

9<sup>th</sup> October 2019

Mr Tony Sievers MLA  
Chair, Economic Policy Scrutiny Committee  
Northern Territory Legislative Assembly  
via email: [EPSC@nt.gov.au](mailto:EPSC@nt.gov.au)

Dear Committee Chair,

**Re: Work Health and Safety (National Uniform Legislation) Amendment Bill 2019**

The following submission on the Work Health and Safety (National Uniform Legislation) Amendment Bill 2019 (hereafter ‘the Bill’) is on behalf of the members of the Australian Hotels Association (NT Branch) (ABN: 48 911 463 427 trading as ‘Hospitality NT’).

**Executive Summary**

Hospitality NT supports safe and secure workplaces.

We strongly believe that legislative change should occur following consensus of participating jurisdictions on the National Uniform Legislation ‘the model legislation.’

If there are concerns with the current functioning and operation of the local Regulator, and we make no submissions on this, then we believe those should be corrected and assessed ahead of legislative changes that take us out of step with the model legislative approach.

**Background**

The Australian Hotels Association (NT Branch) was established in 1979 and is the leading Territory hospitality industry association representing the rights and interests of its members to Territory, Federal and local governments, other relevant parties and the community.

We currently have over 300 members, associates and sponsors ranging from small regional establishments to 5-star hotels, breweries, beverage suppliers, furnishings and many other diverse complementary businesses.

Unique to the Northern Territory, Hospitality NT membership base incorporates 5 divisions:

- Accommodation Hotel Sector
- Hotel / Tavern Sector
- Wayside Inn Sector
- Club Sector
- Restaurant Sector

Hospitality NT offers its members a unified approach to confronting the issues affecting the hospitality industry in the Northern Territory and it is with the wide industry perspective that we wish to contribute to the public policy debate on the Bill currently before the Committee.

## **Introduction**

At the outset, we would like to make clear our support for a strong and robust workplace safety regime that places clear emphasis on the safety of employees, employers, customers, contractors and other third parties.

We support appropriate and targeted resourcing that is focused on education and compliance to ensure workplace obligations are well understood and are being met.

We note that all the overall findings from the *Best Practice Review of Workplace Health and Safety in the Northern Territory* are focused on the role, responsibilities, operations and independence of WorkSafe NT and we make no contrary submissions in that regard against those findings. We do however do not believe the case for Industrial Manslaughter has been made clear locally, especially by moving ahead of any national considerations in this space in the model legislation.

We also are strong supporters of the long-standing bipartisan efforts to harmonise workplace regulations across the country. Many of our Members operate venues in multiple states and territories and/or are part of organisations that operate throughout Australia.

The model WHS Act, Regulations and Codes must be focused on safety outcomes and that any legislative changes should be thoroughly justified, evidence-based, practical and non-prescriptive, in line with COAG principles.

Harmonisation is and should remain a strong focus of state and territory legislatures to stop a hotchpotch system being re-created. We commend past efforts and support from the Northern Territory to move towards uniform legislation and believe more, not less, needs to be done in this space.

As such our strong preference would be for NT Legislation to be brought forward after there is national consensus amongst participating jurisdictions on the way forward with the model legislation.

### **The current Model**

Hospitality NT believes the current regime is sufficient and appropriate and we think that changes in the space should occur following national consensus rather than patchwork jurisdictional changes.

We believe the current system reflects the long-standing principle that penalties align with the level of risk to which a person is exposed, not on whether that exposure leads, perhaps because of confounding factors, to a fatality or multiple fatalities and this is appropriate.

### **National Approach**

Our Association are part of the Australian Chamber of Commerce and Industry and have participated in their consultative processes on this important issue. We adopt and support the ACCI position which opposes the introduction of Industrial Manslaughter and refer to their submission in response to the national review on the model legislation. Relevant excerpts are reproduced below:

The Australian Chamber opposes the inclusion of dedicated industrial manslaughter offences in workplace health and safety legislation.

Industrial accidents, including those leading to fatalities, should remain subject to regulation via existing workplace health and safety legislation.

Manslaughter prosecutions should only come into play in relation to workplace fatalities subject to existing formulations and tests under the criminal law, without the creation of bespoke or dedicated new offences of industrial manslaughter.

