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Mr Stephen Palethorpe
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Dear Mr Palethorpe

Inquiry into the prevention, investigation and prosecution of industrial deaths in Australia

Thank you for the opportunity to make a submission to the Inquiry into the prevention, investigation and prosecution of industrial deaths in Australia.

This is an area of great importance to the ACT Government. Please find attached our submission for the Committee's consideration. ACT Government officials would be pleased to give evidence before the Committee if the Committee considers that this would be helpful to its deliberations.

We look forward to seeing the outcomes of this inquiry.

Yours sincerely

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ACT Government submission to the inquiry into the prevention, investigation and prosecution of industrial deaths in Australia

1. Introduction

Every worker has the right to return home safely from work.

The health and safety of workers is of paramount importance to the ACT Government, particularly the prevention of serious injuries and industrial deaths at Territory workplaces. Unfortunately we know all too well that an industrial death affects the whole community and the ACT Government is committed to ensuring the effectiveness of our work health and safety laws, including enforcement and injury prevention measures.

The ACT Government acknowledges the terrible human cost borne by the family members, colleagues and friends of those who have died as a result of a workplace illness or injury. Based on this understanding, in addition to a commitment to preventing serious injuries and industrial deaths, the ACT Government acknowledges that more work needs to be done to improve how people affected by an industrial death are supported.

2. Applicable legislation in the Territory

The ACT Government is committed to the safety of all workers, and in particular, the effective deterrence of behaviour and minimisation of risks that increase the likelihood of serious injury or death in the workplace.

In March 2004, the ACT became the first Australian jurisdiction to introduce the criminal offence of industrial manslaughter. The purpose of introducing the specific offence of industrial manslaughter was to ensure that employers can be appropriately held to account if their reckless or negligent behaviour results in the death of a worker, and to raise awareness of the duty of employers to provide a safe workplace. These provisions send a clear message to employers and the wider community that avoidable workplace deaths will be dealt with in the strongest possible way.

By amending Part 2A of the *Crimes Act 1900*, the ACT Government sought to ensure that employers and their senior officers can be held responsible where the death of a worker is caused by recklessness or negligence. This applies to all employers in the ACT, including the ACT Government. This provision does not, however, impose vicarious liability on employers and senior officers for the actions of others. An officer cannot be liable for prosecution just because they occupy a particular position in an organisation. Additionally, for liability under the industrial manslaughter provisions, an employer's recklessness or negligence must be proven beyond reasonable doubt.

ACT industrial manslaughter laws include substantial penalties, including financial penalties which can be applied to either individuals or corporations. For both employers and senior officers the maximum penalty is \$300,000 for an individual or \$1.5 million for a corporation and/or a maximum of 20 years imprisonment. Courts can also order corporations to take

actions including publicising the offence, notifying specific people about the offence and carrying out projects for the public interest.

The ACT Industrial Court, established under the *Magistrates Court Act 1930*, has jurisdiction to deal with criminal and civil matters arising under the *Work Health and Safety Act 2011*, *Workers Compensation Act 1951*, *Scaffolding and Lifts Act 1912*, *Dangerous Substances Act 2004* and *Machinery Act 1949*. It was created to give a dedicated focus to work health and safety matters, and commenced on 8 November 2013. However, the Supreme Court has jurisdiction over industrial manslaughter because it has sole jurisdiction to hear criminal matters involving harm to a person where the maximum penalty is greater than 10 years imprisonment.

The ACT Government recognises that the industrial manslaughter provisions drafted in 2004 may not be the most contemporary legislative model for dealing with industrial manslaughter.

The ACT Government therefore supports the inclusion of an industrial manslaughter provision in model work health and safety (WHS) laws that is based on Queensland legislation. The Territory has advocated this position in the review of model work health and safety legislation which is currently underway.

3. Harmonised work health and safety laws

The ACT Government recognises the value of harmonisation in the area of work health and safety and has adopted the nationally agreed model WHS laws, including legislation and codes of practice. To date, the ACT has only made relatively minor movements away from the model WHS legislation, primarily making changes to either maintain or increase safety standards.

The Territory is a signatory to the *Inter-Governmental Agreement for Regulatory and Operational Reform in OHS* (IGA) signed in 2008. On 29 September 2011, the Legislative Assembly passed the *Work Health and Safety Act 2011* (the WHS Act), which gave effect to the Territory's commitment under the IGA. On 1 January 2012, the WHS Act and the supporting *Work Health and Safety Regulation 2011* (the WHS Regulations) came into effect in the Territory. The WHS Act is the principal law which provides for the health, safety and wellbeing at work of workers in the Territory.

