Legislative Committee inquiry into the Work Health and Safety Bill 2019

Chamber of Commerce and Industry WA

26 June 2020

We believe in good business

Contents

Introduction

1. The Chamber of Commerce and Industry of Western Australia **(CCIWA)** is the leading business association in Western Australia **(WA)** and has been the voice of business for 130 years. CCIWA represents employer members from across all regions and industries in the state, particularly small and medium enterprises.

2. CCIWA is committed to promoting safe workplaces, with a focus on ensuring that the State's work health and safety (WHS) laws are appropriate to both large and small WA businesses. We recognise that safety is the joint responsibility of employers and employees in every workplace and as such safe workplaces can only be achieved by employers and employees working together to achieve improved safety outcomes.

3. CCIWA's commitment to providing safe workplaces is demonstrated through the extensive services we deliver to the business community in providing practical WHS advice, assistance and training, along with our involvement with the Commission for Occupational Safety and Health **(COSH)** and its relevant committees.

4. We appreciate the opportunity to make this submission to the Standing Committee on Legislation's **(Committee)** inquiry into the *Work Health and Safety Bill 2019 (WA)* **(WHS Bill).**

5. In line with the Committee's terms of reference this submission is principally focused on Part 2 of the WHS Bill, but also includes comments on other parts of the Bill that directly relate to the operation of Part 2.

Intention of the WHS Bill

6. In July 2017, the WA Government announced it would develop modernised work health and safety **(WHS)** laws for Western Australia, that would be substantially based on the national model *Work Health and Safety Bill* **(Model WHS Bill)** that had been adopted in most other states and territories many years earlier.

7. In July 2008, the Council of Australian Governments formally committed to harmonising the WHS laws, which resulted in an agreed framework on a model WHS Act to be adopted by the Commonwealth, state, and territory governments.

8. Legislation based on the Model WHS Bill was implemented by the Commonwealth, Australian Capital Territory, New South Wales, Northern Territory and Queensland on 1 January 2012. South Australia and Tasmania followed suit on 1 January 2013.

9. WA and Victoria are the only jurisdictions that have not adopted the model WHS laws. In the case of Victoria, there has been no intention by successive Governments to adopt the Model WHS Bill.

10. However, whilst there has been general commitment by successive WA Governments to harmonise our occupational health and safety laws this has not yet been achieved.

11. CCIWA has long supported the principle of harmonisation of the State's WHS laws to provide consistency and alignment with the Commonwealth and other jurisdictions.

12. Whilst the WHS Bill largely meets this objective, there are a number of aspects in which it departs from the Model WHS Bill.

13. Many of the more significant of these deviations have not been subject to any public consultation or regulatory impact assessment, the most significant of which is the proposed industrial manslaughter provisions.

14. In developing the WHS Bill, the Government formed a Ministerial Advisory Panel (MAP) which operated between August 2017 and April 2018 with the following terms of reference:

"The Government intends to introduce into Parliament, as soon as possible, but no later than mid-2019, a single WHS Act (the Act) regulating occupational health and safety in Western Australia. The Act will be administered by the Department of Mines, Industry Regulation and Safety.

The MAP will advise the Minister on the content of the Act, having regard to:

- *the current legislation, being the:*
  - *Occupational Health and Safety Act 1984;*
  - *Mines Safety and Inspection Act 1994;*
  - *Petroleum and Geothermal Energy Resources Act 1967;*
  - *Petroleum (Submerged Lands) Act 1982;*
  - *Pipelines Act 1969; and*
  - *Petroleum and Geothermal Energy Safety Levies Act 2011; and*
- *the importance of implementing harmonised laws in Australia generally, implement the optimal structure and content of the Model WHS Act in drafting the single Act; and*
- *whether the matters regulated under the Dangerous Goods Safety Act 2004 should:*

  1. be incorporated into the single Act; or

  2. remain as a standalone, but modernised Act."

15. As a result of the MAP process a number of amendments were proposed to the Model WHS Bill. However, it should be noted that not all of the proposed amendments were unanimously agreed by the MAP members.

16. In June 2018 public comments were sought on the MAP recommendations, after which there was a significant period of inactivity by the Government on this reform.

17. It was not until August 2019 that the Government announced that it would continue with this process, but with the inclusion of contentious provisions that had not been recommended through the MAP process or included as part of the Government's public consultations.

18. These additional provisions, included:

    18.1. A two-tier industrial manslaughter provision, the lower tier of which creates a much lower threshold for an industrial manslaughter conviction compared to any other state or territory;

    18.2. A prohibition on insurance for monetary penalties;

    18.3. A requirement for a Health and Safety committee to include a representative of the Person Conducting a Business or Undertaking **(PCBU)** with sufficient duties to ensure its duties can be met.

19. It took a further three months for the details of these additional provisions to be released, when the WHS Bill was tabled on 27 November 2019. Despite having had the opportunity to do so, the Government has not engaged in genuine consultation on these provisions.

20. Rather, the Government relies upon the national *2018 Review of the Model WHS laws*, which was undertaken by Marie Boland **(Boland Review)**. CCIWA participated in this review and notes that industrial manslaughter did not form part of the consultations that occurred as part of this review. Consequently, the Government can not rely on its assumption that consultation occurred at the national level.

