



**Senate Standing Committee on Education and
Employment**

Inquiry into industrial deaths in Australia

6 June 2018

Introduction

1. The National Road Transport Association (NatRoad) is pleased to make a submission to the Senate Education and Employment Committee Inquiry on the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia.
2. NatRoad is Australia's largest national association representing road freight transport operators, from owner-drivers to large fleet operators, general freight, road trains, livestock, tippers, express car carriers, as well as tankers and refrigerated freight operators.
3. Safe Work Australia statistics indicate that 24 per cent of workers who died were employed in the transport, postal and warehousing industry (2007-2016). Despite a national focus on road freight transport as a priority industry under the *Australian Work Health and Safety Strategy 2012-2022*, the sector continues to have high rates of fatality and injury compared to other industries.
4. NatRoad is concerned by these statistics. We have a deep commitment to improving safety in the road freight transport sector, both on-road and off-road. In this regard, it is essential to focus on effective strategies to prevent work-related death and injury in the first instance, and to balance these with enforcement approaches and penalties that are proportionate to the level of risk and culpability.

Overlapping and confusing safety laws

5. Road freight transport operators must comply with duties under Work Health and Safety (WHS) laws as well as the Heavy Vehicle National Law (HVNL). The HVNL focusses on the safety of a heavy vehicle on a road while WHS laws cover all work-related hazards and risks. This means there is a significant overlap.
6. The HVNL recognises that the responsibility for ensuring safety on the road is shared between various parties in the supply chain, including consignors, schedulers, operators and loading managers. Recent amendments to the HVNL are aligning chain of responsibility provisions more closely with WHS laws to include outcomes-based primary duties and duties for executive officers. The HVNL clarifies that if there is any inconsistency between the WHS laws and the HVNL, the WHS law prevails.
7. We submit that there is no need to have separate industry specific safety laws as the principle for managing risk is the same.¹ The WHS Act is broad enough to capture all types of work activities. The general duties can be supported with industry specific regulations and codes of practice.
8. As a minimum, industry specific laws should be aligned with WHS laws. This will remove the risk of inconsistency and confusion and should improve compliance where heavy vehicle safety is managed holistically as part of a safe system of work.

The lack of national consistency

9. NatRoad strongly supports national consistency in the regulatory regime, including consistency in enforcement approaches. A key benefit of harmonised laws is that multi-state

¹ See Recommendation 76 of the [National Review into Model Occupational Health and Safety Laws – Second Report](#)

organisations can operate under consistent safety practices, language, descriptions and interpretations of safety duties. This has a positive impact on safety and productivity.

10. A truck loaded at a farm in NSW and unloaded in a Queensland processing facility should be able to operate under the same safety regime at both ends of the journey.
11. Unfortunately, we are faced with a situation where Western Australia and the Northern Territory have not adopted the HVNL. Victoria and Western Australia have not adopted the model WHS laws.
12. We are disappointed when governments in some jurisdictions feel compelled to unilaterally change their laws from the nationally agreed model. This is often based on their own political ideology rather than improving safety outcomes as has been the case in Queensland where amendments to their WHS laws have been made each time a new government is elected.
13. National consistency is not only affected by the laws themselves but by the way they are enforced and administered. All jurisdictions should adopt the National Compliance and Enforcement Policy in a consistent manner and continue to work cooperatively through the Heads of Workplace Safety Authorities to improve consistency in the administration, inspection and enforcement of the WHS laws.
14. Although a National Heavy Vehicle Regulator (NHVR) has been established under the HVNL, there are many inconsistent approaches to implementing and enforcing the HVNL across jurisdictions and various agencies. In relation to heavy vehicle safety, it is possible to have the involvement of police, road transport authorities, WHS regulators, the NHVR and local road managers.

