



HOUSING INDUSTRY ASSOCIATION



Submission to the  
Senate Standing Committee on Education and Employment

**The framework surrounding the prevention, investigation and  
prosecution of industrial deaths in Australia**

6 June 2018

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## ABOUT THE HOUSING INDUSTRY ASSOCIATION

The Housing Industry Association (HIA) is Australia's only national industry association representing the interests of the residential building industry, including new home builders, renovators, trade contractors, land developers, related building professionals, and suppliers and manufacturers of building products.

As the voice of the industry, HIA represents some 40,000 member businesses throughout Australia. The residential building industry includes land development, detached home construction, home renovations, low/medium-density housing, high-rise apartment buildings and building product manufacturing.

HIA members comprise a diversity of residential builders, including the Housing 100 volume builders, small to medium builders and renovators, residential developers, trade contractors, major building product manufacturers and suppliers and consultants to the industry. HIA members construct over 85 per cent of the nation's new housing stock.

HIA exists to service the businesses it represents, lobby for the best possible business environment for the building industry and to encourage a responsible and quality driven, affordable residential building development industry. HIA's mission is to:

*"promote policies and provide services which enhance our members' business practices, products and profitability, consistent with the highest standards of professional and commercial conduct."*

The residential building industry is one of Australia's most dynamic, innovative and efficient service industries and is a key driver of the Australian economy. The residential building industry has a wide reach into manufacturing, supply, and retail sectors.

The aggregate residential industry contribution to the Australian economy is over \$150 billion per annum, with over one million employees in building and construction, tens of thousands of small businesses, and over 200,000 sub-contractors reliant on the industry for their livelihood.

HIA develops and advocates policy on behalf of members to further advance new home building and renovating, enabling members to provide affordable and appropriate housing to the growing Australian population. New policy is generated through a grassroots process that starts with local and regional member committees before progressing to the Association's National Policy Congress by which time it has passed through almost 1,000 sets of hands.

Policy development is supported by an ongoing process of collecting and analysing data, forecasting, and providing industry data and insights for members, the general public and on a contract basis.

The Association operates offices in 23 centres around the nation providing a wide range of advocacy and business support services and products.

## 1. INTRODUCTION

HIA takes this opportunity to make a submission to the inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia that was referred to the Senate Standing Committee on Education and Employment on 26 March 2018.

The broad nature of the Terms of Reference invite the Committee to consider the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia, with particular reference to:

- a) *the effectiveness and extent of the harmonisation of workplace safety legislation between the states, territories and Commonwealth;*
- b) *jurisdictional issues surrounding workplace investigations which cross state and territory boundaries;*
- c) *issues relating to reporting, monitoring and chains of responsibility between states, territories and the Commonwealth;*
- d) *safety implications relating to the increased use of temporary and labour hire workers;*
- e) *the role of employers and unions in creating a safe-work culture;*
- f) *the effectiveness of penalties in situations where an employer has been convicted of an offence relating to a serious accident or death; and*
- g) *any other related matters.*

HIA agrees that one death at a workplace is one too many and supports an investigation into this devastating issue.

In responding to this inquiry there are five key matters HIA would bring to the Committee's attention.

### **1) *The existing rules that deal with serious injuries and incidents at a workplace are robust***

The current framework of work, health and safety laws, supported by regulations, codes of practice and compliance activities is the most appropriate and effective way of preventing, investigating and prosecuting industrial deaths.

### **2) *There is a framework of existing powers for deterrence and punishment to deal with deaths at a workplace***

The current penalty regime and enforcement approach has seen appropriate and commensurate actions taken in response to work, health and safety incidents. The imposition of significant penalties, including gaol terms, suggest an appetite by Courts across the country to hold officers accountable for their role in serious WHS incidents under existing regulatory arrangements.

The trend towards establishing a discrete criminal offence to respond to deaths at a workplace is an unnecessary step for the WHS legal framework, which may do little to improve safety outcomes at residential construction workplaces.

