

Consultation RIS – Recommendations of the 2018 Review of the model WHS laws

I write as a bereaved parent.

Our story

Our son, Jarrod died at work on the 14th of April, 2012 whilst in the employment of Paspaley Pearling Ltd.

Jarrod was a very popular, lively, compassionate, intelligent young man, a much-loved family member, just 22 years of age, who went to work one day and lost his future, his ambitions, his potential, his whole life. The repercussions have been devastating to his family, his extended family and his large group of friends.

It was only his second day of drift diving. He surfaced in distress and alerted crew-members on the boat. The lack of any rescue procedure, clearly prescribed in the company's own Code of Practice, meant that it took at least 20 minutes to retrieve him from the water – the company continues to claim it did not think drowning might be a risk worth assessing under OH&S. Once Jarrod was finally "hauled up a ladder" there was no defibrillator to assist with his revival.

The Occupational Health & Safety Act was passed in 1984.

Fifteen years later, in 1999, Paspaley Pearling Ltd, a large company that employs workers in a very dangerous environment by their own admission, first appointed a dedicated OH&S Manager. The appointed Manager described the situation at the time as "a greenfield site". This employee had responsibility for the entire group of Paspaley businesses, an impossible task for one person.

It is a matter of record that another 13 years later, at the time of Jarrod's incident, very little had been done in assessing any risk in the pearling operations.

My wife Robyn, and I owned and operated a printing business in Victoria from 1991 for 16 years. We attended numerous employer association meetings on workplace safety and conducted risk assessments on our processes and our premises. We had lines around the factory for paper storage, walking tracks, forklift tracks and a manual full of procedures. There is no doubt in our minds that the inaction of Paspaley towards the duty-of-care of its employees represented unlawful negligence.

Jarrod's death was investigated by the WA Water Police, they impounded the boat from which Jarrod was working at the time and conducted a

detailed examination. The Police interviewed co-workers and others associated with Jarrod's role on the boat and issued a list of eleven recommendations to Paspaley. Those recommendations encompass absolutely basic, minimum safety issues for this high-risk work, particularly where that work is undertaken in a maritime environment remote from emergency rescue and medical services. The Water Police have no power to do other than issue recommendations. On the other hand WorkSafe WA did have the power to require that specific measures be addressed through the issue of Improvement Notices or Prohibition Notices under sections 48 and 49 of the Occupational Health and Safety Act. Despite this, the boat from which Jarrod was working on when he died resumed operations when released by the Water Police, without the Police recommendations having been addressed. The company stated that the "recommendations have been taken under advice".

Worksafe investigators were in attendance in Broome immediately after the incident, but only for a couple of days. After repeated attempts to find out when the Worksafe investigation would resume we were told on the 31st of May 2012 that the suspension of WorkSafe's investigation for "some weeks while the WA Police conducted the field and related investigations" is "underway again", after 8 weeks.

Two years and 2 months later, in July 2014, Worksafe formally charged Paspaley as follows: 'Being an employer, failed so far as was practicable, to provide and maintain a working environment in which the employees of the employer were not exposed to hazards; contrary to sections 19(1) and 19A(3) of the *Occupational Safety and Health Act 1984*.' The maximum penalty under this offence is a fine of \$200,000. We considered the charge and the penalty to be totally inadequate.

Fourteen months later, after negotiations with Worksafe, Paspaley indicated they would enter a guilty plea. We have no idea what was "negotiated", this information being classified as confidential by Worksafe.

The case finally made it to the Magistrates Court in Broome in October 2015.

In his summing up the magistrate repeatedly referred to the company as a "good corporate citizen", an "innovator in safety" who had saved the public an enormous amount of money with their "early guilty plea", and cited the company's perfect safety record (a perfect safety record is one where nothing is recorded). The Magistrate failed to mention the clear breach of the Pearl Producers Association guidelines: to have and consistently practice a water rescue procedure. It was accepted in court that the timing of Jarrod's recovery from the water was "between 5-to-10 minutes" instead of what we believe was "close to 25 minutes" quoting the Coronial Police Investigator at the time. Jarrod had performed 8 dives already that day over approximately a 9-hour period before the fatal dive.

After an earlier dive that day he confided with a fellow diver that he had nearly died as a consequence of losing his work-line resulting in a very strenuous, traumatic emergency ascent. The Magistrate considered there was adequate supervision on the basis that the crew had some social contact between dives and at the end of each day.

Paspaley was fined \$60,000, just 30% of the maximum possible fine for this charge. A 30% reduction of the maximum fine was awarded for the "early" guilty plea alone.

The whole experience was deeply insulting to us, and to Jarrod, and should be of great concern to anyone who believes in justice.

