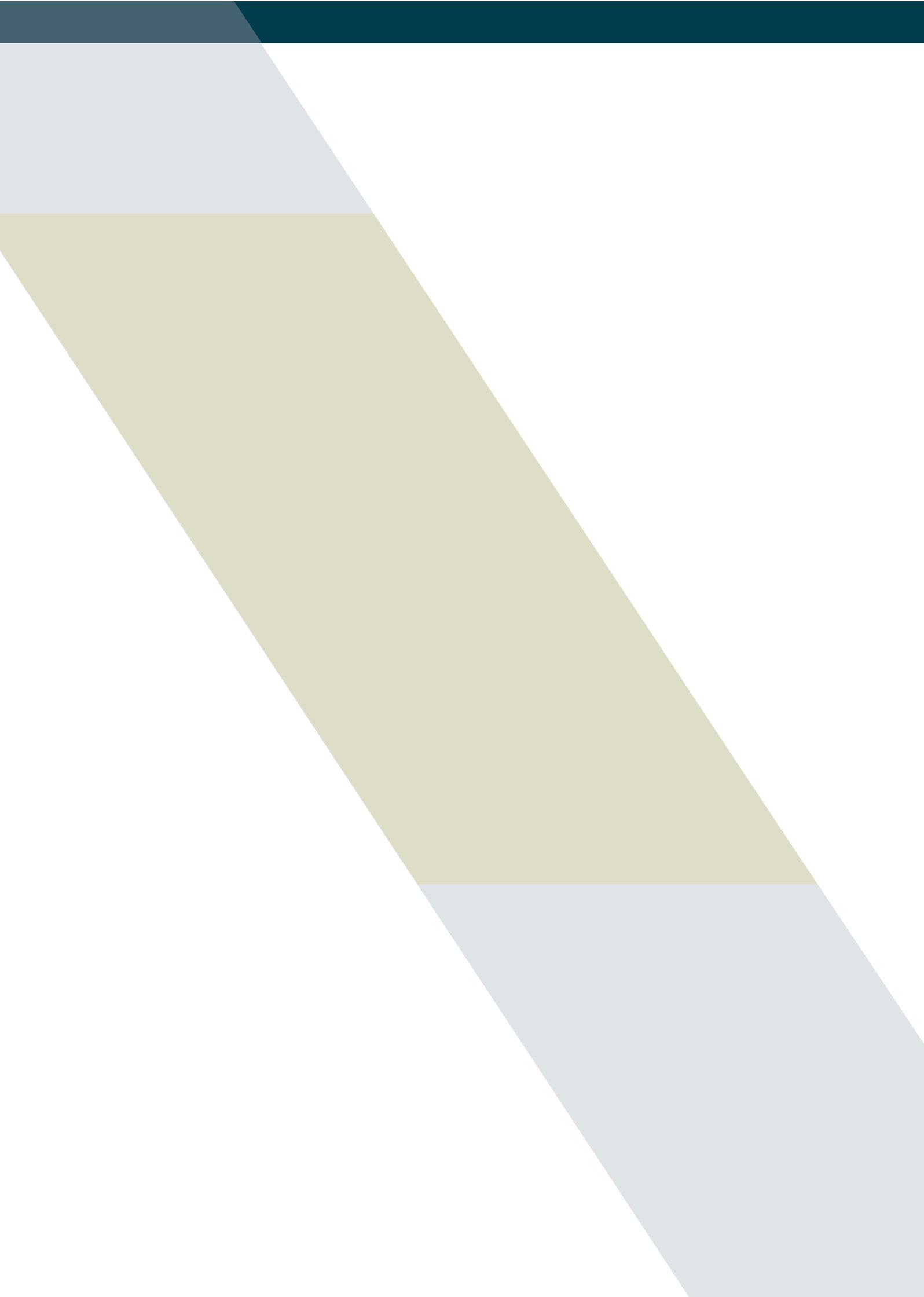


November 2012



GETTING HOME SAFELY

Inquiry into Compliance with Work Health and Safety Requirements in the ACT's Construction Industry



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Glossary

ACT	Australian Capital Territory
ACT ETD	ACT Education and Training Directorate
ACTPLA	ACT Land and Planning Authority
AQTF	Australian Quality Training Framework
ASBA	Australian School Based Apprenticeship
ASQA	Australian Skills Quality Authority
CEO	Chief Executive Officer
CEPU	Communications Electrical and Plumbing Union
CFMEU	Construction, Forestry, Mining and Energy Union
CITC	Construction Industry Training Council
COAG	Council of Australian Governments
DPP	Director of Public Prosecutions
FSC	Federal Safety Commissioner
GTO	Group Training Organisation
HIA	Housing Industry Association
HSE	UK's Health and Safety Executive
HWSA	Heads of Work Safety Authorities
IGA	2008 Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety
ILO	International Labour Organisation

LDA	Land Development Authority
MBA	Master Builders Association
NERB	National Engineering Registration Board
NOHSC	National Occupational Health and Safety Commission
OFSC	Office of the Federal Safety Commissioner
OHS	Occupational Health and Safety
OIR	Office of Industrial Relations in the Chief Minister and Cabinet Directorate
ORS	Office of Regulatory Services
PCBU	Person conducting a business or undertaking
RTO	Registered Training Organisation
SSP	Shared Services Procurement
SWMS	Safe Work Method Statement
TFA	ACT Building and Construction Industry Training Fund Authority
VET	Vocational Educational Training
WHS	Work Health and Safety
WHS Act	Work Health and Safety Act 2011
WHS Regulation	Work Health and Safety Regulation 2011

Executive Summary

In September 2012, the ACT Attorney General, now also the Minister for Workplace Safety and Industrial Relations, asked Lynelle Briggs and Mark McCabe to conduct an inquiry into compliance with and application of work health and safety laws in the ACT's construction industry. The Inquiry Panel was established in the wake of three deaths in the construction industry in the last year and a high number of other serious safety incidents.

The terms of reference and scope of the inquiry are outlined in Appendix 1 to this report. They provided the Inquiry Panel the opportunity to undertake a wide-ranging review of work health and safety issues in the sector and to make recommendations for improvements.

The Inquiry Panel wishes to express its appreciation to all those who contributed to the work of this Inquiry and the good spirit in which they engaged with us. We want to assure them that their personal views have been kept confidential as we promised them.

As this report is designed to address work health and safety issues in the local construction industry, it necessarily involves a level of criticism of current practices. The Panel was, however, struck by the concern that everybody we spoke to or met on worksites had about the recent deaths in the industry. They all want to see change.

The problem is that they are not quite sure how to do it, as they generally have not had the opportunity to step back and do an overall stocktake of what is going on. The Inquiry Panel hopes that this report will help them. There are certainly many great people with good intentions working in this industry and we wish them well.

A Distressing Safety Record

Getting home safely is a right that everyone should expect. To our dismay, this cannot be guaranteed for workers in the ACT's construction industry, where each year one in every forty workers can expect to have an injury which results in them being off work for at least a week, if not much longer. On average, we can expect that every working day one construction worker will sustain such an injury somewhere in Canberra. It is a distressing safety record for a small jurisdiction.

The ACT's serious injury rate for the construction industry is 31% higher than the national average. The industry's long-term injury performance is 50% worse than most other jurisdictions and double the national average. The Inquiry Panel found little in the way of industry confidence that this situation could be improved, despite the achievements of other jurisdictions.

The reasons for the ACT construction industry's poor record are many and varied. There is a culture of complacency based on the nature of the industry—tough, dirty and dangerous—that seems surprisingly accepting of workplace injuries. Safety is often not given the priority it should be given in the workplace and there is a strong view that safety is just another cost add-on for a highly competitive industry to bear. There is enormous pressure to complete work according to the 'program'—on time and on budget, even at the cost of work health and safety.

People seem to spend too much time focusing on paperwork and too little time managing risks and hazards in the work place and assisting team mates to do the right thing on the job. There is a paucity of effective work health and safety training. Government agencies could work more closely with industry and the education sector to improve health and safety education; provide practical health and safety operations guidance; and promote a workplace culture that values safety.

Government procurement practices do not emphasise work health and safety as prominently as they should. The regulator (WorkSafe ACT) is under-resourced for the compliance work that it is tasked to do, and works within a soft penalty regime that makes breaking work health and safety laws a viable economic option for miscreants.

The Inquiry Panel was surprised to find that the ACT construction industry:

- appears not to recognise that the ACT's construction safety record is so bad
- has a sense of inevitability about the occurrence of serious injuries
- does not generally understand how to identify, assess and mitigate risks
- appreciates that workplaces must adopt a safety culture, but has very little knowledge about how to do that or what fundamentals must change in the current "can do" culture to make it happen, and
- disregards work health and safety in some parts of the residential construction sector.

All this must change if more people working in the construction industry are to get home safely.