21. Further, the regulatory impact assessment of the Boland Review recommendations is yet to be finalised.

22. This is a significant concern, given that the Government has not undertaken its own regulatory assessment of the WHS Bill and instead relied on the regulatory impact statement prepared for the Federal Government over a decade ago in September 2009 for the Model WHS Bill, which has been further amended since then.

23. Consequently, the Bill relies on an outdated regulatory impact statement which does not take into consideration key provisions of the WHS Bill which have not been subject to public consultation.

24. The lack of regulatory review of the WHS Bill should be of significant concern to the Legislative Council.

Extension of duties

25. The duties prescribed by Part 2 of the WHS Bill are largely consistent with the Model WHS Bill.

26. The exception is the inclusion of s26A which provides for duties of a person conducting businesses or undertakings **(PCBU)** that provides services related to work health and safety.

27. This section provides that a PCBU which provides WHS services "*must ensure so far as is reasonably practicable, that the WHS services are provided so that any relevant use of them .... will not put at risk the health and safety of persons who are at the workplace*".

28. This recommendation has its origins in the initial 2008 National Review which led to the development of the Model WHS Bill. Ultimately this recommendation was not endorsed by the Workplace Relations Ministers' Council and has not been reinvigorated through subsequent reviews of the Model WHS Bill.

29. As part of the MAP review, the inclusion of this provision formed part of the recommendations. However, it is noticeable that no evidence is provided to justify its inclusion.

30. We submit that, given that harmonisation is a key goal of the WHS Bill, it is prudent that deviations from it are based on a demonstratable need. This has not occurred.

31. However, there is a very real risk that the provision will operate in a manner that means that small and medium sized businesses cease to have access to timely WHS advice and assistance.

32. This provision would impact on the services provided by third parties, such as consultants, employer associations, and other WHS service providers. Such third parties are a particularly valuable and essential service for businesses who do not have in-house expertise or capability, and rely on these services to support them to achieve their health and safety responsibilities.

33. The extension of the additional duty of care to third party providers will lead to an increased cost in providing these services, as a result of:

    33.1. Increased record keeping requirements imposed on the WHS service provider who will need to be able to demonstrate services provided comply with this requirement;

    33.2. Increased insurance costs with respect to professional liability.

34. These additional costs will either be passed onto the end user, or may operate so as to make the service no longer viable.

35. For example, many employer associations provide free over the phone WHS advice to businesses as part of their membership to help them make their workplaces safer. In this situation the WHS services provider is providing advice based on limited information provided by the PCBU without a full understanding of their operations or the ability to undertake a physical assessment of the risk. In these circumstances, how is the WHS service provider expected to ensure that the service provided will not create a risk?

36. The note provided after s26A(3) of the WHS Bill provides examples of how this provision may apply, which includes where a recommendation is made on how to eliminate a risk that is inadequate for the purpose. As identified above, a recommendation may be inadequate for the purpose for a range of reasons not necessarily related to the competence of the person providing the advice.

37. As a result, many WHS service providers will curtail the level of assistance provided to PCBUs in this format. This will especially hurt small businesses who do not have the means to engage in paid consultancy services.

38. The requirement to ensure that services are competently provided establishes a reverse onus of proof, that places a significant regulatory burden on service providers to have sufficient records to demonstrate that each and every piece of advice or other form of assistance was appropriate. This results in a significant additional regulatory burden on service providers compared to other mechanisms which could be adopted to meet the policy objective.

39. Further, this provision significantly contradicts the objects of the WHS Bill, in particular the objective to promote *"the provision of advice, information, education and training in relation to work health and safety"*.

40. It is also concerning that this provision is targeted only at WHS service providers providing advice to PCBUs. No similar obligations exist with respect to unions providing services to employees or to the information provided by WorkSafe.

Industrial manslaughter

41. In announcing the inclusion of industrial manslaughter into the WHS Bill, the Premier identified that there would be the inclusion of two new offences of industrial manslaughter, being:

    41.1. Industrial manslaughter class one: being the most serious offence, which includes a maximum penalty of 20 years' imprisonment for an individual conducting or undertaking a business.

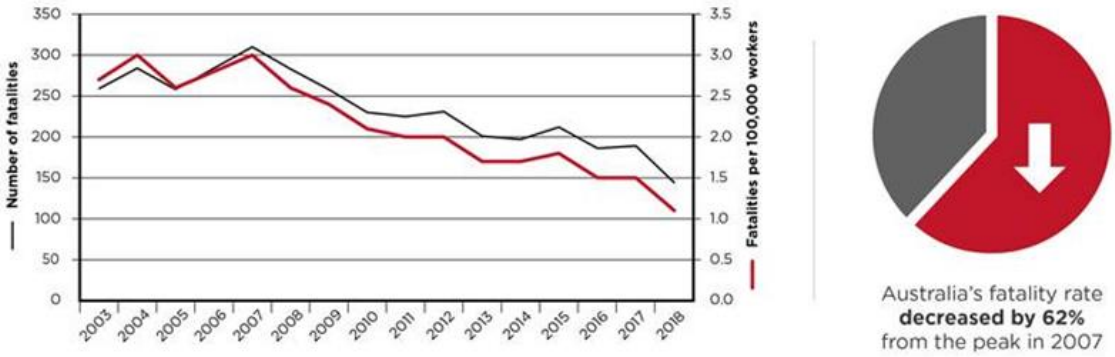
41.2. Industrial manslaughter class two: which includes a maximum penalty of 10 years' imprisonment for negligent behaviour.[1]

42. In seeking to establish industrial manslaughter provisions within the WHS Bill the Government has relied upon the Boland Review and a Senate Committee finding[2] to support the inclusion of its proposed industrial manslaughter provisions.