The industrial manslaughter provisions under the *Crimes Act 1900*, as referred to previously, remained in place under that Act following the adoption of the model WHS laws.

Under the WHS Act, there are shared responsibilities and work safety duties applying from the boardroom to the workers carrying out activities for a business or undertaking. All workers, employees, their directors and managers, both on site and in the office, must ensure safety.

In terms of deterring behaviour that presents a risk to the health and safety of workers in the workplace, the model laws provide significant penalties for the highest category of offence, where recklessness is proven. This attracts a maximum fine of \$300,000 for individuals and or \$3 million for corporations, or a maximum of five years imprisonment, or both.

Chapter 2 of the *Criminal Code 2002* (ACT) also sets out the general principles of criminal

responsibility and defines terms used for offences such as recklessness and strict liability, which are applicable to criminal offences against the WHS Act.

In addition to the categories of criminal offences, the regulator under the WHS Act (the regulator) has a range of additional powers to ensure that work health and safety obligations are complied with. For example, most offences, unless expressly stated otherwise, are strict liability in the Territory's WHS legislation. This allows offences to be prosecuted on the basis of the physical elements of the offence being proven. This also facilitates the application of infringement notice offences under the legislation and provides an immediate incentive to comply.

The ACT Government strongly supports providing the regulator with strong compliance powers to ensure that the legislation can be enforced efficiently and effectively.

As a member of Safe Work Australia the ACT is an active participant of the current review of the model WHS laws and will continue to advocate that laws keep in step with modern practices and approaches and protect the safety of workers.

An area of interest for the ACT Government is how the issue of cross-border investigations will be treated in the revised model WHS laws. The ACT Government notes the recent legislative review undertaken by New South Wales which recommended giving SafeWork NSW extraterritorial legislative powers to ensure it can monitor and enforce WHS compliance where cross-border issues are involved.

The ACT Government supports any amendments to the model WHS laws which would clarify and enshrine in legislation a regulator's ability to conduct workplace investigations that cross state and territory boundaries.

4. Enforcement and Compliance

The regulator plays a crucial role in improving safety outcomes in the ACT. In 2016-17 WorkSafe ACT carried out 4,923 workplace inspections. Of these, 1,933 related to proactive campaigns and events. In 2018 WorkSafe increased the proactive focus of its regulatory activities, using data to target those industries and businesses where the risk of harm is greatest or employers have poor compliance histories.

In 2018 regulatory activities are focusing on young workers, light rail safety, retail, aged and health care, electrical safety and an ongoing focus on falls from heights. In addition, the New South Wales-ACT cross-border construction project was launched in 2016-17. This is a joint inspection program to deliver greater coordination and collaboration between safety regulators across the territory and surrounding New South Wales region.

In addition to the deterrence effect of penalties in enforcing compliance with the Territory's WHS legislation, the ACT Government also recognises the benefit of other mechanisms in ensuring the health and safety of our workers. Education plays an important role in assisting employers and workers to understand their obligations and how to comply with the WHS Act, particularly in sectors where poorly informed workers may be more likely to incur injuries from lifting and carrying, slips, trips and falls, and psychological injuries from workplace bullying or occupational violence.

Noting the current work being undertaken by the regulator, the ACT Government is also aware of the need consider the various methods and models of enforcement and compliance currently being used in work health and safety regulation. The ACT Government has therefore commissioned an independent review to evaluate the effectiveness of the ACT's work safety compliance and enforcement infrastructure, policies and procedures in:

- protecting workers and other persons against harm to their health, safety and welfare by upholding the principle that workers and other persons should be given the highest level of protection against harm to their health, safety and welfare from hazards and risks arising from work;
- securing compliance with the WHS Act through effective and appropriate compliance and enforcement measures; and
- promoting the provision of advice, information, education and training in relation to work health and safety.

In this context, the review will specifically consider:

- the approach to safety compliance and enforcement detailed in WorkSafe ACT's Compliance Framework;
- the appropriateness and effectiveness of WorkSafe ACT's governance structure, including the roles, legislative responsibilities and functions of the Work Safety Commissioner, the Regulator and relevant Ministers;
- the appropriateness and effectiveness of WorkSafe ACT's organisational structure, including consideration of its independence and operational effectiveness in its current status as a business unit within Access Canberra; and
- the ACT's collection, use and analysis of data and the impact and effectiveness of information sharing within Access Canberra and across government to drive work safety compliance and enforcement activities.