Safety Culture

The Inquiry Panel was impressed with the way many players in the industry saw culture change as a key step in the renewal process. They identified a can-do culture of tough men working to do a tough job who pride themselves on their achievements in getting the job done in a tight timeframe. There seems to be a nonchalance about work health and safety dangers and a desire to avoid anything that might be seen as weak or "sissy". Doing things quickly and easily is their unofficial motto: they do not want to be constrained by rules, paperwork and restrictions on using their common sense.

In many ways this culture is admirable and has made the national capital what it is today. But, every culture needs to grow and develop, and this is certainly the case in the construction industry. Just as many men in this industry would do anything to protect their families, what they need to do now is to value the protection of themselves and their workmates so that they get home safely each day. Just like their counterparts in the mining industry, construction workers need to take work health and safety seriously.

The way to do this is to move beyond the usual reactive focus on human error, technological failures or safety systems, to focus more on organisational values that might proactively enhance risk management and safe performance in a complex and hazardous environment.

Everyone—senior managers, middle managers, leading hands, foremen and the workers themselves—must recognise and value the benefits of a safe worksite and accept their role in achieving that end. They must recognise the fundamental importance of valuing and authorising discussions about safety and they must embrace the belief that *"we get things done around here, safely"*.

Drawing on the work of the UK's Health and Safety Executive, the Inquiry Panel believes that a healthy safety culture is one where there is:

- visible commitment to safety by management
- workforce participation and ownership of safety problems and solutions
- trust between workers and management
- good communications
- a competent workforce.

Genuine management commitment and leadership on work health and safety is necessary for this new safety culture to be embedded. So, central to our recommendations is the need for the construction industry to accept that its health and

Everyone—senior managers, middle managers, leading hands, foremen and the workers themselves—must recognise and value the benefits of a safe worksite and accept their role in achieving that end.

safety performance is well below the national average and to take responsibility for a significant improvement in the serious incident level within the next few years, in such a way as to build this healthy safety culture. This means that the health and safety of workers must have first priority and must take precedence over business objectives.

This requires committed leadership and shared responsibility between companies, workers and the Government if the situation is to be improved. The Panel proposes a target of a 35% improvement in the serious injury rate within 3 years and further targets thereafter. It proposes that the key industry bodies—the Master Builders Association and the Housing Industry Association—take the lead in driving the cultural change and reducing the rate of serious injuries.

The benefits to industry of this approach are enormous. Not only will workplaces be safer, but they will be more productive. Work will be completed quicker on safe sites. There will be fewer union confrontations and worksite closures. Workers' compensation premiums and associated costs to the industry will be reduced if the targeted 35% improvement in the serious injury rate is achieved. Companies will be able to attract and retain better quality workers and repeat work will be more likely. More workers will get home safely.

Government

This new direction should be reinforced by a new approach to purchasing and regulation within the Government to give stronger emphasis on work health and safety. This won't involve more regulation because the Inquiry Panel considers that the current laws and regulatory framework are sufficiently strong and comprehensive for the task.

There is a case for the language used in the current laws to be more readily comprehensible to duty holders and the codes of practice in particular would be more useful if they were shorter and more practically based. This would be of particular assistance to small to medium sized businesses. The ACT Government should work with its counterparts in other jurisdictions and through Safe Work Australia to achieve these improvements within the new harmonised legislative framework.

The Inquiry Panel thinks that the ACT Government should use its strength as a purchaser of construction services to bring the industry along. The Government should in future require a high standard of work health and safety on its sites and ensure that such high standards are in place and maintained. Government sites should be a leader, setting the standard for others to match or aspire to.

The ACT Government should use its purchasing power to ensure through its tendering process that only contractors with good health and safety records and the capacity to complete a project as safety as possible are allocated government work. It should ensure that contractors working on its projects are fulfilling their health and safety responsibilities to the best of their ability throughout the project. It might also consider withholding a portion of final payment, pending health and safety outcomes on a site.

At the same time, the Panel has identified a clear need for a more effective regulator. While WorkSafe ACT has been a success and is respected by both unions and employers as an 'honest broker', it is universally regarded as significantly under-resourced. This has led to it fulfilling a largely reactive role with little or no proactive presence. Companies are operating in an environment where they can 'roll the dice', only paying the price, and that price is often a very low one, if something goes wrong.

With construction health and safety serious incident levels as high as they are, the ACT construction industry needs very visible and effective regulation to ensure that safety is taken seriously. WorkSafe ACT's enforcement tools need greater bite. The regulator requires more staff to cover more sites and more capacity for on-the-spot fines. It needs a better data base. It should publicly name and shame defaulters. To add weight to enforcement, the Government has recently increased fines; it

...the health and safety of workers must have first priority and must take precedence over business objectives.

should now signal the increased likelihood of large penalties through the courts for significant misdemeanours.

The Panel has also identified increased scope for more co-operation between government agencies to weed out the cowboys from the industry. In particular, ACTPLA's and WorkSafe's inspectors in the field should collaborate and co-ordinate targeting of specific concerns on worksites and link their enforcement and demerit points systems.

The Inquiry Panel would be particularly happy to see the ACT community, alongside the unions, reporting more to Government about bad health and safety practice in the industry. It is only with a concerted effort on all fronts that the climate will be sufficiently robust to weed out bad companies and individuals that should not be operating in it.

Planning, Processes and Practices

Many people in the construction industry were keen to suggest other ideas to the Inquiry Panel about how health and safety could be improved.

While the Panel found it difficult to generalise between different sectors of the industry, it saw considerable scope for industry players—the two main employer groups, individual companies, the unions and WorkSafe ACT—to work together to achieve improvements in various sub-sectors of the industry. Some of the areas where attention is required are:

- allocating appropriate responsibility and authority for safety on projects, including the minimum training, competencies and governance arrangements for such roles
- minimising unnecessary paperwork and clarifying actual safe work method requirements in order to shift the emphasis from paperwork to safe work practices
- the registration of engineers and an agreement among ACT construction companies and the Government that they will use only engineers registered on the National Professional Engineers Register until a national or local registration scheme is enforced
- better task induction
- the effectiveness of work health and safety committees.

Quality training has an important contribution to make to work health and safety in this potentially dangerous and high risk industry. Training to equip people to work safely on construction sites needs to take account of the way the construction industry operates, which is in a dynamic environment where hazards and risks are changing frequently as construction work progresses and as workers move from project to project.

Substantial funds are invested in work health and safety training each year. It is, therefore, surprising that more attention isn't paid to the overall training strategy for the construction industry and to the quality of the programs provided. It is the Inquiry Panel's view that the current training arrangements would benefit from a major overhaul. There is scope for a fresh look at who determines what competencies need to be provided, what training is actually being delivered, and how the training is being evaluated against immediate and longer term industry requirements, with a view to providing higher quality courses and more effective training outcomes.

The strategic oversighting of work health and safety training needs to be revitalised, with less influence in the hands of vested interests. The strategic framework's training priorities for the industry should include—site leadership and middle management development; planning and project management training; training associated with the shifts in thinking required to build better safety cultures (such as effective communication, worker engagement and team building); high risk work competency; high danger competencies, such as height safety, the use of electricity on sites, and

plant management; and entry level training. The strategic framework should also encompass regular evaluation of such programs to ensure their currency, relevance and effectiveness.

Collaboration to Get Home Safely

The Inquiry Panel's recommendations are directed to the industry players as well as the Government as the level of deaths and serious incidents in the ACT construction industry is so concerning that it requires the best and united efforts of all players if the situation is to improve.

Industry partners must accept that they have responsibility for the ACT's poor work health and safety performance in the construction industry. Employers need to ensure that profit never comes at the expense of the safety of their workers. This means genuinely embracing safety as a value. Fundamental to this is to engage workers as their partners and build cooperative relationships on sites.

Unions also have an important role to play. There is much criticism that their efforts are often driven by other industrial motivation. The Inquiry Panel heard that site visits and union focus is often concentrated on employers undergoing enterprise bargaining negotiations. Unions need to strive to build working relationships with employers.

Safety cannot be achieved through an adversarial approach. The best approach must be a co-operative one, with good communication and a willingness to work together to get everyone home safely. The workplace health and safety legislation is predicated on that co-operation.

The key steps to turning the current work health and safety performance in the construction industry around are that:

- the construction industry—employers, unions and workers—acknowledge that the industry has a poor safety record that can be improved
- the construction industry accepts that turning this around lies in its hands
- the construction industry signs up to the 35% reduction in the serious injury rate by 2016
- the construction industry implements a healthy safety culture on its worksites
- the ACT Government demonstrates its commitment to work health and safety by:
 - proactively changing its purchasing arrangements
 - providing a credible regulatory framework that facilitates industry initiatives and penalises poor performance effectively
 - initiating a strategic framework for work health and safety training with clear priorities and evaluation.

The Inquiry Panel believes that “*We get things done around here, safely*” should become the basis for these reforms.

We commend our report to the ACT construction industry, the Government and to all the people who work in this industry and the ACT community, who will benefit from a safer construction industry. Safer worksites will not only protect local workers, they will lead to safer, quality buildings for our community.