### **3) *Safety is everyone's responsibility***

The current model Work, Health and Safety laws (**Model Laws**) ensure that all individuals at a workplace have work, health and safety responsibilities. This supports the development of a safety culture which is pivotal to better work, health and safety outcomes and supports the spirit of the work, health and safety laws.



#### **4) An industry specific approach is needed**

The building and construction industry is diverse covering businesses operating in detached and low rise residential, multi-residential, renovation, commercial, public infrastructure and civil works construction sectors. The construction process adopted on a single dwelling construction site is different from the approach adopted on, for example, a multi storey commercial development site. Public infrastructure and civil works 'construction' is significantly different again.

The residential building industry provides a significant contribution to the Australian economy, which includes building, on average, 113,000 detached houses per year, employing nearly 1 million people and contributing approximately \$100 billion towards the nation's total GDP. It is not unreasonable to concede that a sector that contributes so much to the economy and society be dealt with distinctly from the broader construction industry.

In HIA's view the Committee should consider recommendations that focus on the following four key principles:

- Industry participants should have certainty of compliance and be directed towards practical safety solutions for achieving that compliance.
- Compliance should take a pragmatic approach.
- Enforcement of the laws should be fair.
- Liability should be based on "actual" control.

#### **5) Concurrent reviews must be considered**

This review is one of three examinations of the current Work Health and Safety laws being undertaken nationally.

Ms Marie Boland has been engaged to carry out the five year statutory review of the Model WHS Framework by Safe Work Australia (SWA) and the Department of Jobs and Small Business has commissioned Seyfarth Shaw to review the Work, Health and Safety Regulatory Framework in the Building and Construction industry.

State jurisdictions have also been considering their safety laws with some jurisdictions taking actions that clearly diverge from the broad agenda of harmonisation.

This situation has potential to lead to a range of unsatisfactory outcomes including:

- unnecessary duplication through the inevitable cross-over of issues being considered.
- the likelihood for different and conflicting outcomes from different reviews.
- the likelihood for a different response to the same specific issues leading to uncertainty.
- impacting the awareness and understanding of industry participants in relation to their compliance obligations.

These reviews must be undertaken in a co-ordinated and consultative manner.



## 2. SCOPE OF THE REVIEW

The term ‘industrial deaths’ is highly emotive and has significant implications. When responding to this inquiry it is important to be clear on the intended definition.

‘Industrial’ is defined as:

*“relating to, of the nature of, or resulting from industry”<sup>1</sup>*

‘Industry’ is further defined as:

*“a particular branch of manufacture; any large-scale business activity; manufacture as a whole; ownership and management of companies, factories ...”<sup>2</sup>*

Consequently the term ‘industrial death’ can be taken to mean a death that has taken place in connection with (for example) a large scale business activity. Within the context of the ‘prevention, investigation and prosecution’ of an industrial death the offence of industrial manslaughter must arise.

The definition of ‘industrial’ is applicable and ‘manslaughter’ attaches a legal test to a ‘death’ being:

*“Law: the killing of a human being unlawfully but without malice aforethought...”<sup>3</sup>*

There is history of various state parliaments dealing with the adoption and use of the offence of industrial manslaughter, however at present there does not seem to be any national consensus regarding the need for an industrial manslaughter offence.

For example, a South Australian Parliamentary Committee observed that *“there are adequate legal systems in place to deal with industrial death”<sup>4</sup>* and did not support the adoption of the offence of industrial manslaughter. Whereas the *Best practice review of Workplace Health and Safety Queensland -final report* recommended that *‘two new offences be created in the Work Health and Safety Act 2011 to give effect to the policy decision to create the offence of negligence causing death to be called ‘Industrial Manslaughter’<sup>5</sup> on the ‘basis that the WHS Act provides for imputing a person’s conduct to a corporate entity.’<sup>6</sup>*

Further the Queensland *Work Health and Safety and other Legislation Amendment Bill 2017* was unaccompanied by a regulatory impact statement and so no examination of the impact of the offence of industrial manslaughter on businesses, employees, workplaces or work, health and safety outcomes was undertaken.

