

ARA SUBMISSION

INDUSTRIAL MANSLAUGHTER LAWS NSW

March 2024

The Australian Retailers Association (ARA) welcomes the opportunity to provide comments on Industrial manslaughter laws to be included within the NSW Work Health and Safety Act 2011 (WHS Act).

The ARA is the oldest, largest, and most diverse national retail body, representing a \$420 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. As Australia's peak retail body, representing more than 120,000 retail shop fronts and online stores, the ARA informs, advocates, educates, protects, and unifies our independent, national, and international retail community.

We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate across the country and in all categories - from food to fashion, hairdressing to hardware, and everything in between.

This submission has been informed by consultation with the ARA's Advisory Committees and our diverse membership base.

EXECUTIVE SUMMARY

Workplace fatalities are tragedies that demand comprehensive legislative responses to ensure accountability and deterrence. As stakeholders in the retail industry, we recognise the importance of robust WHS laws to protect workers, businesses and prevent avoidable deaths.

ARA's position is that any legislative changes should align with the model Work Health and Safety Act 2011 (WHS Act) to maintain consistency across jurisdictions for our members.

Our submission addresses each element outlined in the consultation paper, providing insights from the perspective of Australian retailers and advocating for a balanced approach that prioritises both worker safety and legal clarity.

DISCUSSION

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

The ARA supports option one of using the existing definitions within the WHS Act. This option offers the most practical and efficient approach to defining who can be held accountable for industrial manslaughter offences.

Option one maintains the status quo, ensures consistency with current legislative frameworks and promotes clarity in determining liability, which is helpful to our members who have businesses nationally.

The current definitions within the WHS Act, particularly those pertaining to Persons Conducting a Business or Undertaking (PCBUs) and officers, are well-established and widely understood within the business community.

This option has also been adopted across the majority of jurisdictions.

These definitions accurately capture the individuals who hold primary responsibilities for workplace safety and are therefore logical choices for defining potential offenders in cases of industrial manslaughter.

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

The ARA support option one - inclusion of both workers and others in the workplace under the industrial manslaughter offence. Extending the scope of the offence to cover all individuals present in a workplace reflects a comprehensive approach to ensuring accountability and promoting safety for everyone.

Extending the offence to cover others in the workplace, such as customers, visitors, or contractors, is essential for fostering a culture of safety and accountability across all facets of business operations. These individuals, though not directly employed by the business, are in need of protection from hazards and risks in the workplace environment. In many cases, they may be particularly vulnerable due to their lack of familiarity with workplace hazards or their limited ability to advocate for their own safety.

Moreover, from a practical standpoint, including workers and others in the workplace under the industrial manslaughter offence simplifies enforcement and adjudication processes. It eliminates potential loopholes or ambiguities regarding who is covered by the legislation, thereby facilitating more effective prosecution of offences and deterrence of unsafe practices. This option also aligns with other states and territories and aligns with our primary concern consistency.

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

It is essential to recognise that proving industrial manslaughter requires a high degree of certainty and evidentiary rigour. Therefore, the test should be applied judiciously and with careful consideration of the circumstances surrounding each case. This approach ensures that individuals are held accountable for their actions while safeguarding against unjust or disproportionate outcomes.

The ARA advocates for a test that incorporates elements of recklessness and gross negligence to establish industrial manslaughter. This approach strikes a balance between accountability and fairness, providing a clear and coherent framework for prosecuting offences and deterring unsafe practices in the workplace.

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

Other elements may need to be considered to establish an industrial manslaughter offence include factors such as prior knowledge of safety risks, failure to implement adequate safety measures, and patterns of non-compliance with regulatory requirements. By incorporating these elements, the legislation can capture a broader range of negligent conduct and ensure comprehensive accountability for workplace fatalities.

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?

Aligning NSW WHS penalties with the model WHS penalties for industrial manslaughter is crucial for maintaining consistency and effectiveness.

Penalties for industrial manslaughter must reflect the severity of the offence and serve as a meaningful deterrent against unsafe workplace practices.

However, members have advised ARA that Category One and Two penalties under the current WHS legislation have not been fully utilised. This lack of utilisation raises questions about the effectiveness and practicality of imposing maximum penalties without corresponding enforcement actions. Aligning industrial manslaughter penalties with the model WHS penalties may perpetuate this discrepancy between theoretical penalties and actual enforcement outcomes.

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? If so, should the existing two-year statute of limitations apply to the alternate Category 1 or Category 2 offence?

The ARA supports the proposal that individuals charged with industrial manslaughter may be convicted of a Category 1 or Category 2 offence as an alternative, in alignment with practices observed in other states.

This approach provides prosecutors with flexibility to pursue charges that best reflect the circumstances and evidence of each case, ensuring that appropriate accountability measures are applied while maintaining consistency with legal frameworks across jurisdictions.

The ARA supports the existing two-year statute of limitations to apply to category 1 and Category 2 offences.

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

The ARA supports imposing a reasonable time limit on prosecutions serves several crucial purposes that warrant consideration.

Firstly, the imposition of a statute of limitations provides legal certainty and finality, ensuring that investigations and prosecutions are conducted promptly and efficiently. By delineating a clear timeframe within which legal action must be initiated, stakeholders can avoid prolonged uncertainty and expedite the resolution of cases, thereby promoting the timely administration of justice.

The statute of limitations fosters the timely collection and preservation of evidence, which in turn promotes thorough investigations and bolsters the credibility of trial outcomes.

CONCLUSION

The implementation of an industrial manslaughter offence in the NSW WHS Act represents a critical step towards enhancing workplace safety and accountability.

By aligning legislative provisions with commonwealth WHS laws and addressing key elements outlined in the consultation paper, NSW can reinforce its commitment to protecting workers and preventing avoidable fatalities.

Our members already strive to provide a safe workplace for employees, contractors and customers, and will continue to collaborate with government and stakeholders in any endeavour to strengthen laws around workplace safety, including the effective implementation of the proposed Industrial manslaughter provisions.

The ARA looks forward to actively engaging further in the consultation process to ensure a safer retail environment for staff and customers.

Thank you for the opportunity to provide a submission to this inquiry. Any queries in relation to this submission can be directed to our policy team at policy@retail.org.au.