



Submission

Industrial Manslaughter Consultation – New South Wales

18/03/2024

Transport Workers' Union of New South Wales



Transport Workers' Union of NSW

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Contents

1. About the TWU	3
2. Introduction	3
3. Transport and Logistics: Relevant Context	3
4. Who Can Commit the Offence of Industrial Manslaughter.....	5
5. Who is Covered by the Industrial Manslaughter Offence.....	7
6. What Test Should be Used to Establish Industrial Manslaughter	8
7. Penalties and Defences	9
8. Type of Offence.....	9
9. Conclusion + Summary of Recommendations	11



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1. About the TWU

- 1.1 The Transport Workers' Union of New South Wales (TWU) represents tens of thousands of people in Australia's road transport, aviation, oil, waste management, gas, passenger vehicle and freight logistics industries.
- 1.2 With over one hundred (100) years' experience representing the workers who conduct Australia's crucial passenger and freight transport tasks, the TWU has been proactive in advocating for the establishment and improvement of industry standards which advance the lives and safety of transport workers, their families and the community at large.

2. Introduction

- 2.1 The TWU welcomes the opportunity to respond to the NSW Government's Consultation paper on Industrial Manslaughter.
- 2.2 By virtue of a long representational history of transport workers, the TWU are well-positioned to provide feedback on how the NSW Government should implement a much-needed industrial manslaughter offence. The consultation paper released by the NSW Government is a strong step forward.
- 2.3 In reference to the consultation paper itself, the TWU has prepared this submission to not only answer the outlined questions and elements, but to also provide broader perspectives and factors that may prove relevant or beneficial to decision makers in developing state policy and laws. As such, the TWU will provide its general perspectives and comments, followed by direct address of the consultation paper's questions and elements.
- 2.4 Regarding the questions outlined in the consultation paper, the TWU will address them through discussion of the elements, rather than listing the questions specifically. This submission will conclude with a summary of suggestions.

3. Transport and Logistics: Relevant Context

- 3.1 Transport is widely considered one of, if not the deadliest industry in Australia, and unfortunately, this is for good reason. Based on the TWU's monitoring of media reports, 2023 saw at least 202 people killed in truck crashes, 44 of which were truck drivers themselves, with this number likely being higher due to being current as of November 2023.
- 3.2 The aforementioned figures only refer to truck drivers specifically. It does not include the wide and varied sectors within the broader transport industry. Indeed, transport is a significant industry in Australia, in reference to scale. The Australian transport, postal and warehousing industry division experienced growths in all key data items for 2021-22, indicated by the latest release of Australian Industry by the Australian Bureau of Statistics (ABS). Notably, the transport industry division employment grew by 18,000 people (2.8%)¹.

¹ Australian Bureau of Statistics 2021-22. *Australian Industry*, ABS.
<https://www.abs.gov.au/statistics/industry/industry-overview/australian-industry/latest-release>



