is—

(i) a body corporate; or

(ii) an unincorporated body or
association; or

(iii) a partnership; and

(b) whether or not it represents the Crown.

(4) An offence against subsection (1) or (2) is an
indictable offence.

Note

Unlike other indictable offences in this Act, these
offences cannot be heard and determined summarily,
as section 28 of the **Criminal Procedure Act 2009**
does not apply to them."

4 New Part 9A inserted

After Part 9 of the **Occupational Health and Safety Act 2004** insert—

**"Part 9A—Workplace Incidents
Consultative Committee**

**126A Establishment of Workplace Incidents
Consultative Committee**

- (1) The Minister must, in accordance with the regulations, establish a Workplace Incidents Consultative Committee.
- (2) The function of the Committee is to provide advice and make recommendations to the Minister about—
 - (a) the needs of persons who are affected, directly or indirectly, by incidents that—
 - (i) occur at a workplace; and
 - (ii) involve death, serious injury or serious illness; and
 - (b) the development, review and improvement of policies, practices, strategies and systems relating to—
 - (i) the incidents referred to in paragraph (a); or
 - (ii) occupational health and safety more generally.
- (3) The Committee is to perform its function in accordance with the regulations.

- (4) Without limiting the generality of section 158, the regulations may make provision for or with respect to—
- (a) the appointment of members of the Committee, including—
 - (i) the number of members; and
 - (ii) subject to subsection (5), the experience or qualifications of members; and
 - (iii) the terms and conditions on which members are appointed; and
 - (iv) the remuneration, allowances and expenses of members; and
 - (b) the procedure of the Committee.
- (5) Regulations providing for the experience or qualifications of the members of the Committee must require that a majority of members be persons who have been affected, directly or indirectly, by incidents that—
- (a) occur at a workplace; and
 - (b) involve death, serious injury or serious illness.

126B Annual report

- (1) The Workplace Incidents Consultative Committee established under section 126A may give the Minister a written report about the Committee's operations during a particular financial year.
- (2) On receiving a report under subsection (1), the Minister must cause the report to be laid before each House of the Parliament within 14 sitting days of that House."

5 Limitation period for prosecutions

- (1) In section 132(1) of the **Occupational Health and Safety Act 2004**, after "an indictable offence against this Act" **insert** "(other than a workplace manslaughter offence)".
- (2) In section 132(2) of the **Occupational Health and Safety Act 2004**, after "an indictable offence" **insert** "against this Act (other than a workplace manslaughter offence)".
- (3) After section 132(2) of the **Occupational Health and Safety Act 2004** **insert**—
 - "(3) A proceeding for a workplace manslaughter offence may be brought at any time.
 - (4) In this section—

workplace manslaughter offence means—

 - (a) an offence against section 39G(1) or (2);
 - (b) an offence against section 144(1) arising in respect of a contravention against section 39G(1)."

6 Liability of officers of bodies corporate

In section 144(1) of the **Occupational Health and Safety Act 2004**, for "liable to a fine not exceeding the maximum fine for an offence constituted by a contravention by a natural person of the provision contravened by the body corporate." **substitute** "liable to—

- (a) if the provision contravened was section 39G(1), a fine not exceeding 10 000 penalty units; or
- (b) otherwise, a fine not exceeding the maximum fine for an offence constituted by a contravention by a natural person of the

provision contravened by the body
corporate."

**7 Liability of officers of partnerships and
unincorporated bodies and associations**

For section 145(3) of the **Occupational Health
and Safety Act 2004** substitute—

- "(3) The penalty to which an officer of a
partnership or an unincorporated body or
association is liable for an offence
committed by the officer because of the
effect of subsection (1) is—
- (a) if the offence is against section 39G(1),
a fine not exceeding 10 000 penalty
units; or
 - (b) otherwise, a fine not exceeding the
maximum fine that could be imposed
by a court on a natural person found
guilty of the same offence committed at
the same time (otherwise than because
of the effect of subsection (1))."

8 New Division 2 of Part 15 inserted

After Division 1 of Part 15 of the **Occupational
Health and Safety Act 2004** insert—

**"Division 2—Workplace Safety
Legislation Amendment (Workplace
Manslaughter and Other Matters)
Act 2019**

187 Workplace manslaughter

- (1) Part 5A as inserted by Part 2 of the amending
Act applies to offences alleged to have been
committed on or after that insertion.

Part 2—Workplace manslaughter

- (2) If an offence against section 39G(1) or (2) is alleged to have been committed between 2 dates, one before and one after the insertion of Part 5A, it is alleged to have been committed before that insertion.
- (3) If an offence against section 144(1) arising in respect of a contravention of section 39G(1) is alleged to have been committed between 2 dates, one before and one after the insertion of Part 5A, it is alleged to have been committed before that insertion.
- (4) In this section—

amending Act means the **Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Act 2019**."

Division 2—Consequential amendments to other Acts

9 Crimes Act 1958

In Schedule 9 to the **Crimes Act 1958**, after item 35 insert—

- "35A An offence against section 39G(1) or (2) of the **Occupational Health and Safety Act 2004** (workplace manslaughter).
- 35B An offence against section 144(1) of the **Occupational Health and Safety Act 2004** arising in respect of a contravention of section 39G(1) of that Act (workplace manslaughter—liability of officers of bodies corporate)."

10 Criminal Procedure Act 2009

After section 327M(2)(f) of the **Criminal Procedure Act 2009** insert—

- "(fa) workplace manslaughter (section 39G(1) or (2) of the **Occupational Health and Safety Act 2004**);
- (fb) an offence against section 144(1) of the **Occupational Health and Safety Act 2004** arising in respect of a contravention of section 39G(1) of that Act;"

Part 3—Board of Management of Victorian WorkCover Authority

11 Chief Executive Officer

For section 498(2) of the **Workplace Injury Rehabilitation and Compensation Act 2013** substitute—

"(2) A Director is ineligible to be appointed as the Chief Executive Officer."

12 Constitution of Board

At the end of section 503 of the **Workplace Injury Rehabilitation and Compensation Act 2013** insert—

"(2) The Chief Executive Officer is ineligible to be appointed as a Director."

13 Chairperson

In section 509(1) of the **Workplace Injury Rehabilitation and Compensation Act 2013**, for "Directors, other than the Chief Executive," substitute "Directors".

14 New section 623M inserted

After section 623L of the **Workplace Injury Rehabilitation and Compensation Act 2013** insert—

"623M Transitional provision—Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Act 2019

On the day on which Part 3 of the **Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Act 2019** comes into operation, the Chief Executive Officer ceases to be a Director of the Board."

Part 4—Repeal of this Act

15 Repeal of this Act

This Act is **repealed** on 1 July 2021.

Note

The repeal of this Act does not affect the continuing operation of the amendments made by it (see section 15(1) of the **Interpretation of Legislation Act 1984**).

Endnotes

1 General information

See www.legislation.vic.gov.au for Victorian Bills, Acts and current authorised versions of legislation and up-to-date legislative information.

[†] *Minister's second reading speech—*

Legislative Assembly: 30 October 2019

Legislative Council: 14 November 2019

The long title for the Bill for this Act was "A Bill for an Act to amend the **Occupational Health and Safety Act 2004** to provide for offences of workplace manslaughter and to provide for the establishment of the Workplace Incidents Consultative Committee, to amend the **Workplace Injury Rehabilitation and Compensation Act 2013** in relation to the Board of Management of the Victorian WorkCover Authority and to make consequential amendments to certain other Acts and for other purposes."