We would also like to express our appreciation to Ms Julia Mulligan who provided wonderful secretariat support to the Inquiry Panel.

Lynelle Briggs

Inquiry Panel Chair

Mark McCabe

*Inquiry Panel member and
ACT Work Safety Commissioner*

23 November 2012

“*Employers need to ensure that profit never comes at the expense of the safety of their workers.*”

Recommendations

- Recommendation 1:** The ACT Government should work closely with the Australian Taxation Office, Fair Work Australia and other Government agencies to do all it reasonably can, including through its powers and responsibilities under ACT workers' compensation legislation, to eradicate sham contracting practices in the construction industry.
- Recommendation 2:** The ACT Government should urge Safe Work Australia to work with the Australian work health and safety jurisdictions and the national industry partners to ensure appropriate levels of information and training are made available to transient workers in the construction industry.
- Recommendation 3:** The ACT Government should endorse the targets and priority action areas identified in the Australian Work Health and Safety Strategy 2012-2022 and work with relevant sectors, including the construction industry, to achieve the strategy's goals.
- Recommendation 4:** The ACT should set an initial goal of a 35% improvement in its serious injury claim rate, to bring it below the national average for this measure, by 30 June 2016. Further targets should then be set to align the ACT's performance with the best in the country.
- Recommendation 5:** The ACT construction industry partners should endorse the need to build positive, inclusive safety cultures on local worksites. The Master Builders Association and the Housing Industry Association should take the lead in moving the industry forward, from an approach to safety which is focusing on systems, compliance and reaction to one that focuses genuinely on people and attempts to create healthy safety cultures on construction sites.
- Recommendation 6:** The Master Builders Association and the Housing Industry Association should work closely with the Office of the Federal Safety Commissioner to ensure that specific concerns of ACT employers regarding what they see as an undue focus on paperwork and systems are heard and that such a focus does not operate to the detriment of work health and safety outcomes but allows construction companies to focus their work health and safety priorities on practical initiatives which have meaning and value to employees.
- Recommendation 7:** WorkSafe ACT should work with the industry partners to develop training and guidance that will promote a greater understanding at all levels within the industry of how to manage work health and safety risks. WorkSafe ACT should seek to have this in place by 30 June 2013.
- Recommendation 8:** The ACT construction industry should place greater emphasis on the importance of effective task induction. This emphasis should be supported through education and enforcement activities by the regulator as well as education and other support from employer and worker representative bodies, including guidance on what makes a good pre-start or toolbox talk. This guidance and support should be in place by 30 June 2013.
- Recommendation 9:** Principal contractors must recognise and accept the responsibility they have for the conduct of sub-contractors operating on their sites and should include them in any initiatives to improve approaches to safety within their business. Principal contractors should consider what can be done to impose safety requirements on sub-contractors which are commensurate with the size and sophistication of the sub-contractor involved. WorkSafe ACT, through its educational and enforcement activities, should reinforce this emphasis.
- Recommendation 10:** The Master Builders Association and the Housing Industry Association should lead the development of clear frameworks for the management of safety on ACT construction sites, recognising the practical needs of varying sized businesses and the differing sectors, such as civil, commercial and residential, and recognising the importance of good planning in achieving safer worksites. WorkSafe ACT and ACTPLA should provide input to this process to ensure that legislative requirements are addressed. These frameworks should be available to businesses by 31 March 2013.
- Recommendation 11:** The Master Builders Association and the Housing Industry Association should include in any guidance on safety frameworks for their members the allocation of responsibility for overseeing safety on projects, the recommended minimum training and competencies for such roles and the appropriate safety governance processes which should be in place, recognising the varying types and sizes of employers in the industry.

- Recommendation 12:** The ACT Government should work with other jurisdictions to encourage a national approach to the registration of engineers as soon as is practicable. If a national scheme is likely to be delayed, the Government should 'go it alone' and implement its own scheme for the registration of engineers practising in the ACT by 30 June 2014. In the meantime, all construction companies operating in the ACT should be encouraged to use engineers who can demonstrate their current registration on the National Professional Engineers' Register. The ACT Government should mandate this for any work it procures.
- Recommendation 13:** The ACT Government should urge the other Australian work health and safety jurisdictions, through Safe Work Australia, to include provisions for training for health and safety committee members in the harmonised work health and safety legislation.
- Recommendation 14:** The ACT Government should provide input to the Australian Skills Quality Authority review of White Card Training to ensure that local industry concerns are heard and that there is proper assessment of the method and quality of delivery as well as the competencies gained from this training.
- Recommendation 15:** The Master Builders Association and the Housing Industry Association should undertake further work to investigate the viability of developing a 'cadetship' style program for construction industry project managers including, should the program prove viable, a proposal for a significant level of funding from the ACT Building and Construction Industry Training Fund Authority. A cadetship program should be implemented by the beginning of 2014.
- Recommendation 16:** The ACT Government should work with the construction industry to review all current training arrangements with a view to providing a more strategic oversight of construction industry training, higher quality courses and more effective training outcomes. As part of this review, the Government should consider reducing the influence of organisations with the potential for a financial conflict of interest arising from chosen strategic directions.
- Recommendation 17:** The ACT Building and Construction Industry Training Fund Authority should review its approach to subsidisation of training costs to focus on high priority areas which align to the industry's strategic medium to longer term goals.
- Recommendation 18:** The body responsible for strategic oversight of construction industry training should commission appropriately qualified independent evaluation of key training programs to determine whether anticipated outcomes are being achieved—that is, whether the industry is getting value for money from its investment in training. This information should inform future strategic planning. A proportion of the ACT Building and Construction Industry Training Fund Authority's resources should be set aside for this activity.
- Recommendation 19:** The ACT Government should fund twelve additional inspector positions for WorkSafe ACT in the 2013-14 budget on an ongoing basis. WorkSafe ACT should utilise the majority of these additional positions for proactive field work, including establishing a regular field presence in all three sectors – residential, commercial and civil construction.
- Recommendation 20:** The ACT Government should increase the number of work health and safety matters for which Infringement Notices can be issued on both employees and employers, including sub-contractors. This work should be completed by 30 June 2013. Infringement Notices should be published to ensure that the public is aware of malfeasance and has the opportunity to take their future business elsewhere to safer companies.
- Recommendation 21:** The ACT Government should consider whether provision of one or two appropriately qualified legal staff dedicated to WorkSafe would improve the quality and timeliness of prosecutions while freeing inspectors up for more field work. This could be achieved within the twelve positions referred to in Recommendation 19.
- Recommendation 22:** The ACT Government should appoint an Industrial Magistrate who could develop knowledge and experience of work health and safety matters and the impact of deterrents on the behaviour of duty holders.
- Recommendation 23:** The ACT Government should consider whether there are structural or other opportunities which would enable ACTPLA's and WorkSafe's inspectors in the field to collaborate and co-ordinate targeting of specific concerns on worksites and to link their enforcement and demerit points systems.
- Recommendation 24:** The ACT Government should allocate funds to allow the expansion of the current IT solution under development for workers' compensation data to include a single end-to-end solution for the identification, inspection and management of workplace incidents and the associated work safety compliance activity.

- Recommendation 25:** The ACT Government should proceed with development and implementation of Shared Services Procurements' proposed 'active certification' approach following consultation with stakeholders. This should happen by 30 June 2013.
- Recommendation 26:** The ACT Government should encourage excellence in health and safety performance by introducing comparative assessment of contractors' safety record and capacity as part of the tender selection process for Government construction projects.
- Recommendation 27:** With the exception of the Committee's Recommendation 12, which is replaced by Recommendation 15 in this report, the ACT Government should implement the recommendations of the Civil Construction Safety Issues Advisory Committee.
- Recommendation 28:** The ACT Government should conduct a stocktake of the construction industry's work health and safety performance as at 30 June 2016 to identify what has been achieved, what is yet to be achieved, and what new targets or strategies should be put in place.

1—The Construction Business

The Modern Construction Industry

The construction industry has served the nation well. This is particularly evident in the ACT, with Canberra being a modern, purpose-built city with an enviable collection of innovative and creatively designed buildings and infrastructure. The construction industry plays a vital part in the ACT's economy and has done so for many years.

It is important to understand the scope and nature of the construction industry in order to appreciate the context for this Inquiry into work health and safety, and how some of the issues might have arisen.

The construction industry includes all activities associated with the general construction, fitting-out, renovation, repair, demolition, decommissioning or dismantling of a building or structure. It also includes work connected with excavation and site preparation.

The construction industry is generally split into three sectors: civil, commercial and residential construction. The dividing lines between these sectors are sometimes blurred. The construction of apartment blocks, for example, is generally considered to be commercial construction, though some argue that this type of work fits within residential construction.

The commercial or non-residential construction sector involves the construction or renovation of shops, offices, hotels, factories, educational facilities and hospitals. The residential construction sector concerns the construction of houses, house renovations and extensions. The civil construction sector encompasses the construction, repair and management of roads, railways, dams, bridges, airport runways, and tunnels—that is, work largely associated with infrastructure.