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- 3.3 In 2021, the transport, postal and warehousing industry had the highest number of worker fatalities. The industry also recorded the second highest fatality rate when accounting for the number of workers in the industry (7.9 fatalities per 100,000 workers)².
- 3.4 In 2022, the figure for the transport, postal and warehousing industry increased, with work-related fatalities rising to 9.5 fatalities per 100,000 workers³. What these figures demonstrate is just how serious workplace deaths in this industry should be taken, and by extension, why the TWU has a vested interest in the provision of the industrial manslaughter offence under NSW jurisdiction.
- 3.5 There are some unique elements in the transport industry that must be raised, for contextual factors. Truck drivers are often faced with directions from management, or some supervisor, whatever their designation may be, to practice a form of unsafe work or something that would be considered unreasonable to any other party. An example of this may be a driver receiving an order to cart a new load, even though they are meant to be taking a break, or their working hours for the day have concluded.
- 3.6 In such cases, the driver's job may be threatened, or they may be faced with some manner of hostility where they are left with virtually no choice but to comply. This is something the TWU has observed on an uncountable number of occasions in its long representational history of heavy vehicle drivers.
- 3.7 Situations like these bring into light a number of concerns, particularly in regards to fatigue, which the TWU would categorise as a major safety hazard for heavy vehicle drivers. In some lived cases, managers have directed drivers to continue their journeys, or to start a new one, despite the driver expressing concerns relating to their own fatigue.
- 3.8 TWU NSW State Secretary, Richard Olsen, shares;
- "... over the years, we [TWU Officials] have consistently encountered scenarios in which a heavy vehicle driver is directed to continue working after they've already completed their hours. It doesn't matter if that driver is fatigued, all that matters is that the run is complete so the operator can maintain their contract.*
- Often, we'll [TWU Officials] find that if a driver expresses concern, or is unwilling to fulfill such a request, for whatever justified reason, they are typically met with hostility, and in some cases, direct threats to their employment. So, when drivers are expected to comply, regardless of fatigue, it then becomes a key safety issue."*
- 3.9 The TWU provides specific reference to such cases, as these situations legitimately put truck drivers at risk of serious injury, or worse. Doubly, on the road, this may be putting other road users and vulnerable individuals at risk as well. These contextual factors should be taken into consideration when assessing just how far accountability will go in the case of an industrial manslaughter offence in NSW.

² Safe Work Australia. (2021). *Work-related Traumatic Injury Fatalities, Australia*.

³ Safe Work Australia. (2023). *Key Work Health and Safety Statistics Australia, 2023*.



3.10 Similarly to the situation of truck drivers, warehouse workers in transport and logistics can be forced into situations in which they may perform tasks they are unfamiliar with, or do not normally do, or in some cases, be directed to perform a manner of “unsafe” work. In this space, the maintenance of machinery and plant also come into play, and remain an ever-relevant factor for the TWU and its dealings with members.

3.11 More insight into where specific transport industry elements become relevant in the context of industrial manslaughter will be outlined further within this submission.

4. Who Can Commit the Offence of Industrial Manslaughter

4.1 The TWU is of the view that the offence of industrial manslaughter can be committed under the definitions outlined in the Work Health and Safety Act (2011) (WHS Act), as well as additional categories such as executive officer and senior officer.

4.2 Queensland has made such definitions within its jurisdiction, seemingly as a means of applying proper responsibility for levels of seniority within an organisation, with a clear emphasis on the bigger decision makers.

4.3 While the TWU certainly agrees with the idea of keeping top-level executives to account, it is important that middle-managers and those responsible for decision-making in different levels of an organisation can also be held to account. The TWU is concerned that with the definition of “executive officer” or “senior officer”, lower-level managers who hold significant decision-making roles, and are still capable of issuing orders or directing workers, will not be held to a reasonable degree of responsibility under the jurisdiction.

4.4 The TWU raises this concern, as the QLD jurisdiction, outlined in Appendix A of the Industrial Manslaughter consultation paper, makes no specific reference to “officer”, but rather, implies that only a person conducting a business or undertaking (PCBU) or “senior officer” are included in the scope and exclusions. The TWU believes that the definition “officer” should also be applied under the NSW jurisdiction, in addition to “senior officer”, as it would mean accountability for decision-makers across the board, including those directing workers themselves.

4.5 This is important as, in the TWU’s long experience of representing transport workers, it is all too common for managers and leads (who are not considered executives) to direct workers to perform tasks they do not usually do, or to practice some manner of unsafe work. These individuals should be held to account, just as “senior” officers or the PCBU itself should be in appropriate contexts.

4.6 Simply put, the scope of industrial manslaughter should apply to those with a health and safety duty, those in senior management, and those with significant decision-making roles. Moreover, the scope of the offence should include Section 19 of the WHS Act, as those with duties under Sections 20-27.

4.7 Concerning “who” can commit the offence, as mentioned previously, within any PCBU itself, the inclusion of “officer” and “senior officer” should be considered, though an amending



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section may be beneficial, referring to other senior personnel, such as site managers and executive management. This would solidify the scope of the offence so that its effectiveness as a deterrent is ensured, as well recognising those within a business that have significant decision-making powers at all levels.

