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Economic Policy Scrutiny Committee
Legislative Assembly of the Northern Territory

By Email: EPSC@nt.gov.au

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Dear Committee Members

Re: Work Health and Safety (National Uniform Legislation) Amendment Bill 2019

Hall Payne Lawyers is an employment and industrial relations law firm with a proud history of acting for trade unions, their members and employees in the Northern Territory. This has necessarily included our firm representing a large number of workers injured at work through no fault of their own.

We welcome the opportunity to make this submission to the Economic Policy Scrutiny Committee of the Northern Territory Parliament on the *Work Health (National Uniform Legislation) Amendment Bill 2019* (NT) ('**Bill**') on our client's behalf.

Our submissions in relation to the Bill are as follows.

1. Every worker has the fundamental right to return home safely at the end of their working day. The provision of a safe work environment, and appropriate punishment for those employers who breach that requirement, are essential to the proper maintenance of that right. With that in mind, Hall Payne Lawyers commends the Bill after further consideration, and amendment, as detailed in this submission.

Section 34B of the Bill

2. There are presently two statutes in which a work-related death can be dealt with in the Northern Territory. The first is within the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) ('**Act**') and the second is within the *Criminal Code Act 1983* (NT) ('**Criminal Code**').
3. Both the Act and the Criminal Code arguably apply to a body corporate in the same, or similar manner, as they apply to an individual.¹
4. There are, however, a number of practical issues to consider in regard to the appropriate statute:

¹ We note here the application of section 12A of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) and sections 43BK to 43BN of the *Criminal Code Act 1983* (NT).

- (a) firstly, the offences under the Act focus on the failure to comply with the statutory duty and the resulting risk, as opposed to the work related death;
 - (b) secondly, the penalties for an offence under the Act:
 - (i) are aligned with the level of risk to which a person is exposed, not to a fatality or multiple fatalities; and
 - (ii) consequently, are inadequate in circumstances where the impugned conduct has resulted in death;
 - (c) thirdly, the penalties for an offence under the Act are not an adequate deterrent for corporate employers; and
 - (d) finally, the penalty of imprisonment for an offence under the Criminal Code would not apply to a corporate offender.
5. The ‘*Best Practice Review of Workplace Health and Safety in the Northern Territory*’ (**‘Best Practice Review’**) considered these practical issues and recommended that an offence of Industrial Manslaughter be provided for by the Act.
6. The Bill proposes the introduction of section 34B and the offence of Industrial Manslaughter:
- 34B Industrial manslaughter**
- (1) *A person commits the offence of industrial manslaughter if:*
- (a) *the person has a health and safety duty; and*
 - (b) *the person intentionally engages in conduct; and*
 - (c) *the conduct breaches the health and safety duty and causes the death of an individual to whom the health and safety duty is owed; and*
 - (d) *the person is reckless or negligent about the conduct breaching the health and safety duty and causing the death of that individual.*
- Maximum penalty:*
- (a) *for an individual – imprisonment for life; or*
 - (b) *for a body corporate – 65 000 penalty units.*
- (2) *Strict liability applies to subsection (1)(a).*
- (3) *A volunteer does not commit industrial manslaughter for a failure to comply with a health and safety duty, unless the duty is under section 28 or 29.*
- Note for subsection (3)*
The defendant has an evidential burden in relation to the matters in subsection (3) (see section 43BU of the Criminal Code).
7. There are a number of elements of the offence that, in our respectful submission, require further consideration and amendment.

The Offender

8. The opening words of section 34B suggest that the offence is one that will be capable of being committed by all ‘*persons*’. Whilst ‘*person*’ is not defined by the Act, it is inclusive of both a body politic and body corporate as well as an individual.²
9. The draft terminology allows both the prosecution of a person conducting a business or undertaking (‘**PCBU**’) and individuals:
- (a) making high-level decisions within corporations; and
 - (b) defined as ‘*workers*’ under the Act.

² *Interpretation Act 1978* (NT) s 24AA.