The construction industry includes activities such as land development and site preparation, building structure services such as architectural and engineering services and construction trades such as bricklaying, plumbing, and electrical.

The description of building companies as either Tier 1, Tier 2 or Tier 3 companies is yet another division of the industry based on a company's relative size, resources, experience and the kind of projects they generally take on. Tier 1 companies are the largest and most experienced companies and are generally involved in major commercial and civil projects. Tier 2 companies are companies more likely to take on commercial or smaller civil projects and Tier 3 companies take on smaller projects such as large residential jobs and small-scale commercial work. Cascading further down the scale are other companies of variable size and turnover, down to sub-contractors and sole operators.

Over a period of some decades now, the outsourcing of labour through the use of sub-contractors, particularly in the residential and commercial sectors, has become the norm, leading to increasingly temporary and insecure employment. The experience in Australia and in the ACT in this regard is consistent with international trends and would be difficult to reverse.

Construction companies, employers, contractors and sub-contractors face stiff competition to win projects, needing to keep costs down, maintain profits and meet tight timelines. Labour shortages and lack of skills are leading to a trend to replace labour through greater use of prefabrication and mechanisation.

“The construction industry is experiencing an ongoing organisational transformation based on the increased division and specialisation of work tasks within the industry and an extension of the sub-contract system. This is resulting in an erosion of the integrity of occupations in the industry. It is also generating pressures that are leading to an expansion of informal work organised around cash payments and, with this, to a growing subordinate and precarious workforce. It is a system that is intimately bound up in the globalisation of the industry and the globalisation of the construction workforce.”¹

In a highly competitive industry with low levels of regulation even a small number can force standards down across the sector.

In a large industry with many sub-sectors, a variety of employment arrangements and a high degree of mobility and transience, unsafe and unethical companies have been able to operate alongside companies with a good corporate ethos. While it is difficult to quantify what proportion of the industry might be characterised as ‘unsafe’ or ‘unethical’, and even though the actual number of companies of this ilk is probably quite low, in a highly competitive industry with low levels of regulation even a small number can force standards down across the sector.

‘Sham contracting’ is one manifestation of this behaviour which has become the focus of attention of the Australian Taxation Office and is specifically prohibited in the *Fair Work Act 2009*. A sham contract is when an employer deliberately disguises an employment relationship as an independent contracting arrangement, instead of engaging the worker as an employee. This may mean that the worker misses out on some entitlements.

In other cases, employees are pressured to become independent contractors where they are threatened with being dismissed or are misled about the effect of changing their working arrangements. This is sometimes done to avoid workers’ compensation, annual leave, superannuation, taxation and other entitlements.

The *Fair Work Act 2009* protects genuine employees from ‘sham’ independent contracting arrangements and outlines employers’ obligations when establishing an employment relationship. The Act makes it illegal to:

- say something false to persuade an employee to become an independent contractor
- dismiss or threaten to dismiss an employee and then hire them as an independent contractor to do the same work
- claim that an employee is an independent contractor.

Employers are increasingly being targeted by the Australian Taxation Office for illegal ‘sham contracting’ practices and could face heavy penalties. The practice is especially prevalent in the building and construction industry and has resulted in a recent amendment to taxation legislation, effective July 2012, to demand reports on payments made to sub-contractors.

In practice, employers seeking to enter into sham contracting arrangements are likely to be looking to avoid other responsibilities, including those associated with work health and safety

Recommendation 1: The ACT Government should work closely with the Australian Taxation Office, Fair Work Australia and other Government agencies to do all it reasonably can, including through its powers and responsibilities under ACT workers’ compensation legislation, to eradicate sham contracting practices in the construction industry.

Globalisation of the construction workforce, as with society generally, has led to cultural and linguistic diversity so that it is not uncommon to find employees on construction sites with poor language skills and with lower standards in workplace

¹Rosewarne S, Sin JS, McGrath-Champ S and Toner O, *The Globalisation of the construction workforce: The impact on the Australian Building and construction industry.*

health and safety. Some construction employees are unskilled, have poor literacy skills, limited schooling and little subsequent training. This, together with their transience, means employers are reticent to train and invest in them and many such workers have no real connectedness to their current employer.

This is a major challenge for work health and safety.

Recommendation 2: The ACT Government should urge Safe Work Australia to work with the Australian work health and safety jurisdictions and the national industry partners to ensure appropriate levels of information and training are made available to transient workers in the construction industry.

The Law

Over recent decades there has been a steady trend of increasing vigilance on workplace health and safety matters, largely through increasing legislative requirements. Until recently, while all jurisdictions have had broadly similar requirements, there have been significant differences in form and detail between work health and safety statutes, regulations and codes of practice made under those statutes.

Consequently, in July 2008 the Council of Australian Governments signed the *Intergovernmental Agreement for Regulatory and Operational Reform in Occupational Health and Safety*. The Intergovernmental Agreement outlined the commitment of the Commonwealth, state and territory governments to work together to develop and implement model work health and safety laws.

The aim of harmonising the legislation² was to reduce regulatory burdens, provide a national standard of health and safety protection for all workers in Australia, provide greater certainty for businesses operating across state borders and reduce compliance costs over time. It was also hoped that this reform would lead to greater legal certainty with the same offence in different states resulting in similar outcomes.

The 2008 Intergovernmental Agreement committed jurisdictions to implement 'model' laws by December 2011. The model laws were to comprise a model Work Health and Safety Act supported by a model Regulation and model Codes of Practice. In May 2009, the Workplace Relations Ministers' Council (representing all Australian jurisdictions) agreed on the framework for uniform work health and safety laws to address the disparate and inconsistent laws across jurisdictions. This led to the development of a model Work Health and Safety Act and set of Work Health and Safety Regulations by Safe Work Australia.

In the ACT the *Work Health and Safety Act 2011* and the *Work Health and Safety Regulation 2011*, which are based on the model Work Health and Safety Act and Regulations, came into effect on 1 January 2012. At the same time, new harmonised legislation also commenced in New South Wales, Queensland, the Northern Territory and the Commonwealth. The South Australian and Tasmanian legislatures have both now passed Bills for the introduction of the harmonised legislation by 1 January 2013.

In the ACT the *Work Health and Safety Act 2011* and the *Work Health and Safety Regulation 2011* provide the main regulatory framework to secure the health, safety and wellbeing of all workers, including construction workers. This legislation replaced the *Work Safety Act 2008* and the *Work Safety Regulation 2009*. The purpose of the legislation is to:

²The reluctance to date of Victoria and Western Australia to adopt the model laws casts a potential shadow on the eventuality that all states and territories will come under the harmonised regime and in some states the legislation and enforcement regimes will not be identical to the model.

- establish a primary duty of care requiring persons conducting a business or undertaking³ so far as is reasonably practicable, to ensure people in the workplace are protected from harm to their health, safety and welfare from hazards and risks arising from work, specified types of substances or plant
- provide for effective workplace representation and issue resolution in relation to work health and safety
- encourage unions and employer organisations to be constructive in promoting improvements in work health and safety practices and assist employers and workers achieve a healthier and safer working environment
- promote the provision of information, education and training in relation to work health and safety – including reporting requirements for ‘notifiable incidents’
- achieve compliance with the legislation through effective and appropriate compliance and enforcement measures
- ensure appropriate scrutiny and review of the exercise of powers under the legislation
- provide a framework for continuous improvement and higher standards of work health and safety, and
- maintain and strengthen the national harmonisation of laws relating to work health and safety and to facilitate a consistent national approach to work health and safety in the ACT.

The regulations provide additional detail on specific work issues such as workplace arrangements, facilities, high risk work licencing, construction, plant safety, electricity safety, performing hazardous manual tasks and other matters of this nature.

As well as the Act and Regulation, there are currently around twenty approved Codes of Practice, which offer practical examples of good practice. A further thirteen or so are in the drafting stage or have been released for public comment. These codes are developed by Safe Work Australia, in consultation with the Australian work health and safety jurisdictions and key industry stakeholders, approved at ministerial level (the Workplace Relations Ministers Council) and then passed to each jurisdiction for adoption under their legislative regime.

Codes of Practice provide advice on how to comply with the law, for example, by providing a guide to what is ‘reasonably practicable’ in particular circumstances. Examples of approved Codes of Practice in the ACT include:

- How to manage work health and safety risks
- Hazardous manual tasks
- Confined spaces
- How to prevent falls at workplaces
- Formwork
- Construction work
- Demolition work
- Excavation work
- Managing electrical risks in the workplace
- Managing risks of plant in the workplace
- Preventing falls in housing construction.

Although the Codes of Practice are designed to be used in conjunction with the Work Health and Safety Act and Regulation, they do not have the same legal implications. A court may have regard to a Code of Practice as evidence about

³Primarily employers.

what is known about a particular hazard or risk and may rely on it in determining what is reasonably practicable. A person cannot be prosecuted for failing to comply with a Code of Practice. Generally, the view is that if you are not doing what is outlined in the Code of Practice, then you need to establish that you are doing something else that is equivalent or better to what is contained in the Code.