43. However, these reviews have not identified how the industrial manslaughter provisions will address the very real need to eliminate workplace fatalities and ensure workplaces are as safe as possible.

44. The business community has been committed to reducing the levels of workplace fatalities and serious injuries. The current tripartite approach to employers, employees and the regulator working collectively to make workplaces safer has resulted in the number of workplace fatalities nationally falling by 62 per cent since 2007, from 3 deaths per 100,000 employees in 2007 to 1.1 in 2018.

Trends in work-related injury fatalities
Australia, 2003 to 2018[3]



45. Collectively employers have been proactive in introducing systems to improve workplace safety. In addition to a genuine concern about the welfare of their staff, there are a number of commercial reasons why employers invest in improving safety outcomes. Poor safety outcomes:

45.1. result in lost productivity;

45.2. damage brand reputation and negatively impact on future work, particularly in business to business transactions;

45.3. result in increased workers compensation premiums and costs associated with managing claims;

[1] Media Statement (24 August 2019) *New workplace safety laws and more safety initiatives to better protect workers*.
[2] Senate Standing Committee on Education and Employment (October 2018) *They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia*.
[3] *Safe Work Australia. (2019) Work-related injury fatalities - Key WHS statistics Australia 2019*.

45.4. generate costs associated with safety investigations, remedial action, legal representation, and potential penalties;

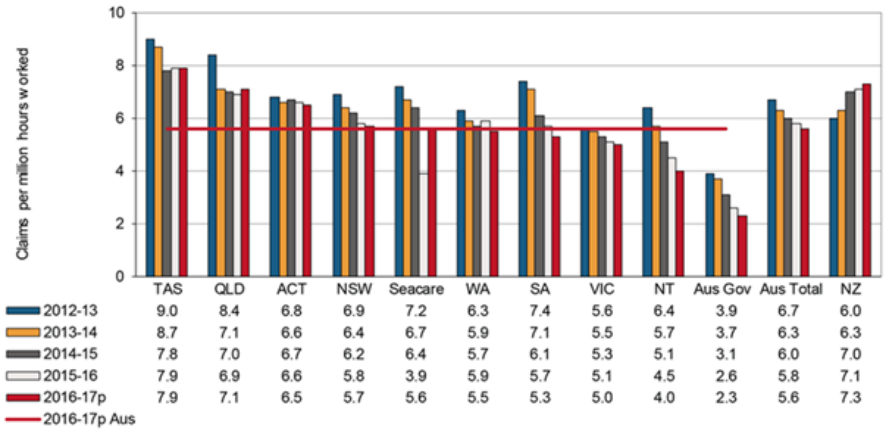
45.5. result in poor workplace relations, increased disputes and higher employee turnover.

46. The argument for industrial manslaughter also ignores the proactive work done by employers and instead takes the approach that safety outcomes should be driven by threatening employers with increased penalties.

47. The evidence from other jurisdictions that have introduced similar provisions demonstrates that this approach does not lead to improved safety outcomes.

48. In 2004, the Australian Capital Territory **(ACT)** introduced industrial manslaughter provisions into the *Crimes Act 1900 (ACT)*. The graph below shows the rates of serious injury by jurisdiction. Notably the incidents of serious injuries in the ACT of 6.5 claims per million hours worked is higher than the national average of 5.6, and the incident rate for WA of 5.5. Further the ACT rate has been higher than the national average over the four years from 2012/13 to 2016/17.

Frequency rates of serious injury claims by jurisdiction (2012-13 to 2016/17)[4]