10. The underlying intent in the proposal to introduce an industrial manslaughter offence was to ensure that the offence operates to include conduct of:
 - (a) corporate entities causing work-related deaths; and
 - (b) those persons concerned with, or taking part in, the management of the corporate entities causing work-related deaths.
11. The current Criminal Code offence sufficiently deals with the conduct of workers or volunteers involved in work-related deaths and, consequently, their inclusion results in an unnecessary overlap with the criminal laws of Northern Territory. It also leads to the statute exceeding its evident purpose.
12. Both the Australian Capital Territory and Queensland, the only states or territories that presently legislate for Industrial Manslaughter, have recognised the undesirability of including all workers in the offence.
13. Consistent with the recommendations set out in the Best Practice Review, we recommend that:
 - (a) the type of offender be changed to a PCBU;
 - (b) a secondary offence be created for 'executive officers' adopting the definition of the *Work Health and Safety Act 2011 (Qld)* ('**Qld Act**'); and
 - (c) workers otherwise be excluded from this offence.
14. It follows from these recommendations that proposed section 34B(3) be omitted for want of utility. It is, in our view, difficult to imagine how an exception for a genuine volunteer would apply to a PCBU or an 'executive officer' of a PCBU.

1. Recommendation 1:

That opening words of proposed section 34B read 'A person conducting a business or undertaking commits the offence of industrial manslaughter if-'

2. Recommendation 2:

That a separate offence of Industrial Manslaughter apply to an 'executive officer', adopting the definition of the Work Health and Safety Act 2011 (Qld) of 'executive officer'.

3. Recommendation 3:

That proposed sub-section 34B(3) be omitted.

Intent

15. Proposed section 34B requires that an offender 'intentionally' engage in conduct. This element differs from the Criminal Code offence which requires only that an offender engage in the conduct, and relevantly there is no intent element.
16. It is not presently clear what prompted the drafters to include this additional fault element in the offence. In the event such reasoning becomes available, we would welcome the opportunity to provide a supplementary submission on this topic.
17. However, if the requirement that the conduct be intention was included to avoid accidental conduct, involuntariness, reasonable excuse or acts independent of the will of the defendant, we note that the defences available in the Criminal Code are already available under the Act

to prevent the prosecution of this type conduct.³ Further, the inclusion of the reckless or negligent requirements later in section 34B provide suitable protection for conduct for which a person should not be criminally culpable.

18. As the Bill is presently drafted, the element of ‘intent’ is an additional fault element that must be attributed to an employee or agent of a corporate offender, over and above the fault elements provided in proposed sub-section 34B(1)(d). In our respectful submission, this is unnecessary and will prevent prosecution of reckless or negligent conduct that:
- (a) was not engaged in intentionally;
 - (b) could have included reckless or negligent conduct that was not intentional;
 - (c) may not include omissions; and
 - (d) nonetheless resulted in death.
19. Such an outcome is in our submission undesirable and manifestly against the purpose of the Bill and the recommendations of the Best Practice Review.

4. Recommendation 4:

That the word ‘intentionally’ be omitted from sub-section 34B(1)(b).

Causes Death

20. Proposed section 34B requires that the conduct causes the death of an individual to whom the health and safety duty is owed.
21. Firstly, and importantly, we note that this includes a worker and, in particular circumstances, other persons who may be at risk – see for example section 19(2) of the Act:
- (2) *A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking.*
22. We commend the legislature in expanding the reach of the offence beyond a death of a worker and the inclusion of this element is strongly supported.
23. However, notably the legislature has not defined the phrase ‘causes the death’ (see in contrast section 34A(2) of the Qld Act). To avoid inconsistent interpretation of this phrase, the legislature should adopt the definition of both the Qld Act and the *Crimes Act 2000* (ACT):⁴

a person’s conduct causes death if it substantially contributes to the death.

5. Recommendation 5:

That the following be inserted into proposed section 34B:

‘For this section, a person’s conduct causes death if it substantially contributes to the death.’

Reckless or Negligent

24. Proposed section 34B requires that the offender is reckless or negligent about the conduct engaged in that:
- (a) breaches a health and safety duty under the Act; and

³ *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) s 12A.

⁴ *Work Health and Safety Act 2011* (Qld) s 34A; *Crimes Act 2000* (ACT) s 49A.

- (b) causes the death of an individual that is owed a health and safety duty under the Act.
25. We commend the legislature for including conduct that is either reckless or negligent and the inclusion of both fault elements is strongly supported.

Imputation of Conduct

26. The Act does not provide for imputation of the reckless or negligent conduct of an individual for liability of a body corporate, however, adopts the imputation provisions of the Criminal Code.⁵

Conduct

27. Under the Criminal Code, the conduct of an individual can be imputed to the corporate offender:

43BL Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

28. The inclusion of this imputation is strongly supported.

Recklessness

29. Under the Criminal Code, recklessness must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.⁶ This can be established by:

- (a) *proving that the body corporate's board of directors intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; and*
- (b) *proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; and*
- (c) *proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; and*
- (d) *proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.*

30. Contrast this to section 244 of the Qld Act:

244 Imputing conduct to bodies corporate

(1) *For this Act, any conduct engaged in on behalf of a body corporate by an employee, agent or officer of the body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, is conduct also engaged in by the body corporate.*

(2) *If an offence under this Act requires proof of knowledge, intention or recklessness, it is sufficient in proceedings against a body corporate for the offence to prove that the person mentioned in subsection (1) had the relevant knowledge, intention or recklessness.*

...