Other elements of the legislative regime are National Standards and Guidance Material. The National Standards, similar to the Codes of Practice, are separate technical guides to assist compliance with particular work safety duties. They have no direct legal force, though inspectors, and courts, will often have regard to them where the legal framework is otherwise silent.

Guidance Material comprises technical and other publications which also have no direct legal authority, though courts once again may have regard to them in the absence of other requirements. They provide useful practical guidance to assist duty holders and stakeholders in understanding the legislation and related workplace health and safety issues.

Additional legislation relating to workplace health and safety in the ACT and with relevance to the construction industry are:

- *Dangerous Substances Act 2004* which provides for regulation of dangerous goods and hazardous substances management. Hazardous substances include lead, asbestos, and major hazard facilities.
- *Workers' Compensation Act 1951* which is concerned with compensation arrangements for disease or injury arising from the employment of a worker.
- *Scaffolding and Lifts Act 1912*
- *Scaffolding and Lifts Regulation 1950*
- *Machinery Act 1949*
- *Machinery Regulation 1950.*

Australian Work Health and Safety Strategy 2012-2022

Efforts to improve Australia's work health and safety performance over the past decade have been guided by the National Occupational Health and Safety Strategy 2002-2012. The strategy for the next decade – the Australian Work Health and Safety Strategy 2012-2022 – was launched by Safe Work Australia in October 2012.

The strategy promotes a collaborative approach between the Commonwealth, state and territory governments, industry, unions and other organisations to achieve the vision of healthy, safe and productive working lives.

The strategy has identified targets to be achieved by 2022 including:

- a reduction in the number of worker fatalities due to injury of at least 20 per cent
- a reduction in the incidence rate of claims resulting in one or more weeks off work of at least 30 per cent, and
- a reduction in the incidence rate of claims for musculoskeletal disorders resulting in one or more weeks off work of at least 30 per cent.

The outcomes identified in the strategy are a reduced incidence of work-related death, injury and illness achieved by reduced exposure to hazards and risks, using improved hazard controls supported by an improved national work health and safety infrastructure.

*Safety doesn't
add value to
your project.
It just costs
you money.*

The strategy outlines seven priority action areas and identifies the construction industry as a national priority for prevention activities (after agriculture, road transport and manufacturing respectively).

The Inquiry Panel believes that the new harmonised arrangements and the National Occupational Health and Safety Strategy 2002-2012 provide an appropriate vision and structure for work health and safety in the construction industry in the ACT. There is little to suggest that further development of this overarching work health and safety framework is necessary or that extra regulatory requirements should be added to the system.

However, the Panel found that there is a high level of variability in understanding the legal requirements, perceptions of low rates of legal enforcement, and difficulty in achieving the practical engagement of employers, managers and workers with robust work health and safety practices on-site.

Recommendation 3: The ACT Government should endorse the targets and priority action areas identified in the Australian Work Health and Safety Strategy 2012-2022 and work with relevant sectors, including the construction industry, to achieve the strategy's goals

Local Industry Pressures

The ACT's construction industry is a highly competitive one in which competitive pressures can only be expected to increase.

The ACT has witnessed a construction boom over the past several years. There are signs that the boom has now peaked, and that it may even have begun to recede, with both the Master Builders Association and the Housing Industry Association voicing concerns over the future outlook. Industries which go through a boom, followed by a period in which the amount of work diminishes, typically also then experience a 'shake-out' period during which some companies fall by the way side.

When a sector such as the construction industry is booming, the competition between businesses tends to focus on acquiring the best people. When the boom peaks, and as times get tougher, the focus of competition tends to shift towards price. For an already competitive industry with significant cost pressures and relatively low margins, this does not augur well for safety if industry players seek to cut corners as a result.

Already there are signs that safety does not always get the priority it warrants on all ACT construction sites. The parlous state of serious injury data alone suggests this, as does the number of fatalities and the continual occurrence of serious incidents on local sites over the past year.

Profit margins and the ever-present potential for cost pressures to escalate over the life of a project rate highly in the minds of middle and senior managers, with liquidated damages (penalties for not meeting the contracted project deadline) sometimes running to many tens of thousands of dollars per day. Many of those presenting to the Inquiry spoke of the focus on 'program' and the tension between safety demands and cost and time pressures on projects.

Bonuses are most commonly paid for getting the job done on time and on budget, for sticking to the critical path and not being side-tracked. Similar bonuses for completing a project safely would seem to be rare if not non-existent.

“
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and safety in
the construction
industry in the
ACT.”

⁴ A senior construction industry employer in conversation with the Panel.

Senior executives and safety managers making submissions or presenting to this Inquiry on behalf some of the largest local companies also confirmed the emphasis on profitability in the local industry.

“Safety doesn’t add value to your project. It just costs you money.”⁴

When questioned by the Panel, a number of senior safety managers from some of the more prominent local construction companies confirmed that they had experienced occasions when they were directed not to go to a particular site on a particular day. Their belief was that some activity would be occurring at the nominated time *“which it would be better for the safety manager not to witness”*. Others mentioned ‘Safety Saturdays’, when everyone in the industry knew that WorkSafe ACT inspectors would not be out and about and they could get up to unsafe practices. While there was no evidence that such incidents were common practice, the anecdotal evidence was that they were not isolated experiences either.

At a recent seminar on safety culture attended by over 100 local industry representatives made up largely of those tasked with managing safety in the local industry, or with day-to-day experience in the industry, 60% of participants agreed that the safety efforts of local companies were often more about avoiding being caught than making their sites safer.

While almost all company leaders will assert that safety is their number one priority, there is not much evidence to support this is actually occurring on many local construction worksites. The focus of many local construction companies appears to be on how to comply with the letter of the law and avoid adverse audit reports from bodies such as the Federal Safety Commission while bringing a project in on time and within budget, rather than ensuring first that their sites are actually as safe as they can reasonably be. Reflecting this focus on legislative obligations rather than a strategic approach to what it might take to make company worksites safe, many companies see the requirements of the law as an upper limit on their safety obligations, refusing to do anything that would take them above or beyond those requirements.

Some others appear to have weighed up the chances of getting caught and have decided to ‘take their chances’; cutting corners in the knowledge that little if any scrutiny will fall on them unless something goes wrong. These companies have calculated that the financial consequences for the business in such a situation are likely to be significantly outweighed by the financial advantages achieved.

Locally, principal contractors also appear almost universally frustrated with the lack of willingness of sub-contractors to comply with the requirements of the law, but seem largely unwilling, or unable in the current competitive market, to use their supply-chain power to demand this of these smaller employers. While a few companies indicated that they managed this issue by dealing only with sub-contractors which they had come to know and trust, others suggested they had little or no capacity to influence the performance of their sub-contractors

“others appear to have weighed up the chances of getting caught and have decided to ‘take their chances’; cutting corners in the knowledge that little if any scrutiny will fall on them unless something goes wrong”

2—The Cost of Safety

It is hard to measure the cost of a human life or the value of protecting one. Nevertheless, the Inquiry Panel considers it important to review the current state of work health and safety in the ACT and to consider the costs imposition of a sub-optimal health and safety environment if we are to see more people getting home safely.

Fatalities and Serious Injuries

Fatalities

Table 1 and Graph 1 show that over the three years from 2008–09 to 2010–11, 123 construction workers died from work-related injuries across Australia, some four of which were in the ACT. This number of deaths nationally equates to 4.26 fatalities per 100,000 workers, which is nearly twice the fatalities rate of 2.23 for all industries.

Between December 2011 and September 2012, the ACT saw four workplace fatalities. Three of these occurred in the construction industry, while the fourth occurred in property and building services.

In the last national report, based on the most recently available national data, when preparing a comparative analysis by jurisdiction of fatalities across all industries, Safe Work Australia decided not to include ACT data as the low number of deaths “do not show a reliable pattern for analysis” .

The national fatality data for the construction industry does, nonetheless, provide useful information as to the likely cause of fatalities in the industry:

- *Falls from height* accounted for 25% of national fatalities (31 deaths) with ladders involved in 11 deaths, buildings in 7 and scaffolding in 7.
- *Hit by falling objects* accounted for 15% of fatalities with a range of building materials and equipment involved.
- *Vehicle incident* also accounted for 15% of fatalities with cars involved in 11 of the 18 deaths.
- *Electrocutions* resulted in 17 deaths (14% of fatalities) and
- *Being hit by moving objects* accounted for 12 deaths (10%), 8 of which involved a truck.

