



SUBMISSION TO SENATE LEGAL & CONSTITUTIONAL AFFAIRS INQUIRY INTO *CRIMINAL CODE AMENDMENT (AGRICULTURAL PROTECTION) BILL 2019*

5 AUGUST 2019

Australia's Right to Know (ARTK) coalition of media companies appreciates the opportunity to make this submission to the Senate Legal and Constitutional Affairs Committee (the Committee) inquiry into the *Criminal Code Amendment (Agricultural Protection) Bill 2019* (the Bill).

We note the Bill introduces two new offences relating to the incitement of trespass or property offences on agricultural land – specifically where a person uses a carriage service to transmit, make available, publish or otherwise distribute material to incite another person to trespass or commit property offences on agricultural land. We note that this legislation seeks to penalise and imprison individuals even where a trespass has not occurred. It is extraordinary that an individual might face a criminal penalty, including imprisonment, where the farmer or primary production business has not in fact suffered any detriment.

While we confine our comments to the news reporting aspects of the Bill, those comments are framed by our overarching concern that the provisions of the Bill unnecessarily duplicate existing laws and also reach further. The Bill, therefore, has broader ramifications including having a chilling effect on reporting and public debate, and discouraging whistle-blowers and sources of stories of this kind.

Exemption

Sections 474.46(2) and 474.47(2) provide for material relating to a news report or current affairs report that (a) is in the public interest; and (b) is made by a person working in a professional capacity as a journalist. This places an evidentiary burden on the plaintiff.

Public interest

Public interest is not defined in the Bill and views may differ about its meaning. At times the public interest is starkly obvious: For example:

- *60 Minutes – live export trade*

In April 2018, footage was aired on Channel Nine's *60 Minutes* program showing hundreds of live sheep, cramped together and dying aboard a squalid live export ship.

The video was filmed by a navigation officer on-board the ship who told the *60 Minutes* crew that the sheep, unable to leave the boat, were essentially being put in an oven.

Following the airing of the program, the Federal Department of Agriculture sent Emanuel Exports, the company responsible for the live export ship featured in the footage, a show-cause notice. Emanuel Exports was required to demonstrate why it should not be stripped of its export licence.

Emanuel failed to satisfy the Department and its licence was suspended in June 2018, which demonstrates the clear public interest in exposing these practices.

Working conditions in abattoirs and primary production businesses is also clearly in the public interest. For example:

- *“Slaving Away: The dirty secrets behind Australia’s fresh food” – Four Corners investigation into exploitation of migrant workers in Australia’s food production*

In May 2015, an episode of *Four Corners* revealed slave-like working conditions in primary production businesses, including chicken processing factories and vegetable farms. Those conditions included brutal working hours, degrading living conditions and massive underpayment of wages. Migrant labourers and backpackers were exploited, and female workers harassed and assaulted.

ARTK recommends that the journalism exemptions in sections 474.46(2) and 474.47 (2) be amended to be consistent with the defence at section 122.5(6) of the *Criminal Code Act* as set out below.

Further, section 13.3 of the Criminal Code should not apply to the exemption: the onus of proof should not be on the defendant. Recent AFP investigations demonstrate that an investigating authority does not take prospective defences or exemptions into account, meaning that a journalist can be subjected to a criminal investigation for a publication which was in the public interest.

Subsection (1) does not apply to material if the material relates to a news report, or a current affairs report, made by a person engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media, and:

(a) at that time, the person reasonably believed that engaging in that conduct was in the public interest; or

(b) the person:

(i) was, at that time, a member of the administrative staff of an entity that was engaged in the business of reporting news, presenting current affairs or expressing editorial or other content in news media; and

(ii) acted under the direction of a journalist, editor or lawyer who was also a member of the staff of the entity, and who reasonably believed that the material was in the public interest.

Subsection 13.3(3) does not apply to the matters in this subsection.

A *reasonable belief* of public interest by a person engaged in the business of reporting news or current affairs strikes the appropriate balance between protecting media freedom and the detriment which is allegedly caused by trespassers on agricultural land. It would also place a fairer burden on a media defendant. The broader application to members of administrative staff is also important for large media organisations where tasks are shared amongst a team.

Further, the Committee will be aware of a recent judgement in the NSW Supreme Court which found that media companies are liable in defamation matters for publishing comments posted on their Facebook pages by third

party users.¹ It is important to note that decision is now subject to an appeal by the parties. Having said that, we are concerned that a similar – erroneous – approach may be taken in regards to the proposed offences in relation to media companies' Facebook pages or other modes of publication, communication or broadcast which invite or encourage public comments but over which media companies either have no editorial controls or insufficient control to edit such comments before they go live. provided a forum for publication of comments and encouraged the publication of comments, and also had control over the comments.

We believe it would be appropriate for the proposed Bill to be clear that media companies will not be held to be liable for third party comments on news stories, on Facebook or any other online location. To that end we also support the Law Council of Australia recommendation of a clarification to aid the interpretation of the offence.

Whistle-blowers

Lastly, the Committee will be aware that ARTK is concerned regarding the lack of effective protections for public sector whistle-blowers in the *Public Interest Disclosure Act*. We urge the Committee to recommend that the PID Act be reviewed to ensure effective protections for whistle-blowers including in regard to the proposed offences of the Bill.

Similarly we are concerned that corporate whistle-blowing protections may not be sufficient to provide effective protections regarding this area. We note that the Law Council raises these issues in that submission in a more detailed fashion than we do here.

¹ *Voller v Nationwide News Pty Ltd; Voller v Fairfax Media Publications Pty Ltd; Voller v Australian News Channel Pty Ltd* [2019] NSWSC 766