EUREKA LAWYERS

SUBMISSION TO THE WESTERN AUSTRALIAN LEGISLATIVE COUNCIL STANDING COMMITTEE ON LEGISLATION

INQUIRY INTO PART 2 OF THE WORK HEALTH AND SAFETY BILL 2019

1. Our firm

1.1. Eureka Lawyers is a Western Australian law firm specialising in personal injuries, industrial relations and work health and safety (**WHS**). We represent several large trade unions with members in the construction, manufacturing, services, and retail industries.

1.2. In view of our experience representing injured workers and trade unions, we welcome the opportunity to make a submission to the Legislative Council's Standing Committee on Legislation (**Committee**) in respect of its Inquiry into Part 2 of the Work Health and Safety Bill 2019 (**WHS Bill**).

2. Background to the WHS Bill

2.1. As the Committee will be aware, the WHS Bill arises out of a process extending beyond the last decade to harmonise WHS legislation across Australian jurisdictions and New Zealand.

2.2. The WHS Bill has been subject to substantial consultation with stakeholders since as early as 2012 under successive governments. Those consultations have involved employer organisations and trade unions, and complemented feedback from the tripartite Commission for Occupational Safety and Health.

2.3. Our submission focuses on two aspects of the WHS Bill: first, the reform of WHS duties, including in respect of psychological health; and, second, the proposed penalty regime, including the introduction of an offence of industrial manslaughter.

3. The need for modern duties

3.1. The duties set out in Division 2 of Part 2 of the WHS Bill largely reflect those proposed through the harmonisation process.

3.2. The express extension of duties to persons conducting businesses or undertakings (**PCBUs**), designers, manufacturers, importers, etc, will ensure that responsibility for WHS is taken at all points in the supply chain. These provisions reflect the modern structure of industries and the modern approach to WHS. They should therefore be uncontroversial to the Committee.

3.3. The critical amendment made by the Government in respect of the scope of these duties (as compared to the model WHS laws) has been to expressly include references to psychological health. That has been done both through the definition in clause 4, the note in clause 19(5) that clarifies that "Health means physical and psychological health", and the regulation-making powers in clause 5(a) of Schedule 3.

3.4. These provisions are clear improvements. It is abundantly clear from recent reports that psychological wellbeing in the workplace is an increasing problem.[1] That is also consistent with our experience in the workers' compensation field, where claims in respect of psychological injuries caused by stress and bullying are increasingly common. Western Australia has been a national leader in addressing psychological health in the workplace.[2] The Committee can be satisfied that endorsing these amendments to the model laws would continue the State's positive work in this area.

3.5. We share the concerns that the WHS Bill, to the extent that it reflects the model laws, does not go far enough in identifying the ways in which psychological risks present in the workplace and the ways of managing those risks.[3]

3.6. This would most appropriately be remedied by including reference to psychological health in the relevant regulations issued under the WHS Bill as recommended by Marie Boland, former Executive Director of SafeWork SA, in her independent report to Safe Work Australia (**Boland Report**).[4]

4. The need for adequate sanctions

4.1. The effective regulation of individual and corporate conduct, regardless of the area of law, demands that regulators have a suite of sanctions available to them in respect of breaches of the relevant laws. That is because it is necessary to apply sanctions that are proportionate to the offending conduct and that can be adapted to achieve specific and general deterrence.

4.2. The WHS Bill seeks to achieve these aims by the introduction of increased civil penalties, as well as a new offence of industrial manslaughter.

4.3. In this section, we reflect on how the WHS Bill's penalty regime, including the introduction of industrial manslaughter, reflects the need to provide for adequate sanctions for breaches.

The need for proportionality

4.4. The principle of proportionality is well-established as a touchstone of applying sanctions for breaches of the law. Indeed, it is one of the key principles outlined in Safe Work Australia's National Compliance and Enforcement Policy.[5]

4.5. Proportionality ensures that the "punishment fits the crime". It is, in effect, a way of ensuring that community expectations are reflected in the law.

4.6. In respect of workplace safety, it is now abundantly clear that the community expects that workplace fatalities caused by negligent practices should be subject to

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1 Centre for Transformative Work Design, 'Impact of FIFO work arrangements on the mental health and wellbeing of FIFO workers', Perth, September 2018.

2 Department of Mines, Industry Regulations and Safety, 'Code of Practice: Mentally healthy workplaces for fly-in fly-out (FIFO) workers in the resources and construction sectors', Perth, 2019.