“the low number of deaths “do not show a reliable pattern for analysis””

⁵ Work Related Traumatic Injury fatalities, Australia 2009-10, Safe Work Australia, 2012, p.12

Table 1. Worker Fatalities – All Industries, 2003-04 to 2009-10 ⁶

	2003-04	2004-05	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11	2011-12	2012-13
NSW	87	76	99	94	80	81	61			
VIC	58	55	54	72	52	55	46			
QLD	53	61	74	70	78	73	52			
WA	36	29	18	38	42	37	29			
SA	18	13	22	10	17	19	14			
TAS	9	10	11	11	12	14	6			
NT	10	7	7	3	10	8	8			
ACT	1	2	2	2	1	2	0	2	3	1
Aust	272	253	287	300	292	289	216			

Graph 1. Worker Fatality Rate by State/Territory of Death
All Industries, 2005-06 to 2009-10

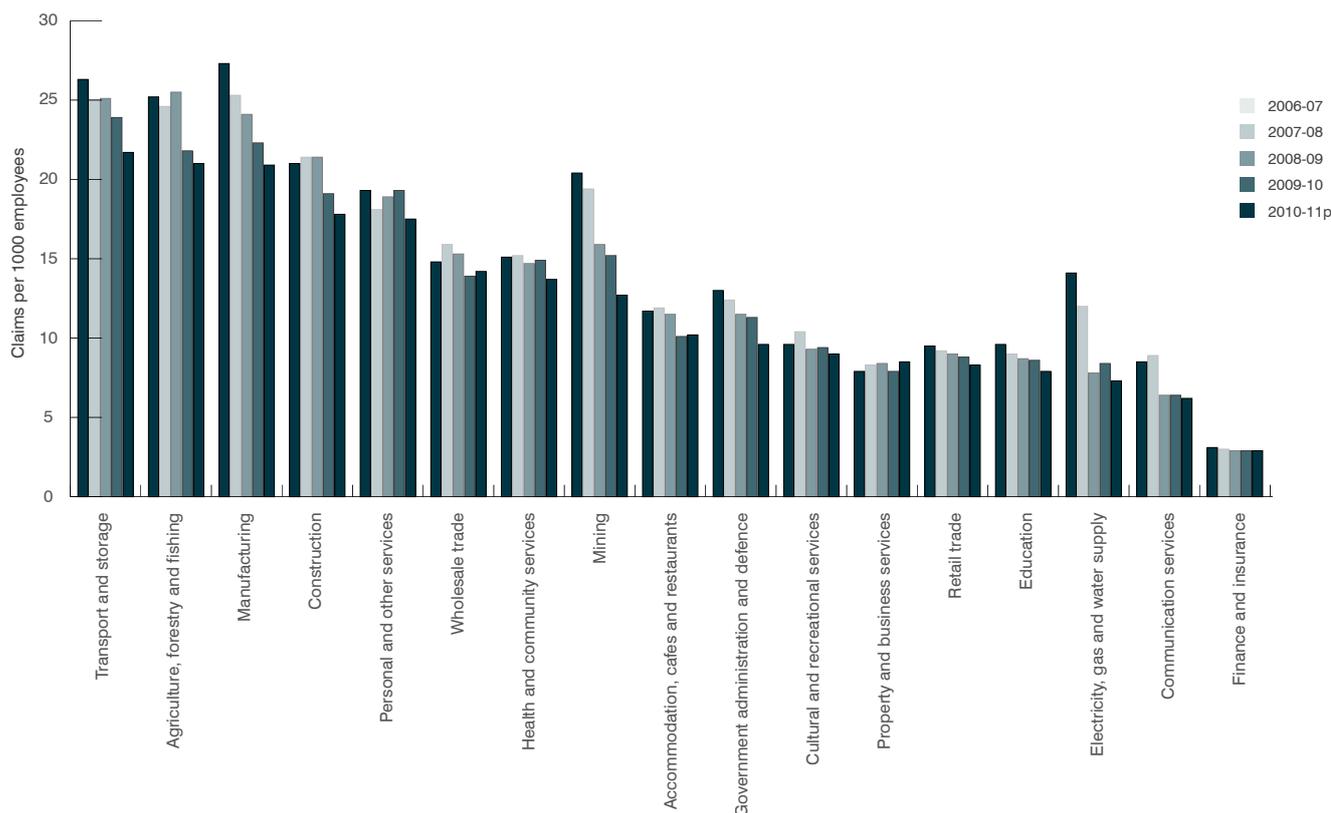


⁶ National data subsequent to 2009-10 is not yet available to Safe Work Australia.

Serious Injuries⁷

Serious injury figures provide us with the opportunity to identify clearer trends and comparisons. When these figures are examined nationally, the construction industry rates fourth out of seventeen in terms of our most dangerous industries, behind the transport and storage industry, the agriculture, forestry and fishing industry and the manufacturing industry (Graph 2).

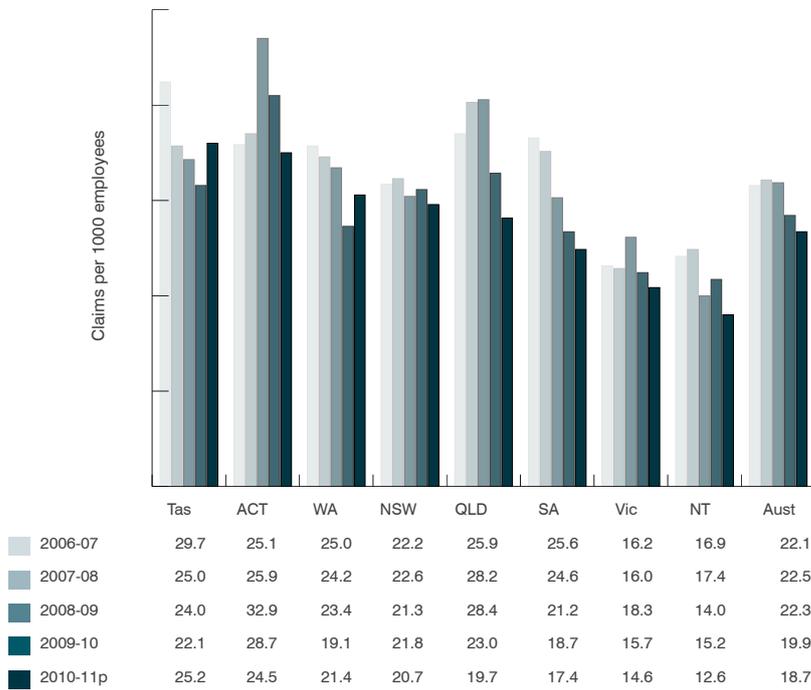
Graph 2. National - Serious Claims: Incidence Rate by Industry



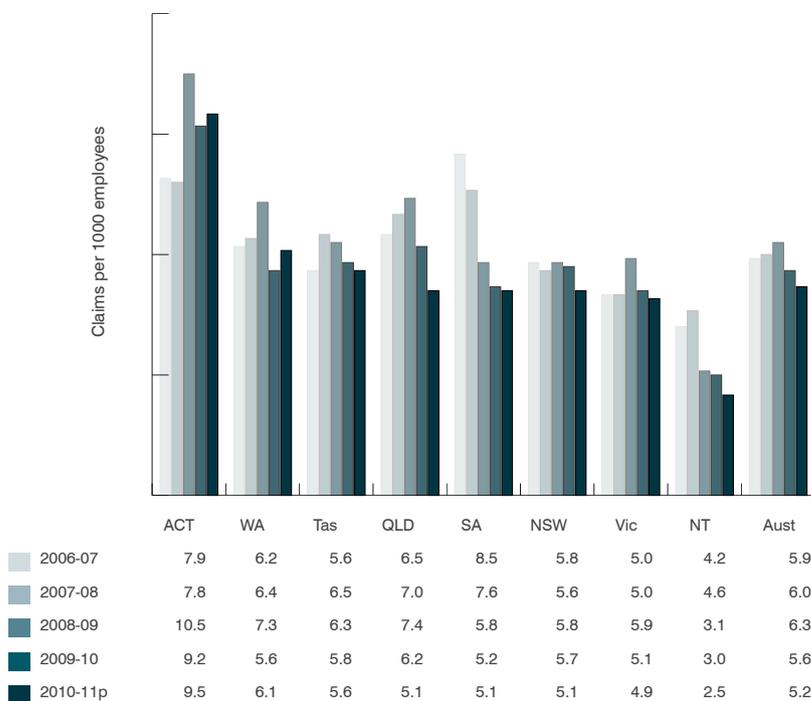
The ACT's number of serious construction industry claims peaked in 2008-09 at a figure much higher than that of any other jurisdiction (Graph 3). Despite significant improvement since then, on the most recently available figures for 2010-11 (provisional), only Tasmania has a higher rate of serious injury, and it only marginally pips the ACT as the worst performing jurisdiction. The figures for the ACT and Tasmania are both significantly higher than the next worst performer, Western Australia. The ACT's serious injury rate for the construction industry is 31% higher than the national average.

⁷ Serious Injury claims as defined by Safe Work Australia include fatalities, claims for personal disability and claims that result in one or more weeks of time lost from work. Serious claims do not include those involving journeys to or from work.