To HIA’s knowledge there is little evidence that the existence of such an offence will lead to better safety outcomes.

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<sup>1</sup> Macquarie Essential Dictionary (2008) 4<sup>th</sup> ed at pg.407

<sup>2</sup> ibid

<sup>3</sup> Ibid at pg.488

<sup>4</sup> Recommendation 2, Report into the referral of the Work Health and Safety (Industrial Manslaughter) Amendment Bill, Parliamentary Committee on Occupational Safety, Rehabilitation and Compensation

<sup>5</sup> See pg.14

<sup>6</sup> See pg.112



A 2013 study commissioned by Safe Work Australia to examine the effectiveness of work health and safety interventions by regulators concluded:

*“Only a very small number of studies on the impact of prosecutions were located. The results suggest that prosecutions have a small general deterrent effect. Large businesses are more likely to be able to understand and interpret court decisions and how they could apply to their business. Both low average penalties imposed by courts for work health and safety offences and the focus in the court cases on the specifics of the particular events leading up to the death or injury that led to the prosecution may act to limit the deterrent effect of work health and safety prosecutions.”<sup>7</sup>*

HIA continues to oppose the introduction of industrial manslaughter as a potential charge under workplace health and safety legislation.

The offence of manslaughter (whether the death occurs in the workplace or in a non-industrial context) is a matter of criminal law. Prosecutions for industrial manslaughter and other criminal offences should only be instituted by public prosecutors and should take place before a proper criminal court with a criminal onus of proof and normal rights of appeal.

Public policy, including workplace health and safety legislation should be focused on the duties of employers and employees in the workplace, including the fundamental duty to provide a safe workplace. Consequently, prosecutions for breach should not be based merely on whether a death or injury has occurred.

### 3. RESPONSE TO THE TERMS OF REFERENCE

#### 3.1 THE EFFECTIVENESS AND EXTENT OF HARMONISATION

When considering the prevention, investigation and prosecution of industrial deaths in Australia, with particular reference to the effectiveness and extent of the harmonisation of workplace safety legislation between the states, territories and Commonwealth, two matters must be considered.

The first is the trend in fatality rates.

Both the 2016 *Work – Related Traumatic Injury Fatalities* report by Safe Work Australia (**2016 SWA Report**) and the *Safe Work Australia Comparative Performance Monitoring Report 2017* show decreasing fatalities rates across the construction sector and in all states and territories.

While neither of these reports identify the factors responsible for this decrease, it does indicate that the fatality rate in construction was trending down prior to the introduction of the Model Laws around 2012. It is also worth noting over this period, jurisdictions that did not adopt the Model Laws – Victoria and Western Australia, also achieved substantial reductions in fatality rates of 23% and 21% respectively.

The 2016 SWA Report reported that injuries at work resulted in deaths of 182 workers in 2016, 26 less than in 2015 and the lowest number since the full collection of data began in 2003.

The same report shows that the number of fatalities in the construction industry has fallen significantly since 2003, Construction reporting a fatality rate reduction of 43%.