- 4.8 Separate to the specific aforementioned definitions, it is also necessary to acknowledge the complex and varying chains of responsibility in the transport industry as a whole. Across the entire industry, transport workers in numerous sectors can be engaged, and/or directly influenced by, multiple PCBUs in conducting their work. An example of this would be waste management, where an employee will be engaged by the waste management company, who are servicing a contract awarded by local government. Similarly to waste management, a bus driver will be employed by an operator, who in turn, provides services for a particular region under an NSW Government contract.
- 4.9 The chain of responsibility in road transport itself is also relevant, and perhaps even more complex than that of buses or waste management. In road transport, there can be different types of employment and conditions for drivers. Some truck drivers are direct employees of a transport operator, who work contracts for large clients at the top of a supply chain. Alternatively, some are owner drivers, who sub-contract to transport companies, effectively creating a lengthy supply chain where the responsibilities of each entity begin to blur the further that supply chain is scaled, and at often times, clients at the top of the chain make all attempts in avoiding accountability for what happens below.
- 4.10 With this reality in mind, it is necessary for all relevant parties in the chain of responsibility to be considered, and held to account, in the context of the industrial manslaughter offence. There are simply too many variables and differing elements within the transport industry's diverse sectors to comfortably pigeonhole the scope of the industrial manslaughter offence, as well as the applicable responsibilities, to any one given party in any one given situation. Due to the complexity, the TWU is always open to further consultation and engagement with SafeWork NSW on this matter, and would go so far as to openly encourage it.
- 4.11 Importantly, as reflected under Division 5 of the WHS Act, a volunteer does not commit an offence for a failure to comply with a health and safety duty. Further exemptions for the industrial manslaughter offence should include workers and other persons in the workplace.
- 4.12 Further, the TWU would specifically raise that health and safety representatives (HSRs) should not, by any means, be included in the parties capable of committing industrial manslaughter to its capacity as an offence. The provision of the industrial manslaughter offence should be drafted in line with Section 66 of the WHS Act. Though a HSR possesses powers and functions capable of supporting their work group, and holding a PCBU to account in its compliance with the WHS Act, HSRs do not hold any duties or responsibilities under the WHS Act.
- 4.13 Additionally, they are not inherently decision makers with a level of formal authority in the workplace, and rarely ever are, considering HSRs are elected by workers in a work group. A HSR, therefore, cannot reasonably be held responsible for a case of industrial manslaughter in the practice of their powers and functions.



4.14 It is not uncommon, in the TWU's experience, for the nature of a HSRs capacity to be misrepresented to them by management. In the past, the TWU has assisted HSRs who had suffered the attempts of a PCBU to lump them with its own responsibilities under the WHS Act. The TWU urge that the protections of HSRs must be emphasised under the industrial manslaughter jurisdiction, to avoid the misrepresentation of their capacity, and doubly, to compel PCBUs to act properly towards their responsibilities in real time.

5. Who is Covered by the Industrial Manslaughter Offence

5.1 The TWU is firm in the belief that the coverage of the industrial manslaughter offence should extend to beyond just employees in a workplace. Instead, it should encompass all individuals present at a workplace, whether it be employees, sub-contractors, visitors, or anybody else.

5.2 Workplaces often do not just contain employees within its spaces. As an example, the TWU frequently hosts members in appointments and meetings, delegates and HSRs in training, and industry stakeholders visiting the premises. With a broad category of individuals that could be present at any given time, it only makes sense that the scope of the industrial manslaughter offence would cover all of these people.

5.3 The TWU would argue that if a visitor was exposed to a particular risk or occurrence, as a result of negligence or any failure in capacity by a PCBU, then the workers engaged by that PCBU were also inevitably exposed to said risk.

5.4 Hazards and occurrences do not care for the labels and designation of individuals present in a workplace. Safety conditions impact anyone present in any given workplace. The scope of industrial manslaughter must extend to everybody if it is to serve as a genuine deterrent for negligence and unsafe practices.

