Industrial Manslaughter in NSW

March 2024

Master Builders Association
New South Wales

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The Master Builders Association of NSW (**MBA**) is the oldest registered employers' organisation in Australia. The NSW Building and Construction Industry contributes over $69 billion to the NSW economy and is a major job creator, with the sector employing an estimated 395,000 people in NSW. The building and construction sector is integral to the NSW Government's infrastructure renewal program worth approximately $113 billion.

As part of the 2023 State Election, the NSW Labor Party committed to introducing Industrial Manslaughter Legislation. Accordingly, the Government has now requested submissions concerning the implementation of an industrial manslaughter offence within the NSW Work Health and Safety Act 2011 (WHS Act). MBA and its members have a high degree of interest in the proper functioning of New South Wales safety systems. The industry is subject to multiple safety requirements, each with its own compliance issues and it is essential that changes to health and safety legislation genuinely focus on making construction sites safer.

MBA is committed to the adoption of the highest safety standards to address underlying risks. As such, we believe in a balanced approach that best protects the lives of all of those who work in our industry, without the creation of additional demands that might put workers' livelihoods at risk.

NSW employers and employees have a shared responsibility for safety by working together and a collaborative approach to achieving safe work places is paramount.

We would welcome the opportunity to further discuss any aspect of these submissions.

Yours Sincerely,

Brian Seidler
EXECUTIVE DIRECTOR
Attachment.

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Summary

The MBA believes the introduction of an industrial manslaughter law into the NSW Work Health and Safety (WHS) legislation must, in our view, be considered carefully for the following reasons.

- *What is proposed is a duplication of law.*

- *It is legally misguided to use a safety law for a retrospective punishment of only one outcome of a breach in workplace safety. Such a forensic punishment is better suited to the criminal law where it in fact already and properly resides.*

- *There is no persuasive evidence put forward that industrial manslaughter laws are either necessary in NSW or that NSW workplaces are less safe than those of other jurisdictions because we do not have an industrial manslaughter law. In fact recent evidence shows that NSW is among the safest of States to work in.*

Objections

1. MBA believes that the introduction of an offence of industrial manslaughter is a duplication of law. For the avoidance of doubt, MBA strongly supports a punitive law of manslaughter for any situation, (in a workplace or otherwise) by which the negligence of a person occasions the death of another person. We believe however, that WHS law is not the appropriate vehicle for such a provision. Currently, the Crimes Act 1901 grants the NSW Police Force a clear and effective power to prosecute any instance of manslaughter in NSW. This overlap is in fact noted on page 7 of the industrial manslaughter consultation paper released by the NSW Government. It states that; "*Additionally, under certain circumstances, workplace deaths may be prosecuted as manslaughter under the Crimes Act 1900. A note to this effect is in the WHS Act."*

2. The abovementioned note is to be found at the start of Division 5 of the *Work Health and Safety Act 2011 No 10* (**WHS Act**). The note is set out in full below;

> *"This Division sets out offences, and penalties for the offences, in relation to the health and safety duties imposed by Divisions 2, 3 and 4 of Part 2. In certain circumstances, the death of a person at work may also constitute manslaughter under the Crimes Act 1900 and may be prosecuted under that Act. See section 18 of the Crimes Act 1900, which provides for the offence of manslaughter, and section 24 of that Act, which provides that the offence of manslaughter is punishable by imprisonment for 25 years."* (Emphasis added).

3. This note clearly shows that in addition to being punishable under the WHS Act, the death of a worker may also be prosecuted under the Crimes Act 1900 and refers to sections 18 and 24 of that Act. This makes clear beyond any doubt that the NSW Police already fully possess the power to prosecute any person (including the officers of a body corporate) for the crime of manslaughter. What is being proposed is an additional and standalone category of manslaughter which is focused solely on the workplace. We respectfully submit that we believe that there is no evidence that such a narrow category of manslaughter is necessary.