5. Labour-hire workers in the ACT

The ACT Government is aware that inquiries into the labour-hire industry in other jurisdictions identified significant non-compliance with workers' compensation, employment, tax and superannuation laws. This has led to the Queensland, Victorian and South Australian Governments undertaking to establish labour hire licensing regimes.

In the ACT, there are currently no additional, special regulations that apply to labour-hire businesses. For example, there is no requirement for a labour-hire business to be licensed.

Like all other ACT businesses, labour-hire businesses are subject to work health and safety and workers' compensation laws. Generally, it would be the labour-hire business, as the employer of the worker, that is responsible for payment of the worker's entitlements and that bears the legal responsibilities and liabilities as an employer. This can be complicated by the form the relationship takes on as well as the relationship with the host.

The ACT Legislative Assembly recently conducted an inquiry into the extent, nature and consequence of insecure work in the ACT. The Terms of Reference for the inquiry extended

to the consideration of the effectiveness of existing industrial relations laws and instruments and their enforcement in the labour-hire industry, including work health and safety laws and workers' compensation laws.

The Standing Committee responsible for the inquiry tabled its report on 8 May 2018. The ACT Government is yet to respond specifically to the report. However, the Government is on record as saying that it has been closely watching developments in other jurisdictions around labour-hire licensing and regulation; that it supports a national approach to labour-hire licensing; and that it will take seriously the findings of the Assembly inquiry on this issue.

6. Tripartite forum to discuss work health and safety issues

Locally the Territory has established a tripartite consultation forum under the WHS Act, the ACT Work Safety Council. The Council provides advice to the Minister for Workplace Safety and Industrial Relations on matters relating to work safety, workers' compensation, bullying in the workplace and other workplace psychosocial issues. It also enquires into and reports to the Minister on matters referred to the Council.

The Council is currently considering issues such as the health and safety of apprentices and young workers, occupational violence, health and safety culture in the construction industry and the development of a sector-specific strategy, and health and safety issues for transient workers. The ACT Work Safety Council is an important forum to connect with stakeholders to discuss emerging issues and provide useful recommendations to enhance the Government's response to ensuring worker health and safety.

To assist the work of the Council it is also provided with workers' compensation claim data. This data is used to identify injury trends across industries and also enables fluctuations in the nature and mechanism of injuries to be identified and considered.

7. Industrial deaths in the ACT

The ACT Government is committed to the Australian Work Health and Safety Strategy 2012-2022 and specifically the objective of reducing the number of worker fatalities locally and nationally.

Under the WHS Act, industrial deaths must be reported to the regulator as a notifiable incident. These statistics are gathered and published by Safe Work Australia in a number of different publications. Relevantly, the "*Work-Related Traumatic Injury Fatalities, Australia*" publishes this data since 2003 for all jurisdictions. The latest publication (October 2016) showed that since 2008, eight industrial deaths had occurred in the ACT.

There have been an additional two deaths in the ACT since the publication of that report. One of these deaths occurred in the construction sector and has resulted in charges being laid against nine defendants, including a manslaughter charge against a crane driver and Category 1 and/or 2 work health and safety offences against the other defendants, ranging from individuals on the site at the time of the incident to the principal contractor Multiplex Constructions Pty Ltd, its Chief Executive Officer and RAR Cranes Pty Ltd and its Managing Director.

8. Support for people affected by an industrial death

The ACT Government acknowledges that each family, and potentially each family member, will require different levels and types of support following an industrial death. While WorkSafe ACT engages with families after major incidents, due to the sensitive nature of evidence gathering and potential for criminal prosecutions, there is a limit to the support that the agency can provide. The broader provision of adequate support services during a period of grieving should be a priority consideration for all levels of Government.

Adequate support must be provided to the family of a worker who dies as a result of a workplace injury or disease. The ACT Government suggests that this is an area that requires attention and improvement, including through collaboration between Commonwealth, state and territory health and safety regulators.

9. What is the ACT doing to ensure the prevention of serious injury and industrial deaths

ACT Construction Industry

Following three deaths in the ACT's construction industry in 2012, the then ACT Attorney-General appointed Mark McCabe (former ACT Work Safety Commissioner) and Lynelle Briggs (former Australian Public Service Commissioner), to conduct an inquiry into compliance with, and application of work health and safety laws in the ACT construction industry. The Getting Home Safely Report (GHS Report) made 28 recommendations for a safer construction industry in the ACT. The recommendations were made to industry and the ACT Government. All recommendations were agreed to by the ACT Government in early 2013.