5.5 Section 19(2) of the WHS Act, outlining Primary duty of care, states that; *"A person conducting a business or undertaking must ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking."*

5.6 Furthermore, Section 19(3f) of the WHS Act, states that without limiting prior subsections, a PCBU must ensure, so far as is reasonably practicable that; *"the provision of any information, training, instruction or supervision that is necessary to protect all persons from risk to their health and safety arising from work carried out as part of the conduct of the business or undertaking..."*

5.7 The aforementioned subsections of the WHS Act indicate that the Act itself acknowledges that the safety of individuals who are not explicitly considered workers must be held into account by a PCBU. This measure should also be applied to the provision of industrial manslaughter as an offence in NSW.

5.8 Therefore, industrial manslaughter should cover those who are killed in a workplace provided they are considered any manner of "worker" under Section 7 of the WHS Act. Additionally, industrial manslaughter should cover those killed in a workplace who may be considered



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“others”, “other persons”, or any equivalent/alternative descriptor within the WHS Act, for all the reasons outlined above.

- 5.9 In the context of workers, under industrial manslaughter, suicides that may have a causal factor relating to work should also be properly investigated, and not brushed aside. In such cases, where the link is established and the workplace is found to be a contributing factor to the death, the PCBU should be prosecuted under industrial manslaughter provisions.

6. What Test Should be Used to Establish Industrial Manslaughter

- 6.1 Currently, there is a minimal number of individuals facing prosecution for Category 1 crimes under the NSW jurisdiction. This can be attributed to the excessively high threshold within the WHS Act for recklessness and gross negligence.

- 6.2 Maintaining the current threshold for prosecution would effectively serve as detrimental to the overarching goal of having the industrial manslaughter penalty serve as an effective deterrent. By extension, this may hinder the effectiveness of the industrial manslaughter offence in ensuring safety in workplaces – simply put, the lower the deterrent, the less pressure on PCBUs in maintaining the best safety measures possible.

- 6.3 The TWU would propose two potential elements for the assessment criteria in the NSW jurisdiction. It may be best to revise the criteria to “*recklessly and/or negligently*”, rather than recklessness and gross negligence specifically. Alternatively, the QLD model’s criteria that outlines it is sufficient for a PCBU or senior officer to be found negligent due to their conduct, could also serve as an effective criterion, as it maintains a suitable level of accountability for the offence, whilst also preventing offenders from slipping through the cracks. Of course, in reference to this, the TWU would again highlight the idea of including the definition of “officer” within this framework.

- 6.4 One particular element that the TWU believe should not be included in the jurisdiction for industrial manslaughter, under any circumstances, is enforceable undertakings. Enforceable undertakings would only serve to water-down the severity of industrial manslaughter as an offence, and would effectively undermine the intended weight of the offence, and its subsequent power as a deterrent.

- 6.5 Additionally, it is worth noting that the NSW jurisdiction would benefit from including a “no reasonable excuse” provision for industrial manslaughter offences. The TWU would argue that there is no situation in which there can be a reasonable excuse for industrial manslaughter.

- 6.6 Under definitions in the WHS Act, particularly, under Section 19(1a), among others, the responsibilities of a PCBU are noted with the descriptor of “*so far as is reasonably practicable*”. The TWU suggests that in industrial manslaughter cases, something being “reasonably practicable” or not should not be allowed as a defense by the charged PCBU.

- 6.7 This is due to multiple reasons, the first of which is that, as outlined above, the TWU believes there is no reasonable excuse for industrial manslaughter, which would include whether any



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given example of a PCBU practicing its duties under the WHS Act could be considered “reasonably practicable”.

- 6.8 Secondly, the existence of a “reasonably practicable” condition, on paper, seems as if it could be used by a PCBU as a loophole in industrial manslaughter cases, to lessen the severity of the crime, shirk itself of its duties under the WHS Act, and could potentially be used to squirm its way out of an industrial manslaughter charge. The TWU believes that this potentiality should not be facilitated under any circumstance.
- 6.9 TWU NSW Assistant State Secretary, Director of WHS & Education, Marija Marsic, shares:

“... transport is an industry that is especially vulnerable to the sluggish nature of the Regulator. SafeWork, the enforcement body, moves too slowly, which is a fault of the current legislation.