4. As the law currently stands there is no exemption for workplaces as regards manslaughter. That means that (as the abovementioned note in the WHS Act states) a workplace death, which meets the relevant definition of manslaughter, can (and in our view should) be prosecuted under the Crimes Act 1900.

5. MBA suggests that the current manslaughter law is effective and as such, it is not necessary to have a specific industrial category of manslaughter, separate to the current criminal offence of manslaughter.

6. MBA respectfully submits that safety outcomes have not improved in other Australian jurisdictions, as a result of the introduction of industrial manslaughter laws. Further, MBA submits that there is no evidence that NSW is a less safe State to work in under the existing laws.

7. On these bases, MBA believes that a necessity for the introduction of an industrial manslaughter law has not been shown. Further, MBA is of the view that the criminal law is the proper vehicle for punishing criminal behaviour.

8. One key difference between the safety and criminal law is that under the WHS Act the industrial manslaughter provisions would carry a monetary penalty whereas punishment under the criminal law is only concerned with imprisonment. MBA submits that an introduction of a monetary penalty for a body corporate that commits manslaughter being introduced into the NSW WHS Act as an adjunct to the existing criminal law could be considered.

9. Safety law should be (and largely is) focused on the proactive and timely identification and removal or mitigation of safety risks as far as is reasonably practical. Simply stated, safety law should be proactive and educative, whilst retrospective punishment is better suited to the criminal law.

10. By way of expansion on this point, if a form of work involves a serious risk to safety, there are at least three possible results which may arise from that risk. Either the risk may eventuate into an incident, and an injury (**result #1**) or fatality (**result#2**) may be a result of that incident, or the risk may remain unrealised and not eventuate into an incident (**result #3**). Of these three results only the fatality (**result #2**) will attract the attention of an industrial manslaughter law not withstanding that the risk is potentially fatal. Under such a scenario the same risk will not attract the same sanction if it does not result in a fatality. In our view this appears to be contrary to the purpose of safety law which should target exposure to risk.

11. The MBA believes it is far more appropriate that safety laws are designed to be proactive and focused on the timely identification and management of serious risks. As stated above and for the removal of any doubt, any person whose actions bring about the unintended death of another person, is already properly subject to the manslaughter provisions of the criminal law which are already in place. Further we emphasise that there is no evidence that inserting an additional category of manslaughter into the WHS law will actually make NSW workplaces any safer or that NSW workplaces as they currently stand are less safe than any other jurisdiction due to the absence of industrial manslaughter laws.

12. The balance of these submissions will deal with, inter alia, the issues raised by the consultation paper.

Trends in workplace deaths and comparison with other States

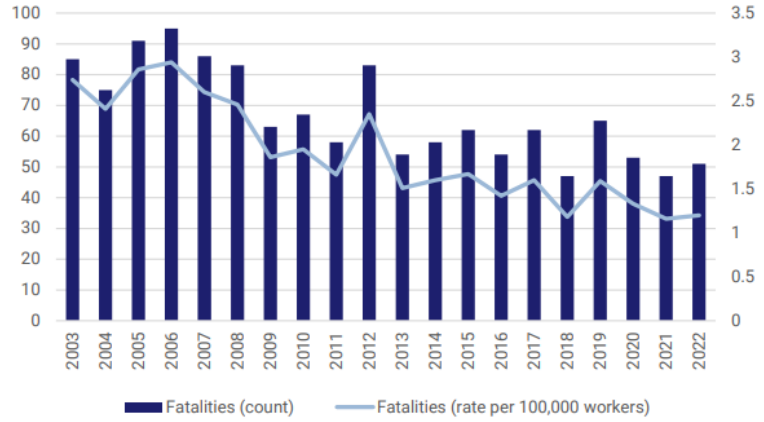
13. As the data from SafeWork Australia (see graph below) indicates, NSW compares well against the other mainland States which all have industrial manslaughter laws in place. The diagram below, is taken from the February 2024 paper on industrial manslaughter laws produced by the NSW Parliamentary Research Service and shows a steady decline in fatalities in NSW since 2003.

