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8 October 2019

Dr Jennifer Buckley
Committee Secretary
Economic Policy Scrutiny Committee
GPO Box 3721
DARWIN NT 0801

By email: EPSC@nt.gov.au

Dear Dr Buckley,

We welcome the opportunity to provide feedback in relation to the Economic Policy Scrutiny Committee's inquiry into the Work Health and Safety (National Uniform Legislation) Amendment Bill 2019 (the Bill).

Maurice Blackburn Pty Ltd is a plaintiff law firm with 32 permanent offices and 31 visiting offices throughout all mainland States and Territories. The firm specialises in personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation (particularly total and permanent disability claims), negligent financial and other advice, and consumer and commercial class actions. The firm also has a substantial social justice practice.

Maurice Blackburn has provided legal services to Territorians since 2014. Our staff of 9, including 4 lawyers, provide legal advice primarily for personal injuries including workers compensation, motor vehicle accidents, public liability claims and institutional sexual abuse. The safety and wellbeing of Territorians is at the centre of our work.

Maurice Blackburn has a proud history of advocating support for the introduction of industrial manslaughter provisions into workplace health and safety (WHS) legislation across States and Territories, based on nationally agreed benchmarks.[1]

Maurice Blackburn congratulates the NT Government on this long-awaited Bill. We recognise that it is part of a national movement toward criminalising industrial manslaughter across jurisdictions.

As the Committee will be aware, industrial manslaughter provisions currently exist within the legislative frameworks of Queensland[2] and the ACT[3]. Carve-outs achieved by the mining

[1] See for example: https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/IndustrialdeathsinAus/Report/section?id=committees%2Freportsen%2F024170%2F26563; para 5.39
[2] https://www.worksafe.qld.gov.au/forms-and-resources/newsletter/esafe-newsletters/esafe-editions/esafe-rural/january-2018/new-industrial-manslaughter-laws-in-queensland
[3] http://classic.austlii.edu.au/au/legis/act/consol_act/ca190082/s49d.html

industry for exemption from those laws in Queensland are in the process of being removed[4]. Victoria is also in the process of developing legislation to criminalise industrial manslaughter[5]. The McGowan Government in Western Australia has also announced its intention to introduce similar legislation this year[6].

Two important national inquiries have drawn the same conclusion – that the criminalisation of Industrial Manslaughter is a desirable outcome for reducing workplace deaths in Australia:

The Senate Standing Committees on Education and Employment, in their 2018 report entitled "They never came home—the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia"[7] made a number of recommendations relating to industrial manslaughter, including:

> *Recommendation 13*
> *The committee recommends that Safe Work Australia work with Commonwealth, State and Territory governments to:*
> - *introduce a nationally consistent industrial manslaughter offence into the model WHS laws, using the Queensland laws as a starting point; and*
> - *pursue adoption of this amendment in other jurisdictions through the formal harmonisation of WHS laws process.*

The Committee requested that Marie Boland take these findings into account when conducting her 2018 independent review of the model WHS laws[8].

The abovementioned independent review of the model WHS laws made the following recommendations in response to the review's investigation into prosecutions and legal proceedings[9]:

> *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 or death.*
>
> *Recommendation 23b: Industrial Manslaughter*
> *Amend the model WHS Act to provide for a new offence of industrial manslaughter. The offence should provide for gross negligence causing death and include the following:*
> - *the offence can be committed by a PCBU and an officer as defined under s 4 of the model WHS Act;*
> - *the conduct engaged in on behalf of a body corporate is taken to be conduct engaged in by the body corporate;*
> - *the body corporate's conduct include the conduct of the body corporate when viewed as a whole by aggregating the conduct of its employees, agents or officers;*

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[4] See for example: https://www.brisbanetimes.com.au/politics/queensland/industrial-manslaughter-laws-considered-for-queensland-resources-industry-20190710-p525vm.html
[5] https://www.premier.vic.gov.au/first-meeting-of-workplace-manslaughter-taskforce/
[6] https://www.mediastatements.wa.gov.au/Pages/McGowan/2019/08/New-workplace-safety-laws-and-more-safety-initiatives-to-better-protect-workers.aspx
[7]https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/IndustrialdeathsinAus/Report
[8]https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/IndustrialdeathsinAus/Report/section?id=committees%2freportsen%2f024170%2f25991, recommendation 4.
[9]https://www.safeworkaustralia.gov.au/system/files/documents/1902/review_of_the_model_whs_laws_final_report_0.pdf; p.15 & 16

- *the offence covers the death of an individual to whom a duty is owed.*

The report went on to make further recommendations in relation to timeframes for bringing prosecutions, as well as sentencing.