3 National Research Centre for OHS Regulations, 'Effectiveness of the Model WHS Act, Regulations, Codes of Practice and Guidance Material in Addressing Psychosocial Risks, Working Paper 7, 2016, 57 to 58.

4 M Boland, 'Review of the model Work Health and Safety laws: Final report', Canberra, December 2018, 33 to 35.

5 Safe Work Australia, 'National Compliance and Enforcement Policy', Canberra, 2009, 3.

the most serious sanctions, up to and including prosecution for industrial manslaughter.

4.7. This expectation is reflected in the number of Australian jurisdictions that have now implemented, or signaled an intent to implement, an industrial manslaughter offence.

4.8. While industrial manslaughter was once an area of contention, it is now an established feature of Australian WHS laws. Indeed, the introduction of industrial manslaughter would bring Western Australia in line with Victoria, Queensland, the Australian Capital Territory and the Northern Territory.

4.9. Furthermore, the introduction of industrial manslaughter has been recommended by:

(a) the report tabled by the Senate Education and Employment References Committee on 17 October 2018 (**Senate Report**);[6] and

(b) the Boland Report.

4.10. Community expectations in respect of industrial manslaughter are reflected in the Senate Report by the detailed evidence given by family members of victims of workplace fatalities . As one example, Janice Murrie, father of Luke Murrie who was killed at work in 2007 at aged 22, said:

> We never got justice for Luke. He was killed. It wasn't an accident; he was killed. It made us feel that his life was worthless or that he wasn't important. So you have to make the punishment fit the crime. We're living with the fact that we will never see our son again. It's 11 years this October, but the directors got a piddling fine. They're off with their families. Good on them! I hope they rot in hell, because they didn't hurt and they knew that it wasn't going to hurt. So you have to make it fact that you can go to jail and you can sit in jail every day and remember why you're sitting there – because you killed someone. If you shot someone with a gun, you'd go to jail because you're a bad person. But if you kill them at the workplace you're not a bad person.[7]

4.11. Mrs Murrie's comments, and the comments of many other witnesses, are consistent with the expert evidence given by Dr Lynda Matthews, an Associate Professor in the Faculty of Health Science at the University of Sydney, to the Senate Report. Dr Matthews is quoted on the feelings of families of workplace fatalities as follows:

> There is a strong desire for measures to be taken to ensure hazards are addressed so that something positive comes from the work tragedy and other families do not have to experience the same grief. They are often disappointed. Community expectations are that the system provides some type of legal justice for the death if it's not identified as a true accident. In the eyes of many families, justice is rarely done.[8]

4.12. Evidence such as this, together with stakeholder feedback, led the Boland Report to conclude as follows:

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6 Senate Education and Employment References Committee, 'They never came home – the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia', Canberra, October 2018.

7 Ibid, 8 [2.10].

8 Ibid, 77 [6.2].

> The strong community expectation is that it should be possible to prosecute for the death of a person under a statutory offence of industrial manslaughter in the model WHS laws.[9]

4.13. The Committee can therefore be comfortably satisfied that community expectations, and the view of experts in the field, support the introduction of industrial manslaughter as a proportionate response to fatality-related breaches of WHS laws.

The need for deterrence

4.14. The overarching goal of any regulatory regime must be compliance. In that respect, there are a variety of methods that should be available to regulators to secure compliance, including educative and persuasive methods. However, they must be combined with deterrent, penal methods in appropriate cases.

4.15. The WHS Bill provides for educative and persuasive methods through, *inter alia*, the following:

(a) Providing that both the regulator and the Work Health and Safety Commission have the express function of promoting education and training in work health and safety as widely as possible;

(b) Giving the regulator the power to issue provisional improvement notices, improvement notices, prohibition notices and non-disturbance notices.

4.16. The complementary, deterrent methods are reflected in the WHS Bill's provision for:

(a) increased civil penalties relative to the OSH Act;

(b) terms of imprisonment as currently set out in the OSH Act, plus civil penalties and terms of imprisonment for the new offence of industrial manslaughter (as a crime and offence).

4.17. It is a necessary feature of any penalty regime that the penalties that may be imposed should be set at a level so as not "to be regarded by the offender or others as an acceptable cost of doing business" and which will deter them from "the cynical calculations involved in weighing up the risk of penalty against the profits to be made from contravention".[10]

4.18. Furthermore, international instruments ratified by Australia oblige it to ensure that violations of WHS laws and regulations are accompanied by "adequate penalties".[11]

4.19. The increased penalties in Subdivision 3 of Division 5 of Part 2 of the WHS Bill have plainly been set at a rate that ensures they are not regarded as a "mere cost of doing business". They are also appropriately adapted to provide for higher penalties for more serious offences. Previous penalties under the OSH Act had become outdated and lost their deterrent effect.