Graph 3. Construction Industry - Serious Claims: Incidence rates by jurisdiction ⁸



Graph 4. Construction Industry - Serious Claims Involving 12 or more weeks off work: Incidence rates by jurisdiction



⁸ Construction Fact Sheet, p2 Safe Work Australia, Canberra, October 2012

<http://www.safeworkaustralia.gov.au/sites/SWA/AboutSafeWorkAustralia/WhatWeDo/Publications/Pages/FS2010ConstructionInformationSheet.aspx>

Based on these figures, each year one in every forty Territory construction workers can expect to receive an injury at work that results in them being off work for a least one week, and in some cases much longer. If they work in the industry for ten years, the odds reduce to a one in four chance. On average, we can expect that every working day one construction worker will sustain such an injury somewhere in Canberra. These are not good odds for our children, partners, relatives or friends to be facing, and they do not provide any comfort for families wishing to see their relatives get home safely. The Panel notes that because of the 'lag' effect with workers' compensation data, reports on performance up to 30 June 2016 will not be available until early 2017.

While the ACT's serious injury rate is almost a third higher than the national average, it is not unreasonable to suggest that we should be aiming for better than that – as is currently being achieved by South Australia, Victoria and the Northern Territory. A reasonable time period for such an improvement would be by 30 June 2016 – within three complete financial years.

Recommendation 4: The ACT should set an initial goal of a 35% improvement in its serious injury claim rate, to bring it below the national average for this measure, by 30 June 2016. Further targets should then be set to align the ACT's performance with the best in the country.

The ACT's performance in respect of long-term injuries⁹ in the construction industry (Graph 4) paints an even worse picture, with the ACT's result deteriorating, currently more than 50% worse than any other jurisdiction and approaching double the Australian average. The Inquiry Panel notes, however, that this result is likely to be skewed by issues associated with the ACT's workers' compensation system which, some would argue, may discourage early return to work for those with more serious injuries who are also seeking lump sum benefits.

Taken as a whole, the performance of the ACT's construction sector in terms of incidents resulting in serious injury claims is a sorry one that must be improved.

The Cost of Safety

Many participants in this Inquiry talked about the cost of safety, albeit often from different perspectives.

Some talked about the legal and financial cost of safety, the cost to the business of complying with safety requirements, the imposition this placed upon businesses and the costs that could be incurred when the system failed. Others talked about the human cost of safety failures. While the financial cost can be estimated, the human cost cannot. With three deaths on ACT construction sites in the past 12 months, what possible figure could be put on each of those lives?

Taking the financial cost to the business as a starting point, differing views were expressed. A number of participants claimed that the financial cost of safety compliance created a burden on local businesses. A few echoed the sentiments of one senior construction company executive,

"Safety doesn't add value to a project. It costs you money."

The evidence suggests that this view has widespread support. Those that didn't openly claim it nonetheless saw little value in striving for anything more than a level of compliance that would be acceptable to the regulator. A few questioned why a company would do anything more than what is required under the law.

This is despite clear evidence that safety is an investment for a company, not just a

“On average,
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serious injury
somewhere in
Canberra.”

⁹ Those resulting in claims involving 12 or more weeks off work

cost. A simple cost benefit analysis suggests that building a safe business can pay handsome dividends for a company.

WorkSafe ACT statistics show that out of \$133.2 million paid in workers' compensation premiums by all industries in 2009-10, about \$33 million, or 24.7%, was paid by the construction industry. This was despite the industry contributing only 9.3% of the total wages bill and 15.2% of all workers' compensation claims¹⁰

Workers' compensation premiums in the construction industry vary, but 6.6%¹¹ of the wages and salary bill for a business would be a reasonable estimate of the average rate paid. A business employing 25 workers at an average salary of \$70,000 would incur a premium bill of \$115,500 per annum if their premium rate was 6.6%.

Conservative analysis by Safe Work Australia indicates that a business spends at least \$2 for every \$1 it spends on workers' compensation in on-costs (including re-training, administration, downtime, loss of productivity, etc.). This bumps the true workers' compensation cost in our example up to nearly \$350,000 dollars and the true total premium cost to the industry up to around \$130 million per annum.

If estimates of the ratio of indirect to indirect costs being closer to 4:1¹² are accepted, this business' true costs will be \$460,000, or over quarter of the total wage and salary bill, and the cost to industry closer to \$200 million dollars per annum.

"Even though the upfront costs of safety may appear to be expensive, in the long run, safety investments not only increase safety in the workplace, but also lower the risk of indirect costs that may pose more harm to a company's financial performance."¹³

Premium rates (direct costs) for some construction companies in the ACT range as high as 10% or more, of the wage and salary bill. The costs associated with any significant or serious incidents, must be added to this figure. These costs could arise from rectification work required by the regulator, or as a result of any internal investigation, financial impact on the project, through to legal costs and possible penalties arising from court action. Court action could be initiated by the regulator or as part of civil action taken by relevant individuals.

Perhaps one of the biggest costs to a business which cuts corners on safety can be the impact on its business reputation. Maintenance of a good reputation, although hard to quantify, is vital in a competitive industry and in a world where, increasingly, consumer pressure can influence a client's choice of contractor. One construction firm presenting to the inquiry lamented that it was still seeing the impact on its business reputation of a significant safety failure which occurred nearly a decade ago.

"The most profitable companies are the safest. There is no need for a trade-off between safety and profit."¹⁴

The Director of the European Agency for Safety and Health at Work has said that *"Spending on workplace health and safety should be seen as an investment and*

“With three deaths on ACT construction sites in the past 12 months, what possible figure could be put on each of those lives?”

¹⁰The reason for the high premium cost lies in the relatively high claims frequency and average claims cost in construction when compared to some other industries.

¹¹This was the average achieved premium rate for construction firms in 2009-10 in the ACT

¹²In its 2007 report, *Proving the Value of Safety*, Rockwell Automation in the US noted Liberty Mutual Insurance's estimate that these indirect costs are three to five times the direct costs.

¹³Lyle Masimore, *Proving the Value of Safety*, Rockwell Automation, Milwaukee, 2007, p12

¹⁴Michael Costello, Chief Executive of ActewAGL, speaking on 666ABC about the customer impact of getting safety right for his business.

not a cost". The cost benefit analysis alone confirms this.

On the benefit side, a business which implements an effective approach to safety on its sites can expect a number of things to occur, including:

- increased productivity – one safety manager from a large local construction company noted during the Inquiry, *"Everyone knows a safe job finishes quicker than an unsafe one."*
- reduced levels of confrontation with unions over safety issues
- increased capacity to attract and retain the best workers and managers in what is a competitive industry
- increased likelihood of winning tenders – one long-standing senior construction company executive noted that *"Success in this industry comes from repeat business and doing the job right the first time."*
- reduced workers' compensation premiums – some local insurers will offer premium reductions simply for the implementation of a bona fide safety improvement initiative, delivering a cost benefit even before the results show a reduced number and severity of claims.

Many businesses will attest to the benefits to be gained from making even small investments in health and safety.

*"Good, sensible health and safety is not a burden on a business or a spoiler of fun – it is a cornerstone of a civilised society and a strong, prosperous economy."*¹⁵

All of this talk of financial cost and benefit belies the human side of the equation. While fatalities come at an inestimable cost to individuals, families, indeed the whole community, significant injuries can also result in considerable human cost, impacting on a person's quality of life and their earning capacity – in some cases for the rest of their life.

The old adage, *"Families, partners and loved ones have an expectation when they see their partner, parent or child go off to work that they will return to them safely at the end of the working day"*, holds true today possibly even more so than it did in the past. That is why we have chosen *"Getting Home Safely"* as the theme for this report.

In the modern world we all hope that workplace fatalities are a thing of the past, of the early days of the industrial age. While the families of construction workers understand that the construction industry is one that is characterised by some significant risks, the community expectation is that everything that can reasonably be done to protect workers' safety will be done.

No bereaved family member would ever find it an acceptable proposition that a fatality occurred because safety was a lower priority than meeting a deadline or incurring a cost.

And yet profit is being put before safety on some of our construction sites. At best, we can hope this is occurring due to complacency, at worst because the safety of workers is not always the number one concern.

The community understands the need for a company to achieve profits. This is a fundamental tenet of our modern economy. It is what enables businesses to employ workers in the first place and it is what can enable them to grow and employ even more workers in the future.

The community has a right to expect that every business owner can honestly say, *"Safety is our number one priority. Safety will never be compromised for profit."* This

"The most profitable companies are the safest. There is no need for a trade-off between safety and profit."

¹⁵Richard Jones, head of policy at the UK Institution of Occupational Safety and Health (IOSH), 5 October 2012.

community expectation needs to be matched in deed.

If some businesses won't accept this proposition, then the community also has a right to say, *"If a business cannot commit to genuinely making the safety of its workers its number one priority, then this is not a business we want in our community."*

Accidents can and will happen, despite the best efforts of all concerned, if for no other reason than humans are imperfect creatures, capable of fault. They should never happen, however, because profit or some other factor has been given a higher priority than safety.