A Coronial Inquest was always going to be the most effective, trustworthy place to find out exactly what might have caused Jarrod distress underwater, to analyse the actions taken by the crew and explore possible improvements to workplace practices and procedures to minimize the chance of this tragedy being repeated. However, the Inquest had to be suspended pending the charges laid by Worksafe. Why? Surely the Worksafe case against the company would have benefitted through access to the evidence and witness statements submitted by the Water Police to the Coroner's office.

The decision to call an Inquest was repeatedly adjourned - in case Worksafe placed charges - and then suspended until the case was completed. The Inquest was finally held in May, 2017.

The outcome of the Worksafe investigation and prosecution should be of concern to every single employee in Western Australia. Were all Paspaley OH&S records scrutinised to establish the truth of their history and attitude towards workplace safety?

This is clearly an industry operating outside of what are considered acceptable standards of training and safety in the 21st century. The pearling industry operates under the "General Diving" classification, basically self-regulation. They have failed spectacularly in the management of Occupational Health & Safety. They are a commercial operation and should be subject to the regulations of the Commercial Diving classification.

What steps have Worksafe taken as a result of the conviction?

Did Worksafe provide any analysis or opinion of the General Diving classification for this particular industry?

Did it make any further recommendations at all?

Does Worksafe consider the following work practice of pearl divers to be fair and reasonable?

- 9 dives per day, averaging 40 to 50mins duration, for 10 consecutive days
- 1st dive approx 6am, last dive approx 5pm, basically sunrise to sunset
- Surface interval time between dives approx 20mins, a combination of rest, shell cleaning, gear checking and sustenance

Has Worksafe sought advice in this area?

We have been left feeling that Worksafe was happy to gain a conviction against Paspaley, regardless of whether or not it represented justice and regardless of whether or not it had an impact on the danger still present for pearl divers.

Harmonisation

Jarrold was previously employed in Airlie Beach for 2 years as a scuba instructor for tourists on the Great Barrier Reef. The culture at True Blue Sailing was one of safety-first where procedures were practised, and communication was encouraged. Jarrold personally made suggestions to management about some of his safety concerns, all promptly assessed and acted on. The company operated under the Recreational Diving Classification.

Seeking more open-water time to further his qualifications and the lure of working on the Kimberley coast saw Jarrold apply for work with Paspaley Pearling on the west coast. From their corporate profile this was a wealthy company with enormous resources including air-sea rescue capability. Paspaley operate under the General Diving Classification, which affords them self-regulation. What has become clear since Jarrold's incident is that the training is inadequate, the boats are under-resourced for basic safety, they have safety procedures from their own code that are not implemented, particularly pertinent in Jarrold's case, and the culture is one of bravado "if you don't want to do the job, someone else will".

The comparison between the two companies could not be starker.

Cultures can be encouraged but not legislated. Standards within different classifications need to be legislated. Divers, in fact any workers from any industry, should be able to expect equivalent safety standards wherever they work in Australia. Employers should be subject to the same standards of compliance and penalties.

Insurance/Penalties

In Jarrold's case, a company worth hundreds of millions of dollars was fined \$60,000. That this fine is then covered by insurance defies common sense.

Upon arriving in Broome the day after Jarrod's incident, James Paspaley met us at the airport and provided us with transport and accommodation. During one discussion he warned me in a very straight-forward manner "don't expect much, the most we will suffer is a smack over the wrist, the penalties are just not there". He knew. There was no deterrent.

A significant increase in the rate of penalties is obviously required. It seems crass to talk of the cost of a workplace death but it is horrendous; investigators, administration, court battles, loss of incomes, emotional and psychological damage, to name just a few. I would definitely support the setting of minimum rates rather than maximums. Wealthy companies have the ability to hire expert legal defences and have undue influence over court proceedings. This is something we witnessed first-hand in Jarrod's case.

To this day we still do not even know whether or not the fine in Jarrod's case has been paid and there is no way we can find out.

Industrial Manslaughter

The introduction of this law is necessary as a deterrent but it must also be effective if it is to actually SAVE LIVES. If it is put through as a flag-waving gesture with restricted ability to obtain convictions it might as well be not introduced at all. This is the time to get it right.

Employers have known of their obligation of duty-of-care since the introduction of the OH&S Act in 1984. Blatant breaches of the Act must be punished. The burden of proof should be removed from the prosecution and put fairly and squarely on the defence. This precedent has been set in other areas of the law where individuals or entities are operating outside the law and death occurs as a result. Employers should be made to prove they have not been grossly negligent or, in fact, culpable. This is so important if this law is to have a real impact and actually save lives. It will then become a REAL DETERRENT.

Tony Hampton