2. Data on workplace deaths

2.1 New South Wales

In 2022, there were 51 workplace deaths in NSW. Workplace deaths, both as a count, and as a rate per 100,000 workers, have decreased over the past 20 years (Figure 1). Between 2018 and 2022, the occupations with the highest number of workplace deaths were road and rail drivers, farmers and farm managers, and 'other labourers' (Figure 2).

Figure 1: Workplace deaths in NSW, 2003-2022



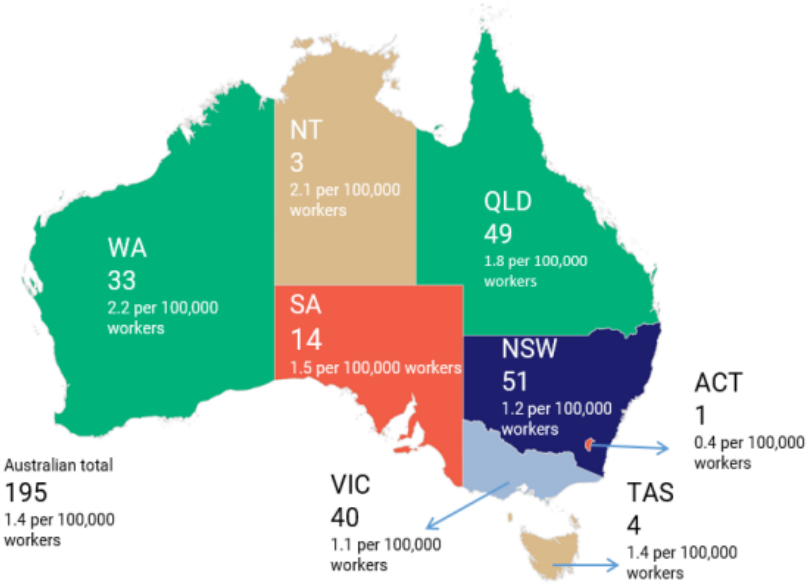
Source: SafeWork Australia, *Work-related fatalities*, interactive dashboard.

14. When one respectfully compares NSW against other States, we see that NSW has the second lowest rate of workplaces deaths on a per-capita basis. The diagram below, which is taken from the February 2024 paper on industrial manslaughter laws produced by the NSW Parliamentary Research Service confirms this. In fact, NSW exceeds WA, QLD and SA, all of which have industrial manslaughter laws.

2.2 Comparisons with other states

While NSW had the highest number of workplace deaths in Australia in 2022, it had one of the lowest rates of workplace deaths (1.2 per 100,000 workers) (Figure 3).

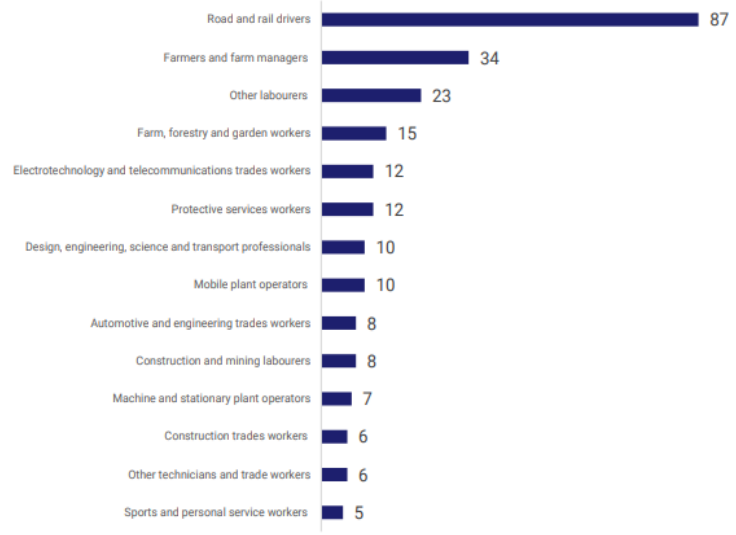
Figure 3: Workplace deaths in Australia, by jurisdiction, 2022



Source: SafeWork Australia, *Key Work Health and Safety Statistics Australia, 2023*, 2023.