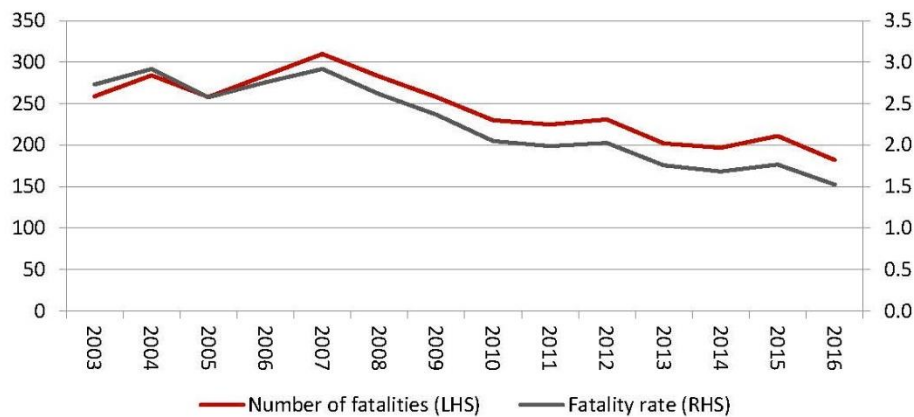
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<sup>7</sup> See pg.8



This indicates continuous improvement in workplace health and safety outcomes over the last decade, with both the rate of serious workers' compensation claims and the rate of worker fatalities significantly declining over this time.

**Figure 2: Worker fatalities – number and fatality rate (fatalities per 100,000 workers), 2003 to 2016**



Source: Safe Work Australia, Work-related Traumatic Injury Fatalities data set, 2016

A greater focus by workplace health and safety regulators towards more coordinated engagement with industry, and providing clearer and focused compliance information, guidance, advice and assistance to construction workplaces, rather than the harmonisation of work, health and safety laws has contributed to the downward trends in fatality rates.

The second matter is what is 'harmonisation'?

By and large, through the adoption of the Model Laws across a number of states and the territory, work health and safety concepts have been harmonised. However jurisdiction specific provisions remain and in some instances serve to undermine the adoption of a consistent approach. Most notably the recent changes in Queensland which, amongst other things, saw the introduction of industrial manslaughter laws in a state which had adopted the Model Laws, now stands apart from other 'harmonised' jurisdictions.

Other examples of state specific approaches include:

- Queensland has retained a 3 metre height threshold. In contrast those that have adopted the Model Laws and codes of practice must manage a risk of a fall by a person from one level to another that is reasonably likely to cause injury.
- The monetary threshold for when a work health and safety management plan is required differs across jurisdictions, for example in South Australia the threshold is \$450,000, in Northern Territory the threshold is \$500,000 whereas in NSW the threshold remains at \$250,000 in line with that set by the model Work, Health and Safety Regulations.

Various state based codes of practice have also been retained, notwithstanding that those matters may be dealt with in a model Code of Practice, for example, the NSW Code of Practice *Safe Work on Roofs Part 1: Commercial and Industrial Buildings* contains control measures that are inconsistent with the WHS Code of Practice *Managing the Risk of Falls at Workplaces*.

Further there are various other jurisdiction specific legislative frameworks that interact with safety laws.

Occupational licensing, for example, stands out as an area completely within the remit of state and territory based jurisdictions, which has safety implications. The purpose of licensing those who carry out residential building work is to mitigate risks to consumers if an 'unqualified' person or organisation is used to undertake such work. Licensing in the residential building industry in theory, minimises risks by ensuring that people who perform work which is critical to the structure of a home or building have achieved a certain standard of technical skills. This work would, if done badly, have the potential to cause significant harm to people or cause costly property damage.





Again in Queensland, recent changes to building legislation have been introduced which create the ability to withdraw a person's license if found guilty of a workplace health and safety offence that leads to death.

Currently occupational licensing arrangements across Australia are inconsistent for example there are:

- Variations in the types of individuals required to hold an occupational license.
- Variations in the training and experience required to hold equivalent licenses.
- Variations in the types of work or value thresholds that require a licensed builder, a building approach and/or home warranty insurance.

Differences in laws across the country highlight that the development of a safety culture is more valuable in term of achieving safer workplaces than the content of the legal framework across the country.

## 3.2 FORMS OF LABOUR ENGAGEMENT AND A SAFE-WORK CULTURE

All individuals at a workplace have a role in relation to work, health and safety and the creation of a safe-work culture. The primary duty of care under the Model Laws was purposely designed to focus on this outcome.