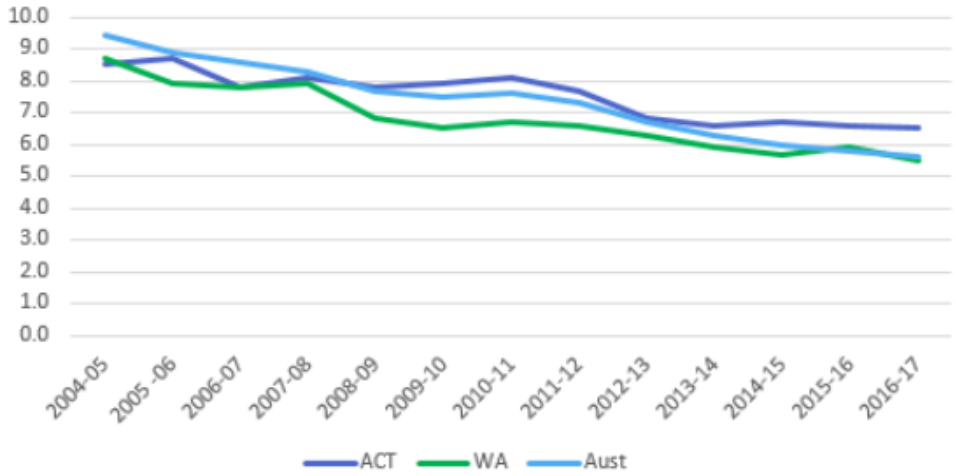


	TAS	QLD	ACT	NSW	Seacare	WA	SA	VIC	NT	Aus Gov	Aus Total	NZ
2012-13	9.0	8.4	6.8	6.9	7.2	6.3	7.4	5.6	6.4	3.9	6.7	6.0
2013-14	8.7	7.1	6.6	6.4	6.7	5.9	7.1	5.5	5.7	3.7	6.3	6.3
2014-15	7.8	7.0	6.7	6.2	6.4	5.7	6.1	5.3	5.1	3.1	6.0	7.0
2015-16	7.9	6.9	6.6	5.8	3.9	5.9	5.7	5.1	4.5	2.6	5.8	7.1
2016-17p	7.9	7.1	6.5	5.7	5.6	5.5	5.3	5.0	4.0	2.3	5.6	7.3
2016-17p Aus												

49. Over the longer term, the rate of serious injury for the ACT has declined largely in line with the national average from 2004/05 to 2012/13 before plateauing over the last four years. Industrial manslaughter provisions have therefore not been effective in improving safety outcomes in the ACT.

[4] *Safe Work Australia. (2018)* Comparative Performance Monitoring Reports – Part 1

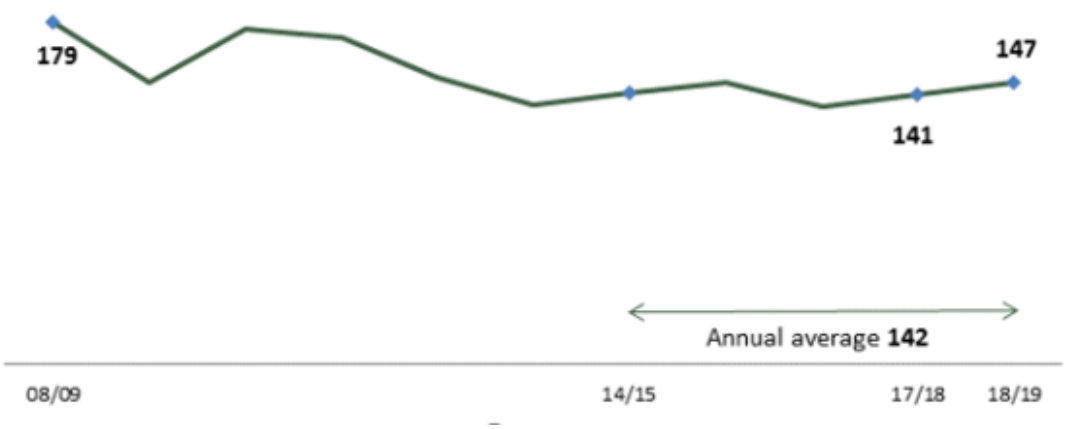
Frequency rates of serious injury claims by jurisdiction (2004-05 to 2016-17)[5]



50. In 2008, the UK Government implemented the *Corporate Manslaughter and Corporate Homicide Act 2007 (UK)* **(Corporate Manslaughter Act)**, which allows for significant penalties to be imposed on corporations where a fatality arises out of a gross breach of their duty of care.

51. Since its introduction the level of workplace fatalities in the UK has remained relatively flat, which further raises concern regarding the deterrent effect upon which industrial manslaughter provisions are underpinned.

Workplace fatalities – United Kingdom (2008-19 to 2018-19) [6]

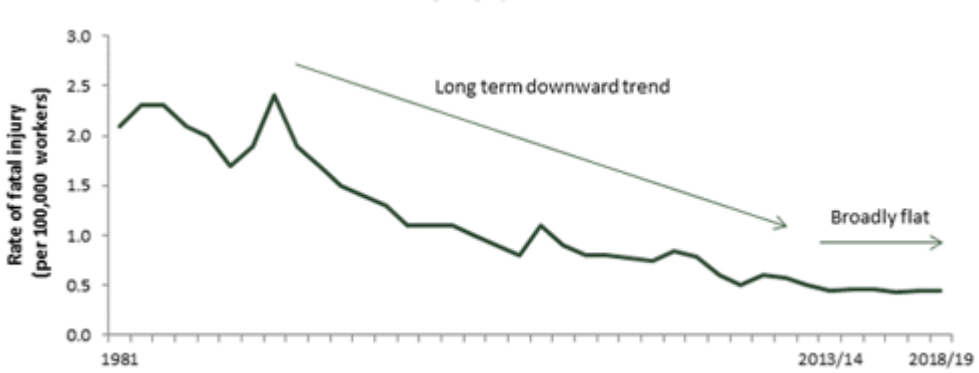


[5] Compiled from Safe Work Australia. Comparative Performance Monitoring Reports 12th edition to 20th edition.

[6] Health and Safety Executive (2019) *Workplace fatal injuries in Great Britain, 2019.*

52. Over the longer term, it is noticeable that the largest improvement in fatality statistics occurred prior to the Corporate Manslaughter Act taking effect, as shown in the graph below.