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9 Boland, above n 4, 120.

10 *Singtel Optus Pty Ltd v ACCC* (2012) 287 ALR 24, [62].

11 *Occupational Safety and Health Convention,* 1981, No 155, Art 9.

4.20. In respect of industrial manslaughter, it is important that there be a deterrent aspect above and beyond economic consequences for fatality-related breaches. The criminal law has long recognised that it is not only the conduct and intentions of the accused that determine the seriousness of the offence and the penalty, but also the consequences.

4.21. Given that corporations can only act through their officers, making terms of imprisonment available as a penalty against individuals will further ensure that responsibility is taken by those officers with control over WHS. It is also consistent with the notion that WHS is a responsibility that, while collectively shared, is personally held by workers, managers, directors, and other parties.

4.22. The distinction in penalty level between clauses 30A and 30B is appropriate in view of the differing levels of intentionality, and so culpability, that a person may have in respect of a fatality-related breach.

4.23. The Committee can therefore be satisfied that the offences and penalties in Part 2 of the WHS Bill are adequate in achieving a deterrent effect, while being proportionate to the nature of the underlying conduct.

Case Study: Death of Marianka Heumann

4.24. The need for clauses 30A and 30B is sharply underlined by the many preventable fatalities that have occurred in Australia, including in Western Australia, in recent years. Indeed, the Queensland District Court recently sentenced two directors to terms of imprisonment (suspended) for industrial manslaughter in circumstances where the fatality was plainly preventable.

4.25. The need to provide for industrial manslaughter, so as to ensure that community expectations are met and that the regulator is armed with the proper suite of penalties, is also ably highlighted by the death of Marianka Heumann in October 2016.

4.26. Ms Heumann died after falling 13 floors down an open shaft at the Concerto Apartment site in East Perth (**Concerto Site**) occupied by Hanssen Pty Ltd.

4.27. Following Ms Heumann's death, Gerry Hanssen, the Managing Director of the occupier, sent an email to Ms Heumann's family in which he indicated, in graphic terms, that Ms Heumann was solely responsible for her fate:

> Marianka was a lovely , well respected,dedicated worker and a valuable member in our company.
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> Very sadly in a moments lack of concentration and dedicated to do the right job she ommitted to harness up and secure herself.
>
> She did this job for 15 floors impeccably and a 30 second lack of concentration caused this fall.
>
> Only God would know the answer.
>
> All 300 people on site ,their thoughts and prayers are with her.
>
> Well had a Buddhist monk bless her spirit on the place of the accident the next day.

> He said to all of us,if her spirit could talk what would she say to all of us, his answer was, Marianka would say I AM SORRY FOR LETTING YOU DOWN to my mum,dad,family,friends and workmates.

4.28. In addition to the singular tragedy of Ms Heumann's death, the consequences arising from it have taken years to resolve, and in some important respect, remain unresolved.

4.29. On 8 December 2016, and in the wake of Ms Heumann's death, the CFMMEU's Occupational Safety and Health Officer received photographs that appeared to show open penetrations and other fall hazards at the Concerto Site. On 9 December 2016, two permit holders attempted to exercise their lawful right to enter the Concerto Site to investigate suspected breaches of the OSH Act.

4.30. The permit holders were denied entry by the occupier's agents, including Mr Hanssen, in contravention of ss 501 and 502 of the *Fair Work Act 2009* (Cth).[12] In imposing penalties for those contraventions, Street J expressly noted that the refusal was more serious by reason of Ms Heumann's recent death at the Site:

> In the circumstances of the present case, the Court is satisfied that there is a need for [a] specific deterrent as well as a general deterrent. The evidence before the Court was that this particular site there had been a fatality in respect of an employee prior to the applicants taking steps to seek to investigate the photographs that gave rise to the contraventions in the present case. In circumstances where there had been a fatality at this particular site, the respondents should have had an even greater height of sensitivity and need to ensure compliance with legal obligations and, in particular, in respect of safety standards. The Court regard[s] that background as an aggravating factor in the context of the issue of penalty. There is no issue but that the conduct was deliberate.[13]

4.31. Despite the Australian Building and Construction Commissioner (**ABCC**) being a dedicated and well-resourced regulator in the construction industry, the ABCC did not commence its own proceedings against Hanssen Pty Ltd and its agents or otherwise intervene in support of the CFMMEU's proceedings.