There is significant commonality in the findings which have led to this current appetite for legislative change:

- That, given the tragic and persistent occurrence of workplace deaths, current deterrents within the WHS framework are clearly not working.

- That a model of State/Territory based legislation, founded on nationally agreed benchmarks is the best model for industrial manslaughter legislation.

- That consistent State/Territory based legislation, underpinned by national standards, will be easier to achieve than a scheme created through Commonwealth legislation.

- That there is an important role for the Council of Australian Governments (COAG) in driving and monitoring this process.

- That the Queensland model should be used as the template by which legislation developed by other States and Territories should be benchmarked (with the exception of the exemptions achieved by the mining industry).

Implicit in the above is the proposition that unless the new laws are effectively drafted, they will not have the necessary deterrent effect upon employers who take unnecessary chances with the lives of their workers.

Maurice Blackburn believes that, unfortunately, the NT draft legislation is fundamentally flawed. To have the requisite deterrent effect, and to be consistent with other jurisdictions, amendments are imperative.

To this end, we draw the Committee's attention to the following:

1. The language of the proposed offence is significantly different in application and meaning to that now part of Queensland law in the *Work Health and Safety Act (2011).* In particular, the employment of the words 'reckless or negligent' significantly changes the meaning as compared to the Queensland offence. We consider the use of these words in the NT offence creates significant difficulty.

    - The use of the phrase 'reckless or negligent' creates 'cognate' offences (see *Ex Parte Hayes Wilson*[10]). This would mean that the prosecutor could elect or particularise one or the other cognate offences, or perhaps both in the alternative;

    - The notion of a cognate or alternative offence arises from the fact that the offences are so similar in nature such that (subject to any timely amendment of the charges or particulars of the charges) a defendant is able to be convicted of either offence[11].

    - Further, it is likely that because of the rule of interpretation *'noscitur a sociis*' ('the immediate context rule') that the word 'gross' would be implied into the

[10] See Hayes v Wilson, ex parte Hayes (1984) 2 Qd R 114
[11] Refer Hayes v Wilson, as above

notion of 'negligence' in order to give effect to the cognate nature of the acts or omissions required to constitute the offence and create a 'culpability equivalence' between the cognate or alternative offences.

- There is a serious concern that the phrase ‘reckless or negligent’ lends itself to the interpretation of the section to mean ‘gross negligence’. The Queensland offence does not require proof of gross negligence and it is unlikely that the Courts would readily imply that word into the Queensland offence.

In summary, and in plain English, the inclusion of the phrase “reckless or” will create a bar to prosecution which is legally impossible to reach in the vast majority of hypothesised cases of deaths at work involving negligence. The policy intent will thereby be defeated.

2. The use of the word 'intentionally' in 34B(1)(b) greatly strengthens the above view as intention imputes *mens rea* - a guilty mind - probably requiring more than mere knowledge of a risk. It is unlikely that a court would find civil negligence (as opposed to criminal negligence) to be associated with a guilty mind in the criminal sense, especially in circumstances where the courts readily identify civil negligence without needing to find any intention to breach a common law duty.

3. The implication of 'gross' into 'negligence' is also a particularly strong inference or necessary implication given that the same maximum penalties apply to both species of offending; the culpability recognised by 'reckless or negligent' is undifferentiated by the proposed scheme of the offence.

4. Even if the above interpretations are incorrect, the confusion created by the opposing views could result in the ambiguity being resolved in favour of non-conviction in many cases[12].

Examples to illustrate the above concerns can readily be found. The death of Daniel Bradshaw in the course of his employment with Barge Express in 2017 is one such example.

