



PEARL PRODUCERS ASSOCIATION
Australian South Sea Pearls

SUBMISSION:

**Standing Committee on Legislation – Inquiry into the
Work Health and Safety Bill 2019 (Industrial
Manslaughter)**

26 June 2020

Attn: Hon Dr. Sally Talbot MLC (Chair)
Standing Committee on Legislation.

Legislative Council Committee Office. Parliament House, 4 Harvest Terrace,
West Perth, WA 6005

via email:

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1. BACKGROUND

1.1 The Pearl Producers Association

The Pearl Producers Association (PPA) is the peak industry representative body for the *Pinctada maxima* pearling industry licensees regulated under the Western Australian Pearling Act (1990). PPA membership includes 100% of all pearl licensees from both WA and the NT, covering all licenses issued under the legislation that operate in Western Australia. The PPA represents pearling licensees on a range of issues including:

- Legislation, Regulation and Policy Development
- Resource Access Policy
- Sustainable Resource Management and Ecological Sustainable Development
- Work Safety and Training Policy

The Pearling Industry is an iconic Australian primary industry, and the only pearling industry utilising wild oysters for the production of Australian south sea pearls, and relies almost exclusively on oysters from the *P. maxima* fishery at Eighty Mile Beach south of Broome which “is the only remaining significant wild-stock fishery for [wild *P. maxima*] pearl oysters in the world.”¹

The production of pearls from *P. maxima* pearl oysters requires the fishing of an oyster from the wild fishery at Eighty Mile Beach., it is rested and then seeded; after seeding, the pearl is grown in nutrient rich tropical waters of North-Western Australia, for at least two years, under reliable husbandry systems. Pearls that are grown in other parts of the world are not able to combine all these variables to produce pearls of comparable quality or rarity.

At peak production the Pearling Industry has up to 150 vessels (of various sizes and functions) conducting pearling operations throughout Northern Australia in both open water and on aquaculture farms within the North-west Bioregion. The industry employs hundreds of Australians in Northern Regional Australia, who undertake various activities within pearl production including diving for pearl oysters, pearl oyster husbandry, as well as research and development. Many of our members are have vertically integrated businesses and also undertake wholesale, retail and corporate activities.

The Pearl Producers Association Plays an important role in administering the Pearling Industry Diving Code of Practice and Pearling Industry hyperbaric unit at Broome Hospital. Through the PPA Executive, the PPA Safety Sub-Committee and the PPA Safety and Training Officer, the PPA plays an important role in supporting and promoting good occupational health and safety practice within the context of pearl production.

1.2 Submission to the Standing Committee on Public Administration – Inquiry into the issue of Property Rights

The PPA appreciates and thanks the Standing Committee on legislation for the opportunity to provide a submission to the committee on the inquiry into the Work Health and Safety Bill 2019.

¹ A. Hart, D. Murphy and R. Jones. (2015). Pearl Oyster Managed Fishery Status Report. In: Status Reports of the Fisheries and Aquatic Resources of Western Australia 2014/15: The State of the Fisheries eds. W.J. Fletcher and K. Santoro, Department of Fisheries, Western Australia, p211.

The PPA submission refers to the following relevant terms of reference for the inquiry into property rights the refer to property and compensation. These terms provide that the house:

- (1) That the *Work Health and Safety Bill 2019* be discharged and referred to the Standing Committee on Legislation for consideration of Part 2 of the Bill and report no later than Tuesday, 11 August 2020;
- (2) The Committee has the power to inquire into and report on the policy of the Bill; and
- (3) The Committee is to consider any government response to Report 126 of the Uniform Legislation and Statutes Review Committee.

In addition to this submission, with respect to other submissions received by the Committee the PPA supports and has contributed to the submissions of the Western Australian Fishing Industry Council (WAFIC) and of the Joint Industry Submission and to this end will only submit only on those issues that are relevant to pearling.

The PPA remains happy to speak to the Committee regarding out submission should the Committee require.

2. PPA SUBMISSIONS

2.1 Work Health and Safety Bill 2019 (Manslaughter Provisions)

The PPA refers to the Work Health and Safety Bill 2019 ("the Bill") which was tabled by the McGowan Government in Parliament in November 2019.

The PPA notes that these provisions are *prima facie* implementing the commonwealth model Work Health and Safety laws (acknowledging modifications for Western Australia); this includes a series of new provisions with respect to the introduction of 'industrial manslaughter'. The PPA is concerned with the lack of transparency and public consultation with respect to these provisions. We note that they were not included in the Ministerial Review Panel recommendations.