Governments and Regulators, in reviewing and implementing regulation, should be mindful of each of the key components of effective compliance – awareness of the rules (regulation), the ability to comply (resources) and punishment (deterrence). Punishment is only one side of this compliance triangle.<sup>1</sup>

### **Alternative approaches**

Similarly, we adopt the position of the Australian Chamber with regards alternatives to ‘industrial manslaughter’ which they outline as follows:

Regulators have a number of education and awareness programs, and much of what is done in Australia is world leading. However, measurement of their effectiveness and influence is limited.

Anecdotally, a majority of Australian businesses still struggle to identify regulations specific to their context and struggle to understand how to implement the regulations in a way that actually makes their workplaces safer. This challenge is unrelated to penalties and compliance.

The current system has scope to be made more balanced, through placing more equal emphasis on both prevention and enforcement. Penalties after the fact cannot be the primary driver of safer workplaces. Regulators need to bolster their inspectorate capabilities to ensure active monitoring of compliance before any incident, as well as improved promotion and information to ensure more PCBUs are focussed on making their workplaces safer through practical, implementable means (and such promotion and information which also engenders workplace cultures that support safe working).

Possible alternative options to improve health and safety outcomes include:

- Increase consistency in sentencing, through issuing sentencing guidelines, rather than legislatively increasing penalties. This should be done with sufficient rigour around the selection of sentencing panels.

---

<sup>1</sup> Page 19 Australian Chamber Submission: Model WHS Laws CRIS (August 2019)

- Greater resourcing for regulators – increased capacity for education activities particularly in small business, more active compliance monitoring and greater investment in inspector training and capabilities.
- Increase safety capabilities and skills – focus on embedding safety and health fundamentals in vocational training and tertiary qualifications.
- Prioritise sharing of lessons learnt – prompt identification and circulation of safety lessons to industry.
- Improve the timeliness and adequacy of guidance and alerts published by regulators to industry.
- Develop a small business strategy that addresses key barriers and contextual issues to the traditional approaches to safety and health.<sup>2</sup>

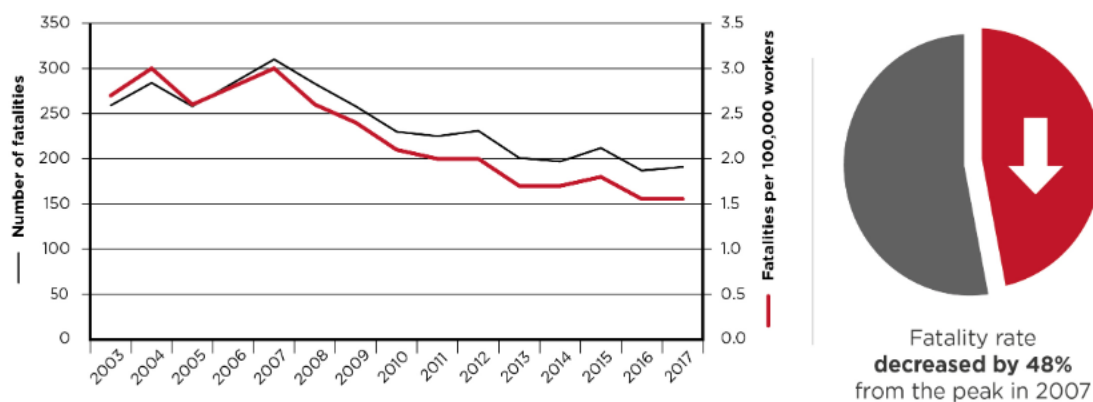
We also believe that greater and better use of enforceable undertakings can significantly enhance WHS objectives throughout the Territory and the nation.

### Support for Status Quo on legislation

We acknowledge that every and any serious injury and worse at workplaces are tragic events that should be avoided and minimised, it is important to consider legislative changes in the context of the downward trends in both fatalities and serious injuries occurring at workplaces across the country:

