Australian Hotels Association
WESTERN AUSTRALIA

26 June 2020

Hon. Dr Sally Talbot MLC
Chair
Legislative Council Standing Committee on Legislation
Parliament House
4 Harvest Terrace
West Perth WA 6005

Via Email: www.parliament.wa.gov.au/subportal

Dear Dr Talbot Sally

AHA SUBMISSION - *WORK HEALTH AND SAFETY BILL 2019*

The Australian Hotels Association WA (**AHA**) welcomes the opportunity to make a submission to the Legislative Council Standing Committee's inquiry into the *Work Health and Safety Bill 2019* (the **Bill**). The AHA is the peak industrial organisation representing employers in the hotel and hospitality industry in Western Australia.

The harmonisation of the Western Australian Work Health and Safety Legislation with the model national laws has been a priority for the Government since 2017. Our substantive recommendations on the Bill are outlined in the Joint Industry Employer Group's submission submitted on 26 June 2020, however we wish to highlight some of the key concerns from a hospitality industry perspective in this individual submission.

Our primary concerns relate to the proposed introduction of the industrial manslaughter provisions, specifically section 30B of the Bill and the appropriateness and operation of penalties on employers and those who may be deemed to be 'officers' within the hospitality industry workplace, such as a shift supervisor.

We acknowledge there are low instances of fatalities in the hospitality industry, however, the recent events in relation to the COVID-19 pandemic has posed a new risk to the hospitality industry in light of the proposed introduction of section 30B of the Bill.

Overview

The Bill introduces an expanded definition of those who have responsibility for work health and safety. Instead of the traditional concept of 'employer', any person conducting a business or undertaking (**PCBU**) will now have a primary duty of care.

In addition, 'officers' will have due diligence obligations, meaning they need to be proactive and do what is reasonably practicable to ensure safety. 'Officer' is defined as anyone who makes or

participates in making, decisions that affect the whole, or a substantial part, of the business of a corporation. In the hospitality industry this could arguably include a 'Head Chef' or even go so far as to extend to a temporary manager, such as a 'shift supervisor' who is not necessarily in a key decision making role, but is deemed to be the 'supervisor' making decisions over a substantial part of the business, on any given shift.

For example, a small bar employs a total of 8 people, of which 2 or 3 employees are required to act in the capacity as an 'approved manager' for the purposes of the requirements under the *Liquor Control Act 1988* (WA). An approved manager could be any employee who is charge for a period of time the hospitality venue us open. Arguably, an 'approved manager' may fall in the definition of 'officer' under the Bill, thereby extending the due diligence obligations under the Bill to an employee that is not necessarily in a key decision-making role but a necessary position under the *Liquor Control Act 1988* (WA). In our view, this is an unintended consequence of the legislation as currently drafted.

Critical issues

The AHA considers section 30B of the Bill unnecessarily imposes significant consequences on employers within the hospitality industry in Western Australia. As a result, it exposes our members to more significant and, in our view, disproportionately harsh consequences which hospitality industry employers in other states do not have to contend with.

As previously mentioned, our primary concerns with respect to the Bill relate to the industrial manslaughter provisions, more specifically section 30B, being the 'simple offence'.

The nature of the section 30B(1) offence has no equivalent counterpart in any other jurisdiction in Australia. Further, section 30B(1) does not require a mental element (such as reckless or negligent conduct) for the purpose of a successful prosecution. Currently section 30B(1) merely requires a breach of the safety rules.

This concern is further compounded by the exclusionary nature of section 30B(1) of the Bill; specifically that employees, as a group are excluded from liability even when the cause of a workplace death may be attributable to the actions of the deceased. This may have the effect of attributing guilt to those who were not directly involved in the offence, particularly in the case of small business owners who could be imprisoned for up to 10 years through no fault of their own. Further, in its current form, there are no defences available in the Bill for PCBUs with respect to this offence.

Finally, based on our understanding, neither the Boland Review nor the State Government's own inquiry demonstrated any positive correlation with the inclusion of the industrial manslaughter offences and the deterrence of workplace deaths in jurisdictions which had industrial manslaughter offences included in their respective workplace health and safety legislation.

Further details in relation to these critical issues are outlined in the Joint Industry Group submission.

Contemporary application

The AHA acknowledges fatalities in the accommodation and food services sector based on national data are negligible when compared to other sectors (nationally 0.1). However, we have

contemplated the potential risk in the context of recent events such as COVID-19 and are of the view the proposed industrial manslaughter provisions could have a significant impact for our industry.

For example, during the COVID-19 crisis, a number of hotels and accommodation service providers were requisitioned by the State Government to provide accommodation to quarantining travelers. During this time, a number of those travelers tested positive to COVID-19. If an employee of the hotel subsequently contracted the virus whilst at work, because that employee chose not to wear a mask, or did not wash their hands correctly, and the virus resulted in that employee's death, it would be argued, under the proposed legislation, the employer failed in their duty of care to provide a safe workplace.

In this situation an employer is not necessarily negligent, particularly where they had provided all their employees with adequate PPE and training in relation to COIVD-19 safety precautions. If an employee chooses not follow those procedures competently, under the proposed section 30B(1) an employer, (if an individual) could be imprisoned for 10 years and/or receive a fine of $2.5 million, or if an employer is a body corporate, fined $5 million dollars.

Our primary concern with the industrial manslaughter 'simple offence' as demonstrated is employers can be held liable in a situation where their employees have been careless.

Conclusion

For the above reasons, the AHA strongly opposes the introduction of the proposed new industrial manslaughter offences set out in the Bill. Instead, we recommend the focus and funding be directed to practical and effective safety measures, including proactive education initiatives and worksite inspections by WorkSafe as outlined in more detail in the Joint Industry Employer Group submission.

In any event, if there is to be an industrial manslaughter offence included in the Bill, then it is the AHA's recommendation the provisions be more akin to the proposed section 30A, which is similar to the industrial manslaughter provisions in other jurisdictions such as the ACT, Queensland, the Northern Territory or Victoria, which requires some form of negligence or reckless conduct.

We thank the Legislative Council Standing Committee for the opportunity to provide a submission into the Inquiry.

Yours sincerely

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