This submission will discuss the Industrial Manslaughter provisions of the Work Health and Safety Bill 2019 (Sections 30A and 30B) which outline the new crime of Industrial Manslaughter.

30A. Industrial manslaughter — crime

(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.

Penalty for this subsection:

- (a) for an individual, imprisonment for 20 years and a fine of \$5 000 000;
- (b) for a body corporate, a fine of \$10 000 000.

(2) A person charged with a crime under subsection (1) may be convicted of an offence under section 30B(1).

(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
- (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.

Penalty for this subsection: imprisonment for 20 years and a fine of \$5 000 000.

(4) A person charged with a crime under subsection (3) may be convicted of an offence under section 30B(3).

30B. Industrial manslaughter — simple offence

(1) A person commits an offence if —

- (a) the person has a health and safety duty as a person conducting a business or undertaking; and

- (b) the person fails to comply with that duty; and
- (c) the failure causes the death of an individual.

Penalty for this subsection:

- (a) for an individual, imprisonment for 10 years and a fine of \$2 500 000;
 - (b) for a body corporate, a fine of \$5 000 000.
- (2) A person charged with an offence under subsection (1) may be convicted of a Category 1 offence, a Category 2 offence or a Category 3 offence.
- (3) An officer of a person (the **PCBU**) commits an offence if —
- (a) the PCBU has a health and safety duty as a person conducting a business or undertaking;
 - and
 - (b) the PCBU fails to comply with that duty; and
 - (c) the failure causes the death of an individual; and
 - (d) the PCBU's conduct that constitutes the failure —
 - (i) is attributable to any neglect on the part of the officer; or
 - (ii) is engaged in with the officer's consent or connivance.

Penalty for this subsection: imprisonment for 10 years and a fine of \$2 500 000.

- (4) A person charged with an offence under subsection (3) may be convicted of a Category 1 offence, a Category 2 offence or a Category 3 offence.

In short, the Bill proposes two *new* classes of industrial manslaughter offences:

1. **Criminal Industrial manslaughter offence:** (section 30A) carrying a penalty of up to 20 years imprisonment and fines of up to \$5 million for individuals and \$10 million for body corporates; and
2. **Simple Industrial manslaughter offence:** (section 30B) carrying a penalty of up to 10 years imprisonment and fines of up to \$2.5 million for individuals and \$10 million for body corporates.

Essentially these new provisions provide for the establishment of strict liability offences within an WH&S framework that on the balance of probabilities are able to criminally sanction an employer or an actor working on behalf of an employer for conduct that constitutes a failure to comply with a WH&S duty that results in a death or non-compliance with a WH&S duty that results in a death.

The sections do not contain within them any elements that are associated with culpability within criminal provisions; most importantly a clear intentional/knowledge element that precedes an action by the defendant.

2.1.1 Mental elements of Sections 30A and 30B

Can a person be held criminally liable for something that occurred that they did not mean to commit or know they would commit?

Both sections 30A(1)(a) and 30B(1)(a) provide that “*the person has a health and safety duty as a person conducting a business or undertaking.*”

While it can be imputed that these subsections include require knowledge (and therefore have a mental component within the offence which incorporates knowledge of some thing and actioning regardless) it is equally possible for the duty to exist without knowledge of its existence.

A crime of such gravity as industrial manslaughter, which has upon conviction significant sanction, cannot be drafted in a strict liability format without a mental element that suggests culpability. Provisions drafted in this format which involves an actor engaging in conduct where their mental state is irrelevant, is only applied where the conduct is a violation (e.g. a civil type offence).

Indeed, the Western Australia Criminal Code Act Compilation Act 1913, with a criminal sanction similar (but without the fine for of Industrial manslaughter) clearly includes recourse to a mental element in additions to the killing of another person.

280. "Manslaughter", definition of

A person who unlawfully kills another under such circumstances as not to constitute wilful murder or murder is guilty of manslaughter.

287. Penalty for manslaughter

Any person who commits the crime of manslaughter is liable to imprisonment for 20 years.

Given that manslaughter occurs already within the WA criminal statutory framework, it is not clear why the crime of industrial manslaughter is required. What is more, the inclusion of a crime of such gravity in a strict liability setting is problematic. It would be better to retain the offences and a defer to criminal manslaughter where required (noting that this crime relies on centuries of jurisprudence and has within it all requisite elements).