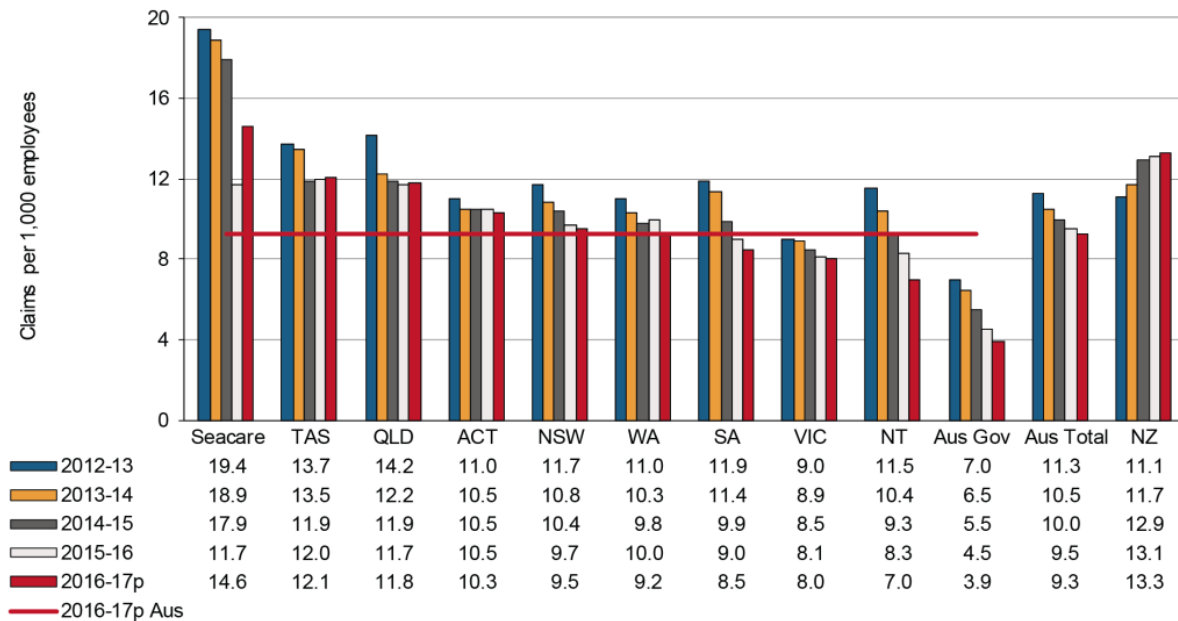
### Trends in work-related injury fatalities, 2003 to 2017 (source: Safe Work Australia)

#### Trends in work-related injury fatalities, 2003 to 2017



<sup>2</sup> Pages 20-21 Australian Chamber Submission: Model WHS Laws CRIS (August 2019)

**Incidence rates of serious injury and disease claims by jurisdiction, 2012 to 2017 (source: Safe Work Australia)**



The Northern Territory appears to be following the national trend of decline of serious workplace injuries and our per worker rates are on par or at the lower level when comparing jurisdictions. We are aware of the claim by Unions relied on in the local Best Practice Review that sort to highlight a higher per worker rate of deaths in the NT compared to Tasmania.

There was no evidence in the local Best Practice Review offered as to why this is occurring when at the same time the number of serious injuries per worker in the NT is significantly decreasing and is considerably lower than in Tasmania. There has also been no evidence put as to how or why introduction of ‘industrial manslaughter’ offences will rectify this.

Given the overall decrease in workplace fatalities across the country and especially in jurisdictions that have adopted the model legislation, any NT discrepancy is likely to be more down to compliance, resourcing and overall stance of the local regulator compared to in other jurisdictions – the key findings of the local Best Practice Review.

We strongly urge focus on those findings and proper assessment of how improvements in those areas make NT workplaces safer rather than implementing ‘industrial manslaughter’ laws outside of the national uniform legislation process.

## **Current inconsistencies**

We rely on the evidence and material contained in the recently completed national review of the model legislation which found:

*“In written submissions and in meetings, most stakeholders expressed a view that WHS regulators across jurisdictions have inconsistent approaches for their enforcement and compliance methodologies and strategies. Some industry advocates stated that this inconsistency was making it difficult for PCBU’s to comply with their WHS obligations.”<sup>3</sup>*

In highlighting the above from that national review, it is relevant to note that the concerns have been raised by employer and employee groups alike with the specific relevant reference in that report given as the Master Electricians Association.

We agree with findings of inconsistency between jurisdictions in the way the model legislation is applied and make no submissions against the Best Practice Review’s findings of how WorkSafe NT should operate going forward.

However, we are of the strong view that all changes to the model laws should be down through the national framework to the primary focus of jurisdictions, and should be to ensure current inconsistencies are addressed and ironed out, rather than embarking on a widening of the legislative gap between jurisdictions which will only exacerbate the problem.