Of note, the Explanatory Memorandum to the *Work, Health and Safety Bill 2011 (Cth)* outlined that:

*'The changing nature of work organisation and relationships means that many who perform work activities do so under the effective direction or influence of someone other than a person employing them under an employment contract. The person carrying out the work:*

- *may not be in an employment relationship with any person (e.g. share farming or share fishing or as a contractor working under a contract for services), or*
- *may work under the direction and requirements of a person other than their employer (as may be found in some transport arrangements with the requirements of the consignor).*

*For these reasons, the Bill provides a broader scope for the primary duty of care, to require those who control or influence the way work is done to protect the health and safety of those carrying out the work.'*<sup>8</sup>

Further, the adoption of the term 'worker' instead of 'employee' and 'Person Conducting a Business or Undertaking' (PCBU) instead of 'employer' sheets home the primary purpose of the Model Laws to protect all persons from work-related harm irrespective of their status.<sup>9</sup>

By purposely adopting this terminology the Model Laws were aimed at being broad enough and flexible enough to remain relevant despite any changes in the way we work and the way work is carried out. Clearly new and evolving styles of workplace organisation have been a feature of the Australian economy for decades.

## 3.3 PENALTIES

With the introduction of the Model Laws and the adoption of these model provisions across most states, the penalties available in relation to workplace deaths drastically increased. These current penalties provide regulators with the necessary tools to respond to a death at a workplace.

An individual can, under existing laws, be sentenced to imprisonment for a breach of safety laws, including a fatality that occurs at a workplace. Additionally under the Crimes Act in each State, individuals can already be charged with manslaughter when they contribute to the death of another person.

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<sup>8</sup> Paragraphs 17-18 at pg.16  
<sup>9</sup> Explanatory Memorandum at pg.7



There are a number of recent decision demonstrating the application and use of the current penalty framework.

In February 2015, a director of a scaffolding company received a 12-month suspended jail sentence (and a recorded conviction) in Queensland after two of the company's workers fell from a high-rise complex after the rigging detached from the swing stage scaffold in which they were located. The director had disregarded engineering instructions relating to how the swing stage rigging was to be erected and also failed to follow relevant Australian Standards. This resulted in the swing stage being erected in a grossly 'negligent' manner.<sup>10</sup>

Of note, this penalty was able to be imposed prior to the passage of the *Work, Health, Safety and Other Legislation Amendment Bill 2017* that introduced the offence of industrial manslaughter in Queensland.

That same year in South Australia a director of a transport company was imprisoned for 12 years and 6 months, with a non-parole period of 10 years, for the manslaughter of his employee. The employee was driving a company owned truck when the brakes failed and he had to veer onto the gravel shoulder to avoid colliding with a small car. The truck hit a pole and the driver was killed.

The truck's brakes were found to be in total disrepair and had very little braking capacity for several weeks. Importantly, the director was prosecuted for manslaughter under the South Australian *Criminal Law Consolidation Act 1935*.

In another example from Queensland a director's failure to take reasonable care and precautions as an electrical contractor resulted in the death of a young man on a construction site. In February 2012 an individual was fatally electrocuted when he was asked to hold a temporary construction switchboard during its installation. No safety switch had been installed and fuses designed to prevent electrocution were incorrectly installed. For the charges of manslaughter and perjury, the Court sentenced the director to seven years jail, with a non-parole period of two years.<sup>11</sup> Again, such a penalty was imposed prior to the introduction of the offence of industrial manslaughter in Queensland.

These examples proceeded under existing laws and the penalties set by the Model Laws without the need for further regulation including for example, the offence of industrial manslaughter.

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<sup>10</sup> *Department of Workplace Health and Safety v Allscraft Systems and Ralph Michael Smith 2015*  
<sup>11</sup> *R v Day [2018]*