2.1.2 Balance of Probabilities:

Having criminal manslaughter provided for within the WHS Act adds to the disclarity of the requisite elements of the crime. Is it the crime subject to the same judicial procedure as with other offences within the Act, and decided on the 'balance of probabilities'? Surely culpability as to a crime of such gravity as industrial manslaughter needs to be clearly subject to the same criminal procedure as those crimes outlined in the Criminal Code 1913, 'beyond any reasonable doubt'?

It is noted that the incorporation of Industrial Manslaughter in the Australian Capital Territory involved that amendment of the Crimes Act.

2.1.3 Agreement with Other submissions:

This submission supports the following points outlined in the Joint Industry Submission and the Submission from the Western Australian Fishing Industry Council.

Whilst industrial manslaughter laws exist in other states, the laws proposed in WA differ in that:

- **Low Prosecutorial Standard:** The standard for the proposed WA offences in section 30B is much lower than other State jurisdictions. The language used to the drafting of section 30B makes it easy for WorkSafe to secure a successful prosecution in any matter involving a workplace fatality, without the corresponding protections or procedural fairness elements apparent. Whilst the prosecution bears the onus of proof, the bar to establish culpability is so low, and does not require any of the standard requirements for a manslaughter provision (knowledge, recklessness,

negligence, deliberate act etc) which exist in all other Australian jurisdictional safety legislation.

- **The Laws Already Exist** - WA already has laws covering negligence which contributes to injury or death in a workplace, including jail sentences (*Occupational Safety and Health Act 1984* and *Criminal Code*). The additional offence of Industrial Manslaughter is a duplication of existing laws, in circumstances where only 12 months earlier the penalties for workplace fatalities were increased to penalties higher than the national model. Individuals currently face 5 years' imprisonment and fines up to \$680,000; and body corporates currently face fines up to \$3.5 million.
- **Extreme nature of section 30B** – The proposed offence in section 30B goes further than any accepted industrial manslaughter provisions in jurisdictions that have them to date, and further than any recommendations in relation to industrial manslaughter offences from other jurisdictions. There are no equivalent provisions in force elsewhere with as low a standard to meet, yet as high a corresponding penalty. Section 30B requires consideration as to the impact, including unintended consequences, which has not occurred without proper consultation on the proposed offences.
- **Low standard of proof** – The very low standard of proof required to prosecute under section 30B, which does not require negligence, gross negligence or recklessness; and with respect to 30B(1), does not even require knowledge (It also puts employers at risk of prosecution for actions by employees that they may not be directly involved with or if the victim is a person who visits or strays into a workplace, whether invited or not).
- **Exclusionary nature** – Exclusion of a whole class of persons from responsibility (employees).
- **Extreme, broad reach of s30B** – No obvious areas it wouldn't catch, including sectors such as health (hospitals, medical services), front line services such as policing, farming, transport/ logistics, apprenticeships and training. How will laws address mental health and suicide?
- **IM does not improve safety** - Despite IM laws in place, the ACT has higher rates of serious injury than both WA and the national rate. Similarly, in the UK, the rate of workplace fatalities has remained relatively flat since IM was introduced. IM simply does not provide the 'deterrent' effect anticipated by the Government.
- **Independence and expertise of Counsel** – concerns over appropriateness of section 30B offences prosecuted by investigator (WorkSafe) rather than independent counsel at DPP as per 30A. This is a significant justice and procedural fairness issue.
- **Relevant Court** – concerns over s30B being tried in Magistrates Court, rather than in the District Court (a superior Court, same as 'County Court' in Victoria), where most indictable offences are usually tried, with only some serious offences going to the Supreme Court.
- **Defences** – it is not clear as to the applicability of defences under the Criminal Code.
- **Other issues** relating to procedural fairness, privilege, legal representation etc.
- **Section 31** – Legal and justice issues also arise with s31, which mirrors the drafting of s30B, but deals with causing serious harm to an individual that doesn't result in death.

Recommendation: That criminal 'Industrial Manslaughter' be covered under criminal manslaughter as provided for within s 280 Western Australia Criminal Code Act Compilation Act 1913.

SUMMARY

The PPA appreciates the opportunity to make a submission on the Standing Committee on Public Administration – Inquiry into the issue of Property Rights.

PPA asks that our following submissions be provided with due consideration and reiterate that we would appreciate the opportunity to speak to our submission should the Committee require it.

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