The GHS Report highlighted the need for intervention to arrest poor performance and increasing risks to the health and safety of Territory workers. Underpinning the GHS Report's call for action was the finding that the Territory's construction industry was characterised by a poor safety culture that prioritised 'getting the job done' above the identification and mitigation of work associated dangers for its workforce.

'Safety Culture' was identified as a critical driver behind the deteriorating health and safety performance of the sector. Accordingly, the GHS Report's recommendations for change were premised on the principle that improvements to the sector's health and safety capability could only be achieved in the context of a strong, safety conscious culture.

Arising out of the GHS Report, in 2017, the Royal Melbourne Institute of Technology University's Centre for Construction Work Health and Safety Research (RMIT) was engaged by the ACT Government to undertake a study to provide:

- a baseline understanding of the culture of the ACT construction industry with regard to WHS; and
- evidence relating to the impact and effectiveness of changes introduced since implementing the recommended measures from the GHS report.

The study was undertaken using a mixed methods (qualitative and quantitative) research design. A baseline safety climate survey was undertaken to understand the prevailing culture

in the ACT construction industry. The survey was conducted using a WHS climate assessment tool developed specifically for the construction industry.

In addition to providing analysis on the survey findings, RMIT also made a number of suggestions aimed at improving the ACT construction industry's safety culture. These suggestions include:

- industry stakeholders to develop indicators to monitor changes in the industry's WHS performance in the future;
- identifying factors impacting on construction workers' health in order to develop evidence-informed risk reduction programs;
- the development of specific resources for mid-sized construction firms, a category of employer that was found to be prone to communication disconnects between owners and workers; and
- further engagement within the industry to better understand the experiences of apprentices in order to create good practice recommendations for their supervision.

The Safety Culture Report was released on 26 October 2017. Following its public release, the Minister for Workplace Safety and Industrial Relations referred the report to the tripartite Construction Safety Advisory Committee to inform the development of a new Construction Safety Strategy.

Although the strategy is still under development, the ACT Work Safety Council recently considered and endorsed a number of amendments to the Territory's work health and safety legislation aimed at enhancing consultation in the construction industry.

For major construction projects, the proposed amendments would:

- mandate consultation with workers and their representatives in the establishment of work groups;
- mandate the election and training of Health and Safety Representatives; and
- mandate the election of Health and Safety Committees (HSCs) as well as training for HSC members.

The ACT Government is committed to improving the safety culture, focus and response in all ACT workplaces and these proposed changes will enable workers to have better input and take more ownership of workplace safety processes and culture.

Young Workers

The safety of young and inexperienced workers is also a high priority for the ACT Government. Following a number of concerning workplace incidents involving young workers, the Minister for Workplace Safety and Industrial Relations established an Apprentice and Young Workers Safety Advisory Committee of the Work Safety Council to consider how best to ensure that apprentices and young people are working in safe environments and are aware of their workplace safety rights and obligations.

In support of this, WorkSafe ACT is conducting a comprehensive audit into apprentice and young person safety in ACT workplaces. The focus of the audit is on training and supervision and involves both an education approach as well as ensuring compliance with legislative provisions.

ACT Government procurement

The ACT Government is also developing a Secure Local Jobs Package which will introduce a number of measures to make sure ACT Government contracts only go to businesses that meet high standards in respecting and upholding workers' rights, including work health and safety obligations. This package rewards businesses who do the right thing by their workers and abide by their industrial obligations. This package recognises that the ACT Government can play an important role in delivering better outcomes for all workers by using its purchasing power to set high standards for workplace safety and workers' rights.

10. Concluding remarks

The ACT Government is committed to improving and strengthening the safety culture, focus and response in all ACT workplaces. In light of this, the Government is conscious of ensuring the continued effectiveness of our work health and safety legislation as well as ensuring the message about the importance of our workers' health and safety is being communicated in the workplace. As highlighted above, this has been the focus of the ACT Government in:

- enhancing consultation about health and safety matters in the workplace, particularly high risk industries; and
- ensuring our regulatory approaches and compliance activities and powers are effective in today's workplaces.

While Government can set the frameworks to support safety in workplaces, we also need industry, regulators, industry groups, employers and workers to work together to lift safety awareness and practice across all worksites to ensure workers return home safely to their family and friends each day.

Legislation alone is not enough. It is up to everyone in the community to foster a workplace culture where safety is paramount and workers feel empowered to speak out and report concerns at work. The ACT Government strongly believes one of the best ways to improve workplace safety is through the active engagement of workers.

The ACT Government welcomes the Senate Committee's consideration of these important issues and looks forward to the outcomes of the inquiry.