... enforceable undertakings completely tear down the standard of an offence, and the effectiveness of the industrial manslaughter jurisdiction would certainly benefit from being free of them.

Another key issue is the thresholds in actually prosecuting Category 1 offences. The thresholds are simply too high, and inequitable in comparison to the weight of offences. The same thing would apply to industrial manslaughter. It is because of these excessively high thresholds that convictions never happen. The industrial manslaughter offence will only serve to be as affective a deterrent as it is made to be, and if it is to be effective, then the thresholds need to be revised.

PCBUs need to be held to account. Companies don't invest in safety because they know legislation isn't enforced, and they know the chances of them being caught in their failures to perform WHS duties are slim. It is cheaper for them to take that risk, rather than investing directly in safety measures, knowing the consequences are minimal. Make real consequences, and we may just see real change.”

7. Penalties and Defences

- 7.1 Regarding penalties, the TWU believes the current penalty that exists for manslaughter under Section 24 of the Crimes Act 1900, that being imprisonment for 25 years, would serve as a fitting equivalent for industrial manslaughter. This of course, applies to individual officers.
- 7.2 In the case of a PCBU found guilty of industrial manslaughter, penalty units would serve as a suitable method of punishment. Penalty units will continue to increase as time goes on, and will remain consistent with inflation and the economy, meaning that the values paid by any PCBU found guilty of industrial manslaughter would effectively be future-proofed without stagnation. This should also support the intent of having an industrial manslaughter offence serve as an effective deterrent for bad practice.

8. Type of Offence

- 8.1 Under the NSW jurisdiction, industrial manslaughter should be classified as an indictable



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offence. It is crucial that the severe nature of the offence is recognised appropriately under the law.

- 8.2 The TWU agrees with the proposal outlined in the consultation paper, denoting that a PCBU or officer charged with industrial manslaughter could be convicted of a Category 1 or a Category 2 offence, as an alternative to the industrial manslaughter offence. This is only given that the PCBU or individual in question is not convicted of industrial manslaughter. This much is necessary, considering the significance of the offence, and would also remain consistent with other jurisdictions, as highlighted by the consultation paper.
- 8.3 However, this is also under the condition that the elements associated with an industrial manslaughter condition are in no way made more difficult to actually prosecute – again, noting the aforementioned suggestion of revising the criteria for industrial manslaughter to *recklessly and/or negligently*". The TWU would further suggest that the idea of Category 1 and Category 2 offence should not be treated as some equivalent alternative that is "good enough" in comparison to an industrial manslaughter conviction.
- 8.4 As such, the TWU agree with the proposal that industrial manslaughter offences should not be subject to a two-year statute of limitations, and would go so far as to say that the existing two-year statute of limitations for Category 1 and Category 2 offences should be eliminated.
- 8.5 As stated in the consultation paper, a lack of statute of limitations would be consistent with other jurisdictions, and perhaps most importantly, would appropriately acknowledge the severity of industrial manslaughter, and would allow for a proper, uninhibited investigation of the offence.
- 8.6 By extension, it is important to note just what kind of official process the industrial manslaughter offence would go through in a legal capacity. Currently, workplace fatalities in NSW are governed by an overlap of the coronial, criminal and WHS jurisdictions, with the NSW Police Force, the Coroner and SafeWork NSW all possessing investigatory functions in relation to workplace deaths.
- 8.7 Consequently, the lines are blurred when assessing the chains of responsibility in relation to the investigation of workplace fatalities between these three bodies. The extent to which these three bodies, in practice, share information and coordinate their actions during the course of their respective investigations is not clear, and there is no legislated requirement in either the Coroners Act or the WHS Act for such information sharing or coordination.
- 8.8 Resulting from this is a situation in which there may be multiple investigations being conducted concurrently by the NSW Police Force, the Coroner and SafeWork NSW. This brings into question just how the resources towards investigating such matters are being used, and if they are being used effectively. Additionally, the TWU has to question the collection and presentation of evidence itself, between the practice of multiple individual bodies.
- 8.9 Because of this, the TWU believes that greater certainty about the jurisdictional responsibility for workplace deaths is urgently needed. Whether such certainty is achieved by legislative amendment, memoranda of understanding (though, a legally binding arrangement would be



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ideal, particularly in the case of industrial manslaughter), or other means, it is vital that the function of each of the three bodies in the investigation of industrial manslaughter be clarified, and how that function operates in connection with the function(s) of other bodies.