15. Construction Trade work is also amongst the safest of what may be termed the higher risk occupations in NSW. Again, this is identified in the February 2024 paper on industrial manslaughter laws produced by the NSW Parliamentary Research Service. This statistic has bearing on the question of Group Training Organisations which we address further below.

Figure 2: Workplace deaths in NSW, 2018-2022, by occupation*



Source: SafeWork Australia, *Work-related fatalities*, interactive dashboard.

*Note that Figure 2 only shows occupations which had 5 or more fatalities in this period.

Group Training Organisations (GTO)

16. GTOs are an essential part of the training landscape, providing not just training, but support and pastoral care to apprentices. GTOs are essential for the development of trade skills in New South Wales, providing the most appropriate method of enabling apprentices to obtain gainful employment in both small and large businesses. GTO's provide significant vocational education and training for the development of trade skills in NSW.

17. It is important to note the nature of GTO employment. A GTO Apprentice is at all times employed by the GTO, but will conduct work on the site of a "training employer". Whilst a GTO may vet any training employer in regard to safety, it is the training employer which retains direct control over health and safety at any particular site. A GTO may remove an Apprentice immediately in the event that it becomes aware of any safety issue, but the GTO does not exercise any day-to-day control of the site. Moreover, Apprentices in the building and construction industry are unique in that they are sometimes required to attend multiple sites, often on the same day.

18. Currently, no state or territory in Australia with applicable manslaughter legislation has, in our view, adequately considered the unique employment arrangements between GTOs, training employers and apprentices. GTOs are an important part of the development of trade skills in New South Wales, providing a viable method of enabling apprentices to gain workplace experience.

19. The future needs of the construction industry in NSW depends in a large part on apprenticeships. MBA is doing its utmost to increase apprenticeships to safeguard the future ability of our industry to meet demand for homes, infrastructure and all other building and construction work. This is especially important in light of the recent undertaking by the NSW Government to increase the stock of available housing. MBA urges the Government not to leave GTOs vulnerable to a charge of industrial manslaughter whilst an apprentice is working within a training employer's enterprise.

Answer to questions in the consultation paper.

20. The consultation paper proposes seven questions to provide feedback. We have answered these questions here.

Question 1: Provide your opinion on using existing definitions within the WHS Act or other definition options?

21. The consultation paper provides two options for consideration. Option one utilises the existing definitions within the WHS Act, whilst option two introduces new definition/s of whom may commit an industrial manslaughter offence. The Queensland option which is set out in the consultation paper is too broad in that the additional definitions for 'senior officer' and 'executive officer' have been included, to enable the industrial manslaughter provisions to also apply to a person who does not hold a health and safety duty under the WHS Act.

22. It is the view of MBA that if the Government does introduce an industrial manslaughter offence, the current definition within the NSW WHS legislation is the most appropriate definition to use. Manslaughter is already a terrifically complex area of law. Expanding the definition to a person who may not even hold a health and safety duty under the WHS Act risks extending liability to people who should not be covered by this law. This complexity has been noted in the NSW Courts. Spigelman CJ said in *R v Forbes* [2005] NSWCCA 377 at [133]–[134]: "*manslaughter is almost unique in its protean character as an offence*. *In its objective gravity it may vary, as has been pointed out, from a joke gone wrong to facts just short of murder*."

23. It is also relevant to recognise that, although instances of manslaughter can be characterised in different ways, particularly in the various contexts which may reduce what would otherwise be a murder to manslaughter, the degree of variation *within* any such category is generally also over a wide range. Matters of fact and degree arise in all categories of manslaughter. As such, liability should not be extended to people who could not reasonably foresee that they would be covered by such a law.

Question 2: Should the industrial manslaughter offence cover workers and others in the workplace? Please explain your reasons.

24. It is the view of MBA that the industrial manslaughter offence should not cover workers *and others* in the workplace. The stated intent of the proposed law is to make workplaces safer, ostensibly for workers. Extending the definition to others, for example customers in a shop, seems a further intrusion on the already existing criminal manslaughter law. Moreover, as per the below examples, both workers and the public are already well protected by the current manslaughter law.