Rate of workplace fatalities per 100,000 workers – United Kingdom[7]



53. Despite 25 prosecutions between 2008 and 2017, the Corporate Manslaughter Act has not been effective in reducing workplace fatalities in the UK.

Action not penalties the key for improving safety

54. Employers have been active in working with other stakeholders to improve workplace safety, the efforts of which are seen in the significant decline in workplace fatalities and ongoing fall in the number of serious injury claims.

55. The WHS system is premised on employers, employees and government working collectively to improve safety outcomes.

56. This approach is reflected in the work undertaken by the COSH in which unions, employer representatives, safety experts and Government representatives collectively consider practical means for improving workplace safety.

57. Practical strategies that address the causes of workplace injuries are the most effective means of preventing serious injuries and fatalities. Currently WorkCover and the Department of Mines, Industry Regulation and Safety **(DMIRS)** are developing a strategy for the prevention and management of work related musculoskeletal disorders **(WMSDs)**. WMSDs are the most common cause of workplace fatalities.[8]

[7] Health and Safety Executive. *Fatal injuries in Great Britain*. Website accessed on 22 November 2019.

[8] Safework Australia identify that 31% of workplace fatalities are as a result of vehicle collision, 17% due to workers being hit by moving objects and 13% from falling from heights. See Work-related Traumatic Injury Fatalities, Australia 2018, p6

58. The strategy aims at a 30 per cent reduction in the number of serious WMSD claims by 2022 through a combination of education, partnership, enforcement and industry incentive strategies focused on preventing these injuries. It also forms part of a national strategy to reduce the number of workplace fatalities by at least 20 per cent.

59. It is long term strategies such as these, in which relevant stakeholders work together to improve safety outcomes, that will result in a continual decline in workplace fatalities.

60. The importance of working collaboratively with businesses to improve safety outcomes is also recognised by Unions WA.

61. The *ThinkSafe Small Business Assistance Program* was established in 2005 to increasing WHS compliance within high risk industries by providing information and advice to small businesses via independent consultants. When the program was cancelled in 2013 UnionsWA Secretary, Meredith Hammat, criticised the decision stating that:

"to stop this important program only half way through the year is appalling and displays a frightening disregard, particularly for the health and safety of small business employees"

and that

"many small businesses want to comply with health and safety laws but need support".[9]

Industrial Manslaughter – Crime (Tier One)

62. At its most serious level, the WHS seeks to introduce an Industrial Manslaughter – Crime **(Tier One)** offence, which provides that a PCBU commits an offence where:

> *(1) A person commits a crime if —*
> *(a) the person has a health and safety duty as a person conducting a business or undertaking; and*
> *(b) the person engages in conduct that causes the death of an individual; and*
> *(c) the conduct constitutes a failure to comply with the person's health and safety duty; and*
> *(d) the person engages in the conduct —*
> *(i) knowing that the conduct is likely to cause the death of an individual; and*
> *(ii) in disregard of that likelihood.*

63. It also allows for an officer of a PCBU to be charged with the offence.

> *(3) An officer of a person (the PCBU) commits a crime if —*
> *(a) the PCBU has a health and safety duty as a person conducting a business or undertaking; and*
> *(b) the PCBU engages in conduct that causes the death of an individual; and*
> *(c) the PCBU's conduct constitutes a failure to comply with the PCBU's health and safety duty; and*

[9] The West Australian (22 January 2014) *Money runs out for ThinkSafe*.

(d) the PCBU's conduct —

(i) is attributable to any neglect on the part of the officer; or

(ii) is engaged in with the officer's consent or connivance; and

(e) the officer engages in the officer's conduct referred to in paragraph (d)(i) or (ii) —

(i) knowing that the PCBU's conduct is likely to cause the death of an individual; and

(ii) in disregard of that likelihood.

64. These provisions are broadly consistent with the definition of manslaughter under the *Criminal Code Act Compilation Act 1913* **(Criminal Code)**.

65. CCIWA has previously expressed support for the use of the Criminal Code to prosecute persons for workplace fatalities, where action constitutes manslaughter. Further, to the extent necessary, we have also provided in-principle support for consideration to be given to amending the Criminal Code to address any barriers that might exist in bringing forth a charge in relation to a corporate entity.

66. Notably, manslaughter provisions within the relevant criminal codes have been successfully utilised in the prosecution of workplace fatalities in South Australia *(R v Day)* and Queensland *(R v Colbett).*

67. General manslaughter provisions can be effectively used in conjunction with relevant WHS legislation. Recently prosecutions were initiated by the ACT Government in relation to a workplace fatality at a Canberra construction project. The incident involved a mobile crane which tipped over, fatally injuring one of the employees working on the site. The resulting investigation identified that multiple parties allegedly failed to meet their obligations under the relevant regulations. This included the Principal Contractor and subcontractor, senior management, site managers, crane dogman and crane driver.[10]

68. In this situation, the most serious charge has been levied against the crane driver who is alleged to have overrode an alarm that warned that the crane was overloaded immediately prior to the accident.[11]

69. Whilst the industrial manslaughter provisions in the WHS Bill are not intended to cover employees, as shown in the ACT example, employees may still be prosecuted where warranted under the Criminal Code.