Case Study – Daniel Bradshaw

The deceased was employed by Barge Express as a deckhand. On 8 January 2017, Mr Bradshaw was found deceased alongside the barge floating in the water face down. The Coroner found that the deceased died when attempting to negotiate a difficult climb to get off the barge.

There was no gangway from the barge to the wharf and the workers fashioned a rope to climb up and down from the barge. The evidence indicated that there was a gangway available that was not in use.

In that case the prosecution of Conlon Murphy Pty Ltd (the company operating Barge Express) led to a fine of $190,000. The Master of the Vessel received a fine of $20,000.

It is unlikely in our view that the conduct would be found to have been ‘intentional’ and ‘reckless or negligent’ to satisfy the current drafting of the NT offence. It is difficult to see how a court could find that either the Master of the vessel or the company were grossly negligent and acted with the necessary ‘intent’.

[12] See Beckwith v R [1976] HCA 55; (1976) 135 CLR 569

Yet Mr Bradshaw was killed in the course of his employment due to the negligence of others.

As noted by the Coroner in that case[13]:

- Where there is death resulting from unsafe practices the community is entitled to expect that the unsafe practices be denounced in the strongest possible terms,

- This was the second such inquest relating to a domestic commercial vessel in the Northern Territory in the last 18 months, where the regulatory authorities appear to be either slow or unwilling to denounce unsafe practices,

- The Principal Marine Safety Officer with the NT Department of Infrastructure Planning and Logistics recommended to the Australian Maritime Safety Authority ('AMSA') prosecutions against the owner and the Master of the barge, but AMSA considered there were "*insufficient grounds*" on the basis that there was "*no evidence…that there was a sufficient degree of criminality*".

Maurice Blackburn submits that the current drafting of the offence simply raises the bar far too high for successful prosecutions, dramatically reducing the likelihood of convictions for industrial manslaughter which seriously undermines the overall intent of this legislation.

In our view the current drafting will lead to a maintenance of the status quo, where deaths at work result in few prosecutions and outcomes which are more likely to involve enforceable undertakings and fines, rather than prosecutions and convictions for industrial manslaughter.

Recommendations:

Maurice Blackburn recommends that the following adjustments be made to the draft Bill:

Recommendation 1:

That the words 'reckless or negligent' in s. 34B(1)(d) be replaced with the term 'negligent'.

The test should be negligence to the civil standard, proven to the criminal standard, consistent with the Queensland legislation.

Recommendation 2:

That the word 'intentionally' be removed entirely in s.34B(1)(b).

[13] Inquest into the death of Daniel Thomas Bradshaw [2018] NTLC 005

Further improvements to Industrial Manslaughter legislation for consideration:

Maurice Blackburn has been actively advocating for SWA and relevant State/Territory bodies to consider further, long term inclusions in Australia's approach to industrial manslaughter, including:

i. Ensuring that industrial manslaughter provisions not only provide for the deaths of workers, but to others affected by the decisions and actions of PCBUs. Passers-by, consumers and visitors can and do die due to the negligence of PCBUs and their senior officers. It seems an absurd outcome that the exact same act(s) of negligence will result in a drastically different penalty, simply because a person is, or is not, a worker.

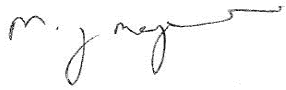
   This is especially the case given that the introduction of the industrial manslaughter provisions in Queensland was motivated in part by the deaths of four Dreamworld customers - not workers.

ii. Extending the parameters of industrial manslaughter to include deaths caused by industrial illnesses such as mesothelioma and silicosis, where the exposures to those substances can be proven to have occurred in circumstances of negligence.

   It seems quite arbitrary to provide for the prosecution of a business for the death of a worker due to an injury that reasonably could have been prevented, but not to allow for prosecution when a worker dies due to an industrial illness that reasonably could have been prevented. If a stone bench company failed to provide its workers with adequate PPE, this would clearly be negligent, yet that business and its management may not be able to be charged with industrial manslaughter.

We would be pleased to discuss the above comments and recommendations in greater detail with the Committee. If we can assist the Committee further in its important work, please do not hesitate to make contact via 08 8914 2300 or MMeyers@mauriceblackburn.com.au.

Yours faithfully,



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