25. Significant sentences may be imposed in other cases of criminal negligence involving members of the public. In *R v Simpson [2000] NSWCCA 284*, the deceased died by coming into contact with an electric wire system erected by the offender to protect an area of land used to grow marijuana. A non-parole period of 6 years and balance of 3 years was imposed; see also *R v Cameron (unrep, 27/9/94, NSWCCA)*, where a non-parole period of 8 months and balance of 1 year and 4 months was imposed. The conduct in *Davidson v R* [2022] NSWCCA 153 was considered to be an unprecedented and "very serious" example of criminally negligent conduct with "catastrophic consequences" involving as it did one act of criminally negligent driving causing the death of four children walking on a public footpath and injury to three other children: [40] (Brereton JA); [138] (Adamson J); [333]–[334] (N Adams J). The offender's appeal on the basis of manifest excess was

allowed, by majority, and he was re-sentenced to an aggregate sentence of 20 years with a non-parole period of 15 years (reduced from 28 years with a non-parole period of 21 years).

26. The above cases reinforce the view that if the NSW Government is determined to create a specific offence of industrial manslaughter, it should as far as possible restrict that law to the workplace, and leave society at large to the current criminal law provisions which are completely adequate.

Question 3: Provide your opinion on the test that should apply to prove that industrial manslaughter has been committed?

27. It is the view of MBA that the offence of industrial manslaughter must at law require proof of either recklessness or gross negligence on the part of the defendant(s). In *R v Blacklidge* (unrep, 12/12/95, NSWCCA), Gleeson CJ said: "*It has long been recognised that the circumstances which may give rise to a conviction for manslaughter are so various, and the range of degrees of culpability is so wide, that it is not possible to point to any established tariff which can be applied to such cases. Of all crimes, manslaughter throws up the greatest variety of circumstances affecting culpability."*(Emphasis added).

28. The *Crimes Act 1900* (NSW) does not define manslaughter, except to provide that it comprises all unlawful homicides other than murder: s 18(1)(b). There are only two categories of manslaughter at common law: **manslaughter by unlawful and dangerous act, and manslaughter by criminal negligence** (see the *Queen v Lavender* (2005) 222 CLR 67 at [38]). They are referred to as forms of "involuntary manslaughter" because the ingredients of each do not include intent to kill or inflict grievous bodily harm.

29. Under the *Crimes Act* there are three statutory categories of manslaughter, based on the reduction of murder to manslaughter by reason of **provocation** (s 23), **substantial impairment** (s 23A), **or excessive self-defence** (s 421). The first two are referred to as forms of "voluntary manslaughter". The third category may or may not be described that way depending upon whether the fact finder accepts the presence of an intent to kill or cause grievous bodily harm (per *Ward v R* [2006] NSWCCA 321 at [40]).

30. It appears to MBA that the proposed industrial manslaughter offence is intended to deal with the two common law categories, that is either manslaughter by unlawful and dangerous act, and/or manslaughter by criminal negligence. It is worth repeating here that the complexity of the law surrounding manslaughter reinforces the view that this is an area best left to the established criminal law. Notwithstanding this we will comment on the two common law tests for manslaughter below.

Unlawful and dangerous act

31. Manslaughter by unlawful and dangerous act does not involve an intention to kill or inflict grievous bodily harm. However, the unlawful and dangerous act involved must be an intentional and voluntary one *and it must be established that a reasonable person in the position of the accused would have realised that he or she was exposing the victim to an appreciable risk of serious injury*: (per *Wilson v The Queen* (1992) 174 CLR 313 at 333). (Emphasis added).