(emphasis added)

31. Relevantly, the Qld Act provides for imputation of reckless conduct to a broader range of individuals including employees, agents or officers of the corporate offender acting within the scope of employment, or within their authority. This allows for imputation of conduct to

⁵ *Work Health and Safety (National Uniform Legislation) Act 2011 (NT) ss 12A and 244.*

⁶ *Criminal Code Act 1983 (NT), Sch 1 s 43BM.*

the corporate offender of lower level decision makers acting within the scope of employment, or within their authority.

32. The Bill should, in our respectful submission, include an amendment to section 244 of the Act providing for specific circumstances of imputation that would apply under the Act. This would ensure that employers are found suitably liable for the conduct of workers of which it was aware.

6. Recommendation 6

That section 244 of the Act be amended to provide an expanded application of the principle of imputation consistent with the Qld Act.

Negligence

33. Under the Criminal Code, negligence may be attributed to a corporate offender under section 43BN:

43BN Negligence

- (1) *The test of negligence for a body corporate is that set out in section 43AL.*
- (2) *Subsection (3) applies if:*
 - (a) *negligence is a fault element in relation to a physical element of an offence; and*
 - (b) *no individual employee, agent or officer of the body corporate has that fault element.*
- (3) *The fault element of negligence may exist on the part of the body corporate if its conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).*
- (4) *Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:*
 - (a) *inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or*
 - (b) *failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.*

34. Section 43AL of the Criminal Code provides:

43AL Negligence

A person is negligent in relation to a physical element of an offence if the person's conduct involves:

- (a) *such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and*
- (b) *such a high risk that the physical element exists or will exist, that the conduct merits criminal punishment for the offence.*

35. By applying section 43BN a corporate offender may:

- (a) be found to be negligent for the conduct attributable to a group of people; and
- (b) be found negligent where it can be evidenced that the conduct was substantially attributable to:
 - (i) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
 - (ii) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

36. The inclusion of these provisions is strongly supported either by:

- (a) continuing to adopt the provisions under section 12A of the Act; or
- (b) expressly providing for these provisions in section 244 of the Act.

Other Amendments

37. The Bill proposes to introduce a number of other amendments to the Act, which we will briefly deal with.

Section 34C

38. Proposed section 34C will remove the application of enforceable undertakings from the offence of Industrial Manslaughter. This is appropriate and does not allow a corporate entity to avoid the maximum penalties expected by the public to be imposed in circumstances of a work-related death. The inclusion of such a provision is strongly supported and ensures that the sentencing principle of deterrence is achieved.

Section 34D

39. Proposed section 34D provides that the Regulator must have the consent of the Director of Public Prosecutions ('DPP') to prosecute an offence under proposed section 34B. We believe, given the size of the Territory, requiring the consent of the DPP is an appropriate measure.

Section 34E

40. Proposed section 34E allows an alternative verdict in a prosecution for Industrial Manslaughter. The inclusion of this provision is strongly supported.

Section 231 and 231A

41. Proposed section 231 provides that a person may request that the Regulator prosecute for a stipulated offence, including Industrial Manslaughter, if no prosecution has been bought within six months.
42. If the Regulator receives a request under proposed section 231 or the Regulator reasonably believes that a death constitutes Industrial Manslaughter, the Regulator may seek the views of the DPP on the merits of a prosecution under proposed section 231A.
43. We recognise that the Regulator has the discretion to seek the views of the DPP on the merits of the prosecution, however, the Regulator is unable to prosecute without the consent of the DPP.
44. In these circumstances, it would seem appropriate to remove the discretion of the Regulator and provide that the Regulator must seek the view of the DPP. This would ensure that the Regulator is expeditiously informed of the view of the DPP (within 25 days under proposed sub-section 231A(3)) and whether they have consent to bring the prosecution.

7. Recommendation 7

To replace the word 'may' with 'must' in sub-section 231A(1).

We once again thank the Committee for the opportunity to make this submission. In the event you have any further queries, please do not hesitate to contact the writers.

Yours faithfully



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