## **Industrial Manslaughter**

Hospitality NT does not support the introduction of ‘industrial manslaughter’ laws into the Northern Territory ahead of consensus on changes to the model legislation from participating jurisdictions.

We note that in the recently completed national review of the model legislation that there is a recommendation to introduce ‘industrial manslaughter.’

We believe consensus amongst jurisdictions that have adopted the model legislation on what that should look like is a critical precursor to any local legislative changes and in this regard the NT

---

<sup>3</sup> *Review of the model Work Health and Safety laws Final report*, Safe Work Australia, December 2018, Page 107

should be working collaboratively with participating jurisdictions to gain consensus rather than implementing unilateral legislative amendments.

The Bill before the Committee creates an offence of industrial manslaughter, with maximum penalties of 'imprisonment for life' for individuals and 65,000 penalty units (currently equating to \$10,205,000) for bodies corporate.

Looking at the proposed Section 34B contained in the Bill:

**S34B Industrial Manslaughter**

1. *A "person" commits the offence of industrial manslaughter if:*
  - a. *the person has a health and safety duty; and*
  - b. *the person intentionally engages in conduct; and*
  - c. *the conduct breaches the health and safety duty and causes the death of an individual to whom the health and safety duty is owed; and*
  - d. *the person is reckless or negligent about the conduct breaching the health and safety duty and causing the death of that individual.*
2. *Strict liability applies to subsection (1)(a).*
3. *A volunteer does not commit industrial manslaughter for a failure to comply with a health and safety duty, unless the duty is under section 28 or 29.*

We note that in the existing national uniform legislation, including in the Northern Territory, a 'Person conducting a business or undertaking' is defined (in section 5 of the NT Act) and this is the category of entities that are subject to WHS obligations in accordance with the Act.

We understand the draft new Section 34B contained in the Bill envisages expanding the group of entities beyond PCBUs to include all 'Persons.' If correct, we do not believe the case for this expansion has been made.

The Bill as drafted we do not believe is in accordance with the local Best Practice Review Recommendation 19 which envisages a 'senior officer' offence and a 'employer offence' within the 'industrial manslaughter' framework. In doing so that Review was drawing on the fact that Queensland has already implemented a 'senior officer' definition and offence in their legislation.



We do not necessarily agree with Recommendation 19 in that Review and not that it is at odds with the national review of the Model Legislation which at on page 123 states:

*“In addition, the Qld WHS Act introduced a new concept of ‘senior officer’, which, although similar, differs from the definition of officer which generally applies to the model WHS Act. This could give rise to confusion, exacerbated by the use of another term—‘executive officer’—as part of the definition of ‘senior officer’.<sup>450</sup> I consider that the current definition of ‘officer’ in the model WHS Act should continue to be relied on for any new offence under the model WHS Act.*

Not only is our local review at odds with the findings from the national review, the Bill chooses neither path and instead widens the ranges of entities captured by the offence by referring to ‘person’ rather than PCBU, officer or ‘senior officer.’

This discrepancy between the Bill and the evidence and arguments put to date on why this legislation should advance ahead of national changes to the model legislation adds further weight to concerns that changes are being proposed to a jurisdiction that accounts for 2% of national economic activity ahead of consensus from participating jurisdictions on the way forward on the model legislation.

Additionally, the Bill states that if a judge is not satisfied beyond reasonable doubt that a person is guilty of industrial manslaughter, the judge can find the person guilty of an alternative offence (under section 31 or 32 of the Territory WHS Act). Additionally, the limitation period for prosecutions in section 232 of the Act doesn't apply to industrial manslaughter or to a guilty verdict for an alternative offence.

Conceptually a prosecution for an event beyond the existing time periods could be brought forward by charging for ‘industrial manslaughter’ where the evidence leads itself more towards an alternate existing offence under the Act and in this way the time constraint is removed.

The Bill also provides that any “person” may request the regulator to bring a prosecution.

We believe what is being proposed in the Bill is for a very wide power, with none of the existing limitations periods applying to findings of guilt of industrial manslaughter or alternative offences under the Act.

**Conclusion**

Hospitality NT supports work health and safety objectives within a model uniform law approach. We do not support changes to our legislation that take us out of step with the rest of the participating jurisdictions and runs ahead of the national review and COAG processes. If problems with the local regulator have been identified, these should be rectified and assessed prior to rushing forward with legislative amendments.

Alex Bruce  
Industry Engagement Manager  
Hospitality NT