32. Although there is no murderous intent involved in manslaughter by unlawful and dangerous act, there will be cases where a heavy sentence will be appropriate: *R v Maguire* (unrep, 30/8/95, NSWCCA). In that case James J said:

"*So far as comparing different instances of manslaughter by unlawful and dangerous act is concerned, although all such acts after the decision of the High Court in Wilson v The Queen must be such that a reasonable person in the position of the offender would have realised he was exposing another person to an appreciable risk of serious injury, the possible range of such acts and the possible range of culpability of the agents who performed those acts is very great.*" (Emphasis added).

33. Given that a heavy penalty may be handed down for manslaughter by unlawful and dangerous act the highest possible threshold should be set in finding guilt.

Criminal negligence

34. Manslaughter by criminal negligence arises when the accused does an act "*consciously and voluntarily without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment*": (per *Nydam v The Queen* [1977] VR 430 at 445, approved in the *Queen v Lavender* (2005) 222 CLR 67 at [136]).

35. If the NSW Government is determined to make an industrial manslaughter law which duplicates the criminal law, the test should at the very least require proof of either recklessness or gross negligence.

Question 4: Are there other elements that should be proved to establish that an industrial manslaughter offence has been committed?

36. It is the view of MBA that if industrial manslaughter is to be made in NSW, the same test for prosecution as is contained in the Northern Territory legislation be introduced as a safeguard against wrongful prosecutions. That is, prior to the charges proceeding the Director of Public Prosecutions (DPP) must consent to the industrial manslaughter charge after reviewing the evidence produced by the investigation. Critically, the DPP must be satisfied that there is a reasonable prospect of conviction on the available evidence, which means the evidence needs to be adequate to persuade a jury beyond a reasonable doubt.

Question 5: Should the NSW WHS penalties align with the model WHS penalties for industrial manslaughter? If no, what penalties would you consider appropriate and why?

37. As already stated, it is the view of MBA that sentences of imprisonment should be left to the existing criminal law. The monetary penalty for a body corporate for industrial manslaughter varies across jurisdictions. SA and the Commonwealth provide for a fine of up to $18 million, the maximum fine in QLD is $15.5 million, WA up to $10 million, Victoria up to $19.2 million and the ACT provides for up to $16.5 million.

38. There is no evidence presented from the other State/Territory jurisdictions that there is a positive deterrent equal to the value of the penalty. As such, any monetary penalty introduced in NSW should not exceed that in any other State or Territory.

Question 6: Do you agree that a person charged with industrial manslaughter may be convicted of a Category 1 or a Category 2 offence, as an alternate to the industrial manslaughter offence?

39. As stated, MBA does not agree that an offence of industrial manslaughter needs to be introduced in NSW. For the purpose of this question however, we do agree that a person charged with industrial manslaughter may be convicted of a Category 1 or a Category 2 offence, as an alternate to the industrial manslaughter offence. For the avoidance of doubt, our position is that the WHS

law should remain as it is and the Category 1 or a Category 2 offence remain the highest offences under that law.

Question 7: Do you agree that the industrial manslaughter offence should not be subject to a two-year statute of limitations?

40. It is the view of MBA that the offence of industrial manslaughter should be subject to a two-year statute of limitations. MBA does not accept that the State lacks the capacity to prosecute an offence of industrial manslaughter in a timely manner. Two years is therefore ample time to complete an investigation and for the prosecution to commence.

41. Moreover, a failure to implement a two-year statute of limitations leaves open the real possibility that criminal charges may hang over the head of people indefinitely. We refer again to the comments of Spigelman CJ in *R v Forbes [2005] NSWCCA 377 at [133]–[134]* where he noted that*; "manslaughter is almost unique in its protean character as an offence... In its objective gravity it may vary, as has been pointed out, from a joke gone wrong to facts just short of murder."*

42. Given this vast and unforeseeable array of circumstances which may give rise a prosecution for industrial manslaughter, it is inherently unfair for the State to have an unlimited amount of time to commence a prosecution.

Conclusion

43. The NSW construction industry can be hazardous, and yet the State is among the best performers when it comes to low levels of fatalities. This can be improved through efforts toward safety education for those most at risk, and MBA supports measures to improve the performance of the sector; more importantly, we support measures to reduce fatalities and injuries.