Workplace investigations and enforcement

15. Regulation is only as valuable as its enforcement and the accountability of all parties. The experiences of our members indicate that a significant proportion of enforcement is focussed on minor technical issues that are not critical to ensuring safety.
16. Furthermore, heavy vehicle incident investigations are managed in very disparate ways across numerous government agencies including police. This creates a significant gap in the data on causal factors related to serious injury and fatal crashes.
16. To date, the main focus of truck crash investigations and data collection has been on the immediate causes relating to unsafe driver behaviours such as inappropriate speed, fatigue and drug use. This is a flawed approach because truck crashes can be an outcome of multiple, interacting factors within the broader transport and supply chain system.
17. Authorities and the media are always quick to assume that the truck driver is to blame, when statistics show that the driver of the car or light vehicle was responsible in 93% of multi-vehicle fatal accidents where a heavy vehicle was involved.²
18. NatRoad recommends that a dedicated, independent authority such as the Australian Transport Safety Bureau (ATSB) be tasked with investigating all serious truck accidents. The findings and recommendations should be reported publicly so that actions by industry and the government to reduce the road toll are not misdirected.

² [2017 Major Accident Investigation Report](#), National Transport Insurance

19. A more consistent approach to collecting data and sharing information across the jurisdictions on the underlying risk factors that lead to serious incidents will support the development of evidence-based policies. It will also help regulators target education and enforcement resources to areas of most risk.
20. Parties in the chain of responsibility must believe that enforcement is likely and therefore regulators must allocate sufficient resources to investigate duty holders not directly involved in a breach but who may influence the work activity in some way.
21. The HVNL requires improvement so that the NHVR receives notification of heavy vehicle incidents, has access to data and has sufficient regulatory powers to effectively investigate chain of responsibility offences.

Extraterritorial application

22. While the existing powers under the model WHS laws allow for sharing of information between jurisdictions, problems arise when investigators from one jurisdiction wish to conduct an investigation into a suspected WHS breach in another jurisdiction.
23. The HVNL includes a clause allowing the extraterritorial operation of the law (section 16). The model WHS law allows jurisdictions to insert their own provisions. NSW recently amended its WHS Act to extend regulatory powers outside the jurisdiction.³
24. Given that many organisations operate across borders, it is essential for the effectiveness of the laws that they include extraterritorial provisions. Regulators should also be able to share information with other regulators in the interests of safety.

Use of temporary and labour hire workers

25. Although the Inquiry Terms of Reference include examining the safety implications relating to the increased use of temporary and labour hire workers, we consider the changing nature of work more broadly, including the 'gig economy', noting that this issue is also being examined under the current Review of the Model WHS Laws and the Future of Work and Workers Inquiry.
26. The safety of work in the road freight transport sector is influenced by more complex supply chains and new business models, such as digital marketplaces that facilitate transactions resulting in the movement of people or goods. Platform companies use technology solutions to match buyers and sellers, also extending the traditional consumer-to-business model to include peer-to-peer. Other changes impacting on the road freight industry include:
 - an ageing workforce
 - rapidly evolving safety technologies such as fatigue monitoring devices
 - automation, and
 - increasing consumer demand for personalised, door-to-door and immediate delivery of goods.
27. In our view the framework of duties and the broad definitions of a 'person conducting a business or undertaking' and a 'worker' in the model WHS laws are effective in adapting to changes in work arrangements, including the use of temporary and labour hire workers. There is no need for separate legislation to protect these types of workers.

³ *Work Health and Safety Amendment Bill 2018* <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3496>

28. Multiple duty holders with concurrent and overlapping duties are a common feature of many work activities, particularly in the transport industry dominated by supply chains. The requirement in the model WHS laws to consult, co-operate and co-ordinate activities with other duty holders is, without a doubt, essential in ensuring that each party can meet their duty effectively.
29. NatRoad also strongly supports the requirement for officers to exercise due diligence. This is helping to drive safety from the top of an organisation and ensure that information about safety performance is reported back up again from the 'factory floor' to the board room.
30. However, we note that the majority of section 27 prosecutions have been against officers of small organisations where officers were closely involved in the day-to-day management of work. While it may be harder to prove the failure of officers in large corporations to exercise due diligence, WHS regulators should not shy away from investigating these offences.