70. The distinction is that under the Criminal Code, the accused is afforded certain rights and protections which have not been specifically identified as having effect with respect to the proposed industrial manslaughter provisions under the WHS Bill.

[10] ACT Government (19 April 2019) Media Release - *Manslaughter and other charges laid following fatal worksite incident*.
[11] The Canberra Times (17 October 2018) *Crane driver to fight charges over industrial death*.

71. In particular, s 172 of the WHS Bill expressly removes the rights of a person against self-incrimination and the right of silence resulting in employers and other parties being required to provide information that may be subsequently used against them[12]. This is a significant departure from the rights of an individual charged with a criminal offence, and is particularly concerning when applied to such serious charges.

72. Section 172(2) seeks to establish a partial protection by providing that any question, information or document provided by a person is not admissible as evidence against them. It is unclear how this provision will operate, given that what is seen can't be unseen. In reality it is unlikely to offer any meaningful protection.[13]

73. Therefore to the extent that the Committee considers that the Tier One manslaughter offence is appropriate for inclusion in the WHS Bill, we submit that consideration should be given to ensuring that it provides the same rights and protections as is contained under the Criminal Code.

Industrial Manslaughter – Simple Offence (Tier Two)

74. Unlike other states and territories which have adopted a single offence of industrial manslaughter, the WA Government is proposing a two-tier provision.

75. The Tier Two offence is of significant concern to the WA business community, and represents a material risk to owners of small and medium sized businesses.

76. Whilst the Tier One offence has some connection to the manslaughter provisions under the Criminal Code, the Tier Two offence has no such link.

77. Section 30B of the WHS Bill simply provides that a PCBU commits an offence if it fails to comply with a health and safety duty and the failure causes the death of an individual.

78. Consequently, a Tier Two prosecution can be initiated even where there has been no recklessness or negligence on the part of the PCBU. This is far removed from the notion of manslaughter in which there is a *"requirement that death was objectively reasonably foreseeable"* which ensures that *"there is a degree of correspondence between the blameworthy conduct of the accused and the resulting harm"*.[14]

[12] It is noted that this is a provision of the model WHS Bill. However, the WHS Bill does not take into account how this provision will operate in a situation of the inclusion of offence such as industrial manslaughter.
[13] This is of particular concern in respect to the Tier Two offence where the regulator both investigates and prosecutes the claim.
[14] Law Reform Commission of Western Australia (2007) Review into the Law of Homicide, Chapter 3, pp88-89.

79. It is also a significant departure from the policy announced by the Western Australian Premier on 27 August 2019 which stated that the second-tier offence would be based on negligent behaviour.

80. As the Bill is written, a Tier Two prosecution can therefore be initiated even where the fatality arose out of an accident or is otherwise not attributable to the negligence of the PCBU.

81. This is contrary to the operation of s23 of the Criminal Code which provides that "*a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident*".

82. The test for an offence under Tier Two is also substantially lower than other criminal charges involving a fatality. For example, dangerous driving causing death under s59 of the *Road Traffic Act 1979 (WA),* which also carries a maximum penalty of 10 years imprisonment, requires the person to have engaged in deliberate conduct that is dangerous to the public.

83. It is therefore difficult to reconcile the Tier Two offence against other offences involving a fatality. To label this provision manslaughter is a misuse of the term.

84. Given the substantially lower threshold for a prosecution, as well as the ability for a charge to be brought by the Regulator without the oversight of the Department of Public Prosecution, we anticipate that if enacted almost all industrial manslaughter charges will be brought under the Tier Two offence.

85. Further, the cascading nature of the claims means that even where a PCBU is charged under Tier One, they must also defend themselves against the Tier Two provisions, along with the other category of offences under the WHS Bill.

86. This will be particularly concerning and costly for small and medium sized enterprises who do not have the capacity to engage in costly legal defence.

Hypothetical Case Study – Practical Application of Tier Two Offence

An apprentice working for a small electrical contracting businesses was fatally injured when the electrician performing work on a switchboard did not appropriately isolate it. The electrician was unfamiliar with the switchboard he was working on and did not inform the employer. As a result, the employer is considered to have failed in its duty of care to provide a safe workplace by ensuring staff were appropriately trained, which is found to be a factor that has caused the death. However, the employer was not negligent in their action as the qualified electrician was expected to exercise his professional expertise in identifying that he was not able to safely perform the task.

Because the business is a partnership, the husband and wife owners are the PCBU. The couple are each liable for up to 10 years imprisonment and/or $2.5m penalty under Tier Two provisions, even though the accident was not as a result of their own negligence.

If the same scenario occurred in a larger business, under Tier Two the company could be liable for fines of up to $5m, but the CEO may have an additional defence that the action did not occur as a result of his/her neglect or with their consent. Small business owners are therefore at greater risk.

87. The above hypothetical case study also raises concern regarding the accountability of an officer of the PCBU under the Tier Two offence. S30B(3) provides that an officer commits an offence where the PCBU is liable for the offence and the failure of the PCBU is either:

87.1. Attributed to the neglect on the part of the officer; or

87.2. Occurs with the officers' consent or connivance.

88. The Explanatory Memorandum does not provide an explanation as to the effect of this provision or how it is intended to operate.

89. Further, the wording does not correlate to the test of negligence which, as previously identified in this submission, is the basis on which the Tier Two offence was intended to be established.