8.10 Furthermore, while the Police could conduct prosecutions into industrial manslaughter, much like with murder and manslaughter under the Crimes Act, the Regulator must also conduct its own investigation in cooperation with the Police, and the Coroner, to ensure a collaborative approach where investigative information is properly collected, distributed, and understood among all parties involved.

8.11 The failure of the safety Regulator to undertake such investigations has been considered a serious weakness in improving unsafe work practices and stopping system failures for a considerable time. If nothing changes, the investigations into industrial manslaughter will only be so effective.

9. Conclusion + Summary of Recommendations

9.1 The TWU would like to thank the NSW Government for releasing the Consultation paper on Industrial Manslaughter, and for providing opportunity to respond in the form of a submission respectively.

9.2 The TWU hopes that the perspectives and explanations provided in this submission will be of use to SafeWork NSW, and that what the TWU has shared will be taken into consideration in the process of reviewing and implementing an industrial manslaughter offence under the NSW jurisdiction.

9.3 The following is a summary of the TWU's main points of feedback / recommendations for the industrial manslaughter consultation;

- Clear and comprehensive definitions for “who” can commit industrial manslaughter – within a PCBU, this could include “officer”, “senior officer”, or any other roles that possess any one, or a combination of, WHS duties, significant decision-making powers, and the power to direct workers.
- The provision of the industrial manslaughter jurisdiction should be drafted in line with Section 66 of the WHS Act, ensuring consistent, and necessary protections for HSRs in the workplace.
- In the context of the transport industry, all relevant PCBUs and entities involved in either engaging workers, or directly influencing their work, such as in waste management and buses, and supply chains in road transport, must be held to account and considered under the provision of an industrial manslaughter jurisdiction.
- “Who” is covered by the industrial manslaughter offence should extend to any individual present in a workplace. This includes all types of “workers” under Section 7 of the WHS Act, as well as “others”, “other persons”, or any equivalent, under the WHS Act.



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- Suicides that may have a causal factor relating to work should also be properly investigated, in the context of workers.
- For establishing industrial manslaughter, the threshold must be revised from what is currently existing. *“Recklessly and/or negligently”*, rather than recklessness and gross negligence, is recommended. Alternatively, the QLD model’s criteria that outlines it is sufficient for a PCBU or senior officer to be found negligent due to their conduct, could also serve as an effective criterion.
- Industrial manslaughter, Category 1 and Category 2 offences, should not be subject to enforceable undertakings.
- Inclusion of a “no reasonable excuse” clause for industrial manslaughter, to maintain the severity of the offence.
- For officers found guilty of industrial manslaughter, as 25-year imprisonment sentence, remaining consistent with the Criminal Act, would be a fitting punishment.
- For PCBUs, a penalty unit system, rather than a set monetary amount, would ensure that fines do not stagnate over time, and is the TWU’s encouraged penalty.
- An individual charged with industrial manslaughter, if found guilty, should be convicted of industrial manslaughter. If, however, the charged party is not convicted of industrial manslaughter, they can still be found guilty of alternative Category 1 and Category 2 offences. However, with this process, the threshold for industrial manslaughter should not be made higher.
- Industrial manslaughter offences should not be subject to a two-year statute of limitations. Additionally, the existing two-year statute of limitations for Category 1 and Category 2 offences should be eliminated.
- There needs to be greater certainty about the jurisdictional responsibility for workplace deaths, relevant to the Regulator, the Coroner, and the Police. The Regulator should conduct its own investigations in direct collaboration with the Coroner and Police, and not take a back seat if the other two bodies are involved.