Role of employers and unions

31. NatRoad acknowledges that unions can promote safety in workplaces by facilitating consultation and participation mechanisms for workers. However, in the context of declining union membership and the changing nature of employment, we believe the focus should be on creating positive safety cultures within workplaces where workers themselves are empowered to raise health and safety issues.
32. We note a major area of concern has been in the construction industry where unions have widely misused entry rights, confirmed by evidence and findings of at least two Royal Commissions and a number of court decisions.
33. Union right of entry must be subject to safeguards to ensure safety is not used to advance industrial agendas and that entry is carried out in an effective and fair manner. It is NatRoad's preference that workplace entry provisions be located entirely within the Fair Work Act, similar to the approach used in Western Australia.

Effectiveness of penalties – industrial manslaughter

34. The model WHS Act has three categories of offences which are based on the degree of culpability, risk and harm, and not on the actual consequence or outcome of the breach. This means that a duty holder can be held to account for a breach, even when it has not resulted in an injury, illness or death.
35. NatRoad does not support the inclusion of industrial manslaughter provisions into WHS laws. These provisions change the focus of the legislation from one that is about level of risk to which people are exposed to one where the outcome becomes a determinant, where industrial manslaughter provisions are triggered by a death in circumstances that may have less culpability than a similar incident that does not result in death.
36. There are already existing manslaughter offences in each jurisdiction, under general criminal law. For example, the *Crimes Act 1900* NSW incorporates a charge for manslaughter (s.18), with a maximum penalty of 25 years imprisonment. The legislation allows the prosecution to establish a manslaughter charge by criminal negligence, unlawful and dangerous act, excessive self-defence or by omission.

37. In recent years, there have been successful prosecutions of officers under the general crime of manslaughter. For example, in April 2017 the South Australian Court of Criminal Appeal confirmed the 12-year jail sentence imposed on a company director who was found guilty of manslaughter under general criminal laws.
38. In March 2018, the Queensland Supreme Court sentenced a company director to seven years' jail, with a non-parole period of two years, for manslaughter under general criminal laws.
39. The model WHS Act already allows for significant penalties including terms of imprisonment. It should be noted that the threat of a penalty or prosecution is not the only deterrent against poor health and safety practices. The direct costs of workplace incidents and reputational damage are additional factors.
40. Instead of including industrial manslaughter provisions in WHS law, we recommend that the Category 1 offence include "gross negligence" as originally recommended by the *National Review into model Occupational Health and Safety Laws*.⁴

Effectiveness of penalties – enforceable undertakings

41. Safe Work Australia's Comparative Performance Monitoring Report indicates that, from 2011-12 to 2015-16, there has been a 35 per cent reduction in the number of legal proceedings resulting in a conviction, order or agreement. At the same time the number of enforceable undertakings has increased by 250 per cent.
42. NatRoad supports the availability of enforceable undertakings as an alternative to prosecution. They can result lasting safety improvements that sometimes extend beyond the business to the broader industry or community.
43. The financial contribution of a person entering into an enforceable undertaking is often significant and potentially higher than a court imposed penalty following a prosecution. In 2017, the average value of actions under enforceable undertakings was \$311,458 with a trend towards larger companies committing around \$1 million.⁵ For example, SafeWork NSW recently accepted an enforceable undertaking of \$1.13 million from AGL Macquarie Pty Ltd after two of its employees at the Liddell Power Station suffered burn injuries.
44. In comparison, the highest average penalty for a successful prosecution in 2017 was in the Commonwealth with \$465,625 followed by New South Wales with \$141,710.⁶ In February 2018, a mining company was fined \$900,000 from a maximum \$3 million in the first finalised prosecution for reckless conduct under Australia's harmonised WHS laws.
45. While enforceable undertakings are not available for a category 1 offence, there is some debate about whether they should be available for category 2 offences that involve a fatality. We believe the regulator should continue to have discretion in accepting enforceable undertakings for all category 2 offences.

⁴ [National Review into Model Occupational Health and Safety Laws – First Report](#)

⁵ [Regulatory Trends 2018](#) Clyde&Co, p.23

⁶ [Regulatory Trends 2018](#) Clyde&Co, p.20