90. For example, an officer may have authorised for work to have occurred not being aware of the risk that it posed to safety. Whilst the officer may not have been negligent in their conduct, they are liable because the failure occurred with their consent.

Small businesses will be the target

91. Small businesses represent 97 per cent of all businesses and employ approximately 500,000 workers in WA. This equates to 41 per cent of the private sector workforce.[15]

92. Whilst small businesses are good in developing a strong safety culture that positively impacts on safety outcomes they have fewer resources available to develop formalised safety systems that will assist them in demonstrating that they have taken all reasonable steps in providing a safe work environment.

93. The industrial manslaughter provisions, in particular the Tier Two offence, encourages the development of an administrative focus on safety. Because the primary defence with respect to Tier Two is to seek to demonstrate that the PCBU did not fail to comply with their health and safety duty there is a strong incentive for businesses to adopt an administrative approach to demonstrating that this occurred. This places an emphasis on the completion of paperwork and other administrative tasks that acts as an evidence trail in the event of a prosecution. However, this approach does not necessarily lead to better safety outcomes when compared to a cultural approach to improving workplace safety.[16]

94. In other words, larger organisations are able to invest in better systems and processes to demonstrate their compliance with their obligations, whereas smaller organisations do not have the resources to do so, leaving them more vulnerable to prosecution.

95. This has been the experience in the operation of the UK's Corporate Manslaughter Act in which 96 per cent of all businesses convicted under these provisions are small or medium sized businesses.[17]

96. Whilst the Government has stated that it hopes not to use these provisions, it will face significant pressure from those unions which have campaigned for this provision. As occurred in the UK, small businesses will be the easiest target for a number of reasons, including:

    96.1. Small businesses have fewer resources to invest in administrative practices that simply create a compliance paper trail;

    96.2. It is easier to hold the directors of small businesses responsible for safety outcomes as there are significantly fewer people involved in the management of the organisation;

    96.3. Small businesses do not have the resources to defend a prosecution, meaning that it is easier to secure a conviction.

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[15] Small Business Development Corporation (November 2019) *Small Business in Western Australia – at a glance*.

[16] Noting that both approaches are frequently used in conjunction with each other.

[17] *Summary of Corporate Manslaughter Cases – April 2017*.

97. Under the UK corporate manslaughter provisions almost two thirds of the businesses charged with an offence pleaded guilty instead of having the matter determined by the court.[18]

98. With lawyers generally charging upwards of $300 per hour and barristers commanding around $10,000 per day the cost to a small business defending a corporate manslaughter charge is conservatively upwards of $100,000. This is simply unaffordable for most small businesses. This is further compounded by the cascading approach applied to alleged contraventions. The cascading approach means that an employer charged under Tier One also needs to defend against Tier Two, along with the Category One, Two and Three offences. This will result in a greater cost to employers in defending a claim than the cost to the Government in prosecuting it.[19]

99. Faced with this, many small business owners may find it more palatable to plead guilty on the basis that the penalty issued is less than the cost of defending the claim.

100. Even taking into account the potential for a prison sentence there may be advantage in a director agreeing to a guilty plea. Many small businesses are operated by a couple where both partners are responsible for ensuring a safe workplace. Faced with the risk of both partners being imprisoned there would be a strong motivation for one to admit liability (irrespective of whether such liability exists), particularly where they have dependent children.

101. Workplace fatalities are tragic events that have ongoing implications for family members and loved ones. The Tier Two offence will only serve to create more hardship by putting small business owners at risk of being locked in jail for 10 years for an accident that is no fault of their own. This is an unfair and untenable proposition that will do nothing to improve workplace safety.

102. Given the significant consequences, it is appropriate that the inclusion of industrial manslaughter provisions establish appropriate safeguards to ensure that penalties that result in business closure and custodial sentences are only applied where such punishment is justified.

103. The Tier Two offence does not achieve this. It should be removed from the Bill.

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[18] *Summary of Corporate Manslaughter Cases – April 2017*.

[19] Under these provisions the Government is not required to file alternative lesser charges at the time of initiating the prosecution, nor does it need to actively prosecute the case for a lesser charge.

Other offences and penalties

104. As a result of the inclusion of the Tier Two industrial manslaughter provision the WHS Bill also departs from the Category One offence contained in the Model WHS Bill.

105. The Model WHS provides that a person commits an offence where:

    105.1. The person has a health and safety duty; and

    105.2. The person without reasonable excuse engages in conduct that exposes an individual to risk of death or serious injury/illness; and

    105.3. The person was reckless to the risk.

106. The WHS Bill instead provide for a two tier system in which:

    106.1. A PCBU commits an offence where it fails to comply with a health and safety duty and that causes serious harm to an individual;

    106.2. A person (other than a PCBU) commits an offence where they fail to comply with a health and safety duty and that causes death or serious harm to an individual.

107. The explanatory memorandum does not provide an explanation for the change to the Category One offence, nor has the change been consulted upon with relevant stakeholders.

108. It would appear that the alteration has been made simply because had this not occurred it would have further highlighted the issues that exist with the Tier Two industrial manslaughter offence.

