AUSTRALIAN INSTITUTE of COMPANY DIRECTORS

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Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

via email: eec.sen@aph.gov.au

Dear Committee Secretary

Inquiry into the framework surrounding the prevention, investigation, and prosecution of industrial deaths in Australia

Thank you for the opportunity to provide a submission to the Senate Education and Employment References Committee (**Committee**) inquiry into the framework surrounding the prevention, investigation, and prosecution of industrial deaths in Australia (**Inquiry**).

The Australian Institute of Company Directors (**AICD**) is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 42,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

According to Safe Work Australia between 2003 and 2016 3,414 workers died in work-related incidents.[1] Each of those deaths is a tragedy. The AICD supports efforts by governments to help eliminate the occurrence of industrial deaths and injuries entirely.

We note that there is currently a comprehensive review of the model workplace health and safety legislation being conducted by Ms Marie Boland, which is expected to report to relevant ministers by early 2019. In light of the Boland review, we would ask the Committee to proceed with caution with respect to any recommendations relating to workplace safety legislation.

This submission will focus on two matters in the Terms of Reference: effectiveness and harmonisation of workplace safety legislation; and the effectiveness of penalties.

1. **Effectiveness and extent of the harmonisation of workplace safety legislation between States, Territories and the Commonwealth**

The AICD supports the objective of harmonisation of WHS regimes between States, Territories and the Commonwealth. Inconsistency between jurisdictions creates unnecessary complexity and cost, which can undermine the efficacy of such legislation.

For this reason, the AICD is concerned that, over the past decade, the harmonisation of WHS laws has been arguably diminished. This has partly occurred through the introduction of amendments to WHS laws in Queensland and the Australian Capital Territory (**ACT**) which do not accord with the framework established by the model WHS laws (see below). In

[1] Safe Work Australia, 'Number and incidence of work-related traumatic injury fatalities by Industry 2012-2016', (19 April 2018).

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addition, the AICD remains concerned that Victoria and Western Australia have not yet implemented the model WHS laws, despite agreeing to their implementation.

We look forward to seeing the results of the Boland review and engaging further with governments on any recommendations. It is critical that any changes are appropriately framed so as to ensure that the policy intent behind the model laws is appropriately affected.

2. The effectiveness of penalties in situations where an employer has been convicted of an offence relating to a serious accident or death

The AICD supports strong and effective penalties in WHS laws, including where an employer has been convicted of an offence relating to a serious accident or death. Current penalties for reckless or negligent conduct which causes death or serious injury within Australian jurisdictions which have adopted the model WHS laws are as follows:

- A category 1 offence under the model WHS laws applies to a person who, having a health and safety duty, engages in conduct that recklessly exposes an individual to a risk of death or serious injury. A person convicted of a Category 1 offence faces a maximum penalty of $600,000, or 5 years imprisonment, or both. The offence relates to conduct which *exposes* a risk of death or serious injury. For this reason, a death or serious injury is not required to satisfy the elements of this offence.
- A natural person can be convicted of manslaughter for a workplace-related death. Manslaughter is the unlawful killing of a person without the intention of causing the death or grievous bodily harm of the person.[2] Manslaughter by criminal negligence involves a person causing the death of another through an act or omission that carries with it a high risk that death or grievous bodily harm would follow. Penalties for such offences are significant - in NSW for instance, the maximum penalty for manslaughter is 25 years imprisonment.

The AICD considers that these offences, and their corresponding penalties, act as a serious and effective deterrent against negligent or reckless conduct. Common law and the WHS legislative framework combined provide a strong framework for workplace safety.

Offences that involve recklessness or gross negligence leading to workplace deaths should rightfully be prosecuted under the general law, and be subject to the relevant Crimes Act. Offences involving failure to take all reasonable steps to prevent injury or death are dealt with through the WHS model laws.

In the AICD's view, relevant authorities should be encouraged and resourced to prosecute individuals where they believe such offences have been committed, rather than introducing new, potentially duplicative offences.

Industrial Manslaughter offences

The ACT and Queensland have specific industrial manslaughter offences. These offences apply where the person's negligent or reckless conduct actually causes the death of a worker. They apply to employers and senior officers, including company directors. The AICD is aware of similar laws being considered for introduction in the Northern Territory and Victoria.

The AICD has several concerns regarding industrial manslaughter offences including that: a focus on punishing wrongdoing can ultimately distract from the core object of WHS laws, which is to protect workers and other persons from harm by requiring duty holders to eliminate or minimise risks; and that it undermines the efficacy of harmonised WHS laws across Australia.

[2] *Nydam v R* [1977] VR 430 at 445.

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The primary objective of industrial manslaughter offences is to achieve deterrence through the fear of criminal punishment. However, given that existing offences outlined above carry significant criminal punishment, the AICD is not convinced that additional offences create any additional deterrent effect.

For example, the variable definitions under each of the Queensland and ACT provisions, and the inconsistencies in maximum penalties (in the ACT, industrial manslaughter can attract a maximum penalty for a corporate of $1.5M, half the maximum penalty applied to other Category 1 offences under the ACT WHS Act), complicate, rather than support, accountability.

Divergent industrial manslaughter provisions have also, to date, failed to uphold the COAG principles for individual accountability for corporate wrong-doing. As an example, the Queensland industrial manslaughter offences do not provide any right of defence, reasonable excuse or relief for individuals who may have taken all reasonable steps (and beyond) to ensure safety. An “accident” defence was originally contemplated, but was later withdrawn.

Any offence should provide an accused with a workable and reasonably practicable defence to prevent the prospect of unjust or unreasonable criminal convictions. This is not defending unlawful conduct but rather a ensuring a fair process is followed before an individual faces serious criminal penalties such as imprisonment (in the case of Queensland, up to 20 years).

The AICD is concerned that industrial manslaughter laws overlap with general law manslaughter offences. For instance, the AICD views the Queensland offence as practically identical to the ordinary manslaughter offence in the Queensland criminal code, except that the manslaughter offence in the criminal code does not apply to corporations.

As the Law Council of Australia has noted in its submission, there are well-established principles for applying criminal negligence to corporations and if evidence exists that those who are culpable in any business are unable to be prosecuted for WHS breaches this should be addressed in broader law review.

We note that the Queensland Law Society has voiced similar concerns, stating that the new industrial manslaughter offence was unwarranted because the *Work Health & Safety Act 2011* and the criminal code already provided offences, including manslaughter, to deal with such criminal wrongs in the workplace.

Most importantly, in the AICD’s view, more resources should be dedicated to government agencies responsible for workplace safety, to more closely monitor compliance, educate businesses on practice, and pursue convictions under the current law in appropriate cases.

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Next steps

We hope our comments will be of assistance to you. As noted above, the parallel Boland review of the model WHS laws is significant, and should see recommendations that will further strengthen the legislative framework across Australia in a comprehensive manner. A piece-meal, State by State approach to reform would be unhelpful, and, in the AICD's view, ultimately undermine the efficacy of WHS laws.

If you would like to discuss any aspect of this submission, please contact Matthew McGirr, Policy Adviser

Yours sincerely,

LOUISE PETSCHLER
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