4.32. Indeed, the only substantive regulatory response to Ms Heumann's death was taken by WorkSafe on 7 November 2019 when it commenced criminal proceedings against Hanssen Pty Ltd for breaches of the OSH Act. Without intending any criticism of the regulator, the prosecution was commenced more than three years after Ms Heumann's death and will no doubt take time to progress through the criminal justice system.

4.33. The facts of Ms Heumann's death, and the regulatory response to it, indicate the following:

(a) Ms Heumann's death occurred in circumstances where she worked on a site occupied by an entity that has previously, and subsequently, contravened WHS and industrial laws.[14]

(b) The approach of Mr Hanssen was to blame Ms Heumann for her death in a personal email to her family and in circumstances where no investigation into

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12 *CFMMEU & Ors v Hanssen Pty Ltd & Ors* [2019] FCCA 1664.

13 *CFMMEU & Ors v Hanssen Pty Ltd & Ors* [2019] FCCA 1667, [5].

14 See, eg, prosecution details at <https://prosecutions.commerce.wa.gov.au/prosecutions/view/546>; *Jones v Hanssen Pty Ltd* [2008] FMCA 291; *CFMMEU & Ors v Hanssen Pty Ltd & Ors* [2019] FCCA 3411.

the cause of her death had been concluded. One can only imagine that Ms Heumann's family share the feelings expressed by Mrs Murrie about the lack of responsibility taken by company directors.

(c) The only legal proceedings successfully brought against the occupier subsequent to Ms Heumann's death have been brought by the CFMMEU in respect of a failed attempt to enter the Site to investigate suspected breaches of the OSH Act that mirrored the circumstances of Ms Heumann's death.

(d) While the occupier and its agents have been penalised for that conduct, no remedy can ever be granted to allow the CFMMEU's permit holders to conduct the investigation of the suspected breaches of the OSH Act. It is therefore only luck that another fatality did not occur at the Site in the months following Ms Heumann's death.

(e) No prosecution, or other report, that would publicly shed light on the circumstances of Ms Heumann's death has been concluded.

4.34. The treatment of Ms Heumann's death, the regulatory response, and the penalties so far imposed for events occurring in the wake of the fatality, do not reflect the community's expectations of an adequate response on any measure. They also fall far short of achieving the aim of deterrence.

4.35. Ms Heumann's tragic death therefore underlines the need to introduce industrial manslaughter so that there are offences and penalties available under WHS laws that are proportionate, and that act as a deterrent, in the context of workplace fatalities.

Arguments against industrial manslaughter

4.36. Finally, we turn briefly to the arguments put against the introduction of industrial manslaughter. Those arguments include the following:

(a) Existing criminal offences are sufficient and that the introduction of industrial manslaughter would "cut across" existing criminal laws.[15]

(b) The consequence of breaches of WHS laws in causing a fatality should not justify a separate offence of industrial manslaughter.[16]

4.37. In response to each of those arguments, we note as follows:

(a) Ordinary criminal offences are not appropriately adapted to dealing with fatalities caused by breaches of WHS laws.[17] Furthermore, workplaces are highly regulated by Australian law, strengthening the case for an offence that is specifically attuned to workplace fatalities caused by corporate negligence or recklessness.

(b) This argument is out of step with community expectations, and the general character of other criminal offences, in that the consequences of breaches of

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15 Workplace Relations Ministers' Council, 'WRMC response to recommendation of the national review into model OHS laws', Safe Work Australia, Canberra, 2009 at 13.

16 R Stewart-Crompton, S Mayman & B Sherriff, 'National review into model occupational health and safety laws: First report', Department of Education and Workplace Relations, Canberra, 2008 at 135.

17 Boland, above n 4, at 120 to 122.

WHS laws is plainly a matter that is relevant to determining the appropriate offence and penalty.

4.38. These arguments, like most arguments against the introduction of industrial manslaughter, are misguided or outdated. They do not reflect current community expectations or the prevailing approach to fatality-based offences in WHS laws. They accordingly should not be accepted by the Committee.

5. Conclusion

5.1. Having regard to the above commentary, we consider that the WHS Bill as presently drafted strikes the right balance between harmonisation and making amendments to improve on the model laws.

5.2. The WHS Bill is long overdue. Its provisions in respect of duties and psychological health will modernise Western Australia's WHS laws. It will also ensure that community expectations and deterrence are reflected in the introduction of industrial manslaughter.

5.3. We therefore commend the WHS Bill to the Committee.