109. Notably, the alteration removes the requirement that the person's action was reckless. This raises the same issues that exist with respect to the Tier Two offence in that the penalty applies even in the absence of any deliberate conduct on the part of the individual.

110. The WHS Bill also requires that another person was either fatally injured or seriously harmed in order to enliven the provision. This is contrary to the approach that has traditionally been taken in enforcing WHS laws, in that penalties are based on the risk caused to other workers, and not the consequence of the action.

111. Consequently, a PCBU or worker would not be liable for reckless conduct where, despite the risk, they were fortunate enough that no one was seriously harmed. This introduces the variable of luck in determining culpability under the WHS Bill despite the person having engaged in a serious contravention. Hence under the WHS Bill the offence would be relegated to a Category Two offence.

112. There is no basis for the departure from the Model WHS Bill with respect to this offence.

Provisions relating to offences under Part 2

113. In considering the effect of Part 2 of the WHS Bill it is appropriate for the Committee to have regard to other provisions that directly impact on its operation. This includes the following matters.

Prohibition on Insurance

114. Section 272A provides that an insurance policy is of no effect to the extent that it would indemnify a person for their liability to pay a fine for an offence against the act.

115. Further it prohibits a person from:

    115.1. Entering in or offering an insurance policy that seeks to provide such indemnity;

    115.2. Indemnifying or offer to indemnify another person;

    115.3. Be indemnified or agree to be indemnifies; or

    115.4. Pay to another person, or receive from another person, an indemnity or fine.

116. This provision appears to have been adopted following recommendations arising from the finding of the Boland Review that the deterrent effect of the WHS laws may be reduced by insurance policies that extend to liability of businesses or their officers.

117. It is important to note that the Boland Review provides no evidence that this concern is real, nor does it seek to explore the impact that a provision such as this would have.

118. The common law currently takes a balanced approach to cases involving this matter, with the general rule being that a contract of insurance is not enforceable in respect of criminal acts. This rule reflects the long-held principle that the availability of such insurance is contrary to public policy.

119. Whilst the common law prohibits insurance for intentional criminal acts, it recognises that there are occasions where a person may unintentionally commit a criminal offence in the course of their duties.

120. In this regard the courts have considered that where offences impose liability without any fault element, or subject to a negligence-based test, individuals should have the capacity to manage some of the risks associated with their professional or business undertakings.

121. There are a number of factors which are taken into consideration in determining this, including:

    121.1. seriousness of the offence;

    121.2. the extent to which a person was involved in the offence;

    121.3. the likelihood that the indemnity will prevent deterrence;

    121.4. the likelihood that enforceability of the contract would promote the interests of innocent victims; and

    121.5. the public interest in the observance of contracts. This multi-factorial test thereby grants the court flexibility to undertake a considered assessments of the specific, often complex, facts before it.[20]

122. It is therefore clear that there is currently no universal ability for PCBUs or officers to indemnify their liability for penalties. Rather, the courts have taken a balanced approach in considering whether it is acceptable in some circumstances.

123. It is therefore reckless for the WHS Bill to subsequently seek to displace these principles without any considered evidence as to the perceived problem or the impact of establishing this provision.

124. This provision will make it difficult for organisations to attract and retain qualified and experienced officers if they are not able to be indemnified against penalties in reasonable circumstances.

125. Take for example the case of a not for profit organisation which relies on their capacity to attract board members who are prepared to volunteer their time to support the running of organisations providing services for the community. There is a serious question to be asked about the capacity of these organisations to attract suitably qualified board members who in addition to being asked to volunteer their time are now being asked to risk their financial security.

126. It is noted that Ministers are exempt from the definition of an officer of a PCBU despite exerting influence over the operation of agencies within their portfolios. It appears at odds with the notion of fairness that the Government wishes to exempt Ministers from any accountability for their agencies, yet prohibit the limited capacity of directors in private organisation to take out insurance with respect to their obligations.

[20] *Australian Institute of Company Directors (AICD) submission to the 2018 model WHS laws review, 20 April 2018.*

127. This provision will also provide a disincentive for investment within WA at a time when the economy is strongly focused on the need to attract investment in order to grow the economy and create jobs.

Evidence unlawfully obtained

128. Clause 232A of the WHS Bill includes a new provision which permits the court to allow evidence to be accepted that was obtained as a result of unlawful conduct.

129. The example provided within the explanatory memorandum is where an inspector exceeds the parameter of an entry warrant when obtaining evidence.

130. This provision adopts a Machiavellian approach to legislative enforcement by permitting the court to excuse a deliberate, negligent and/or reckless action of an inspector in the conduct of their duties in order to prosecute a person for an offence under the WHS Bill.

131. It also raises serious concerns regarding the effectiveness of the operation of those parts of the WHS Bill that regulate the powers of inspectors or provide rights for those who may be charged with an offence.

132. For example, s172 of the WHS Bill removes the right of an accused person not to incriminate themselves, by requiring that a person must co-operate with an inspector's investigation even where it may incriminate or expose the person to a penalty. However, it also provides that such information is not admissible as evidence in a civil or criminal prosecution. Section 232A would allow a court to ignore this provision and permit such evidence to be admitted, therefore nullifying the protection.

133. It is difficult to justify the inclusion of a legislative provision that permits the regulator to act in an unlawful manner in order to enforce a law.