“
The community has a right to expect that every business owner can honestly say, “Safety is our number one priority. Safety will never be compromised for profit.” This community expectation needs to be matched in deed.
”

3—Safety Conscious?

The construction industry is widely regarded as a risky business, and the evidence in Chapter 2 confirms this to be so. Why then is the ACT's construction sector a more dangerous place to work than almost anywhere else in Australia?

A Risky Business

Like much of the rest of the country, the local construction workforce is predominantly made up of tough, young, masculine workers with a can-do attitude, and a confidence that fuels a 'bullet-proof' attitude to risk and even a determination to not comply with sensible workplace standards if that might make them appear to be 'sissies'¹⁶. The workforce is increasingly transient in nature and on many sites the vast bulk of workers are employed by sub-contractors. Literacy and language issues are on the increase as the number of unskilled workers coming into this industry from overseas rises.

The industry is characterised by a command and control culture. It is driven strongly by a need to get the job done¹⁷, on time and within budget. As projects near their completion date, the dual pressures of completion date and budget constraints increase. Daily average work hours for workers on site, the potential for fatigue and the number of different trades on site at any one time all increase.

Given the nature of the workforce, and the pressures at play, the role of senior and middle managers, of site foremen and leading hands has become increasingly important. It is management that must keep a project organised, safe and on-track. Poor project management leads to an inevitable cycle of catch-up arrangements and conflicting activities with an inherent increase in safety risks.

In this environment, good leadership is essential. While workers tend to focus on the task at hand, those leading them have both the opportunity and the responsibility of seeing the bigger picture, of identifying where systems might fail and intervening before they do so.

While most construction companies are well aware of this critical factor, the evidence suggests that the focus on potential systems failure in the ACT is predominantly targeted at matters that will affect 'program', that is, the completion date or the budget. Work done on addressing the safety culture of local companies has found significant deficiencies in the ability of supervisors to anticipate or see the potential for safety failures. It is almost as if they are blinded to potential safety issues by a focus on program issues.

the local construction workforce is predominantly made up of tough, young, masculine workers with a can-do attitude, and a confidence that fuels a 'bullet-proof' attitude to risk

¹⁶Late in the Inquiry Panel's deliberations, the Panel noted a Canberra Times article "Masculinity top safety barrier", 16 November 2102, which reinforced these observations:

"Being asked to take OH&S issues seriously does not sit well with masculine forms of not expressing interest in, or concern about, physical vulnerabilities. A deliberate nonchalance towards such concerns is regarded as a source of masculine pride and self-confidence..... confirming a generalised belief in personal invincibility, a desire to avoid anything that constitutes being seen as "weak" and...an unwillingness or inability to challenge "environmental elements" which downplay health and safety concerns."

¹⁷At a recent seminar on safety culture in the ACT construction industry, a spot survey of the 100+ participants, found that 94% agreed with the view that "The bottom line is, just 'get the job done'."

“We have task observations at work, even though people are not trained in what to look for or how to have an effective conversation. The trouble is, we can even observe things and not know what to do, or how to converse about what we see We live under the illusion that experience equals expertise, that time in action equals competence in perception. Unless we actually believe we are blind, we won't accept our visual and perceptual impairments or the resources offered to us to help us manage risk.”¹⁸

Risk management is at the very core of effective work health and safety. An understanding and ownership of how to identify, assess and then ‘control’ (by eliminating or, if that is not possible, mitigating) risks is the fundamental precursor to making workplaces safe.

Conversely, a lack of understanding of the basic principles underlying risk management can lead to employees, and at times their managers and supervisors, blindly following procedures and processes without a clear understanding of why, or of what the steps to be taken are trying to achieve.

In this context, a few key features stood out during the Inquiry Panel’s examination of submissions, the worksite visits and interviews with key industry participants. Overall, the Panel found:

- a very low level of recognition that the ACT construction industry’s safety record is one of the worst in the country
- a generally poor understanding among supervisors and workers of how to identify, assess and mitigate risks
- a sense of inevitability which leads to an expectation amongst local construction industry managers that people will get injured on sites because it is a high risk industry – serious accidents are regarded by many as either freak, inevitable or simply due to carelessness
- a widespread acknowledgement by senior and middle managers of the importance of building a safety culture, accompanied by an extremely low level of understanding of how to do this
- an almost blatant disregard for the value of safety by many of the smaller operators in the residential construction sector.

Sadly, the approach to safety compliance is sometimes more about avoiding getting caught or failing third-party accreditation than creating a safer working environment.

Virtually no one has suggested to the Inquiry that the answer lies in more rules and regulations. The general view is that the ACT has more than enough of these under the harmonised work health and safety laws. Many, however, supported the view that the industry would benefit from a stronger, more visible regulator, with the resources to ensure a greater level of compliance with those rules and regulations.

A few argued that the industry would benefit from fewer rules and regulations, though no evidence was presented as to why this should lead to better levels of compliance, or better safety outcomes for the industry. There is in fact no evidence to suggest that the ACT has more safety regulations than elsewhere in the country, and yet the data indicates the construction industry in almost all of the other states and territories is achieving better safety outcomes, often significantly so, than here in the ACT.

This is despite the fact that many local companies have made genuine attempts to improve the health and safety aspects of their workplace, to reduce workplace injuries and create a safer working environment.

An understanding and ownership of how to identify, assess and then ‘control’ (by eliminating or, if that is not possible, mitigating) risks is the fundamental precursor to making workplaces safe.

¹⁸Dr Robert Long and Joshua Long, *Risk Makes Sense: Human Judgment and Risk*, 2nd Edition, 2012, ACT, pp82-83

The Next Step – A Proactive Safety Culture

In a recent article, Dr Carolyn Yeoman¹⁹ describes three stages in the evolution of an employer's focus on safety.

The first stage is characterised by a focus on implementing technology, engineering and hardware solutions which leads to significant reductions in incidents.

The second stage sees the development of health and safety management systems including procedures, risk assessments and safe systems of work resulting in further work safety improvements.

Dr Yeoman suggests many employers don't take safety much beyond this second stage, resulting in a series of "safety waves" which are characterised by a cycle of small reductions and increases in reported incidents. In effect, many employers become stuck in this phase, with their systems becoming more difficult to maintain as enthusiasm wanes, but for an occasional resurgence as the shock of a serious incident reinvigorates efforts to ensure the system is operating effectively. It is this phase that most ACT construction companies are currently operating in.

However, Dr Yeoman says, it is critical for employers to consider moving to the third stage, the "people factor".

"There is a real need to take hold of safety and develop a proactive safety culture. This must start in the boardroom and permeate through all management structures to reach every single person"²⁰

Health and safety practitioners around the world have come to understand that vulnerability to safety failures does not originate from just "human error", chance environmental factors or technological failures alone. Analysis of accidents has shown that the industry must focus on the organisational values that might enhance risk management and safe performance in complex and hazardous conditions, such as those confronting the construction industry.²¹

Some local companies have also now recognised that the answer lies in building safety cultures within the industry, with a visible and active regulator helping to maintain the impetus for industry players to constantly strive to improve or maintain such cultures once they are achieved. Indeed, this is the approach being taken by the more enlightened companies in other industries and by some within the construction industry elsewhere in Australia.

Few local businesses, however, seemed to fully understand how to go about achieving a safety culture on their sites. Many equate a safety culture to one where the company is simply committed to compliance with safety rules and regulations.

What is a Safety Culture?

The UK Health and Safety Executive suggests that the "safety culture of an organisation could be described as the ideas and beliefs that all members of the organisation share about risk, accidents and ill health." The culture of an organisation is "the mix of shared values, attitudes and patterns of behaviour that give the organisation its particular character."²²

“the approach to safety compliance is sometimes more about avoiding getting caught or failing third-party accreditation than creating a safer working environment.”

¹⁹Yeoman, C. (2012, September). *WSP Environment and Energy*. Retrieved October 2012, from WSP Environment and Energy Web site: <http://www.wspenvironmental.com/newsroom/news-2/view/wsp-insights-people-are-our-greatest-assets-not-paperwork-379>

²⁰Yeoman, C. (2012, September). *WSP Environment and Energy*. Retrieved October 2012, from WSP Environment and Energy Web site: <http://www.wspenvironmental.com/newsroom/news-2/view/wsp-insights-people-are-our-greatest-assets-not-paperwork-379>

²¹*Safety Culture: A review of the literature*, Health and Safety Laboratory HSL/2002/25, S. Gadd, Sheffield, 2002

This recognises that any organisational culture, be it safety or otherwise, is the product of attitudes and patterns of behaviour at all levels within an organisation, not just in the management group. In terms of a safety culture, it recognises that safety is ultimately dependent on patterns of belief and associated behaviour.

The law may impose rules and processes, but compliance with those rules and processes is dependent upon patterns of behaviour. That behaviour, in turn, is dependent upon the values and attitudes shared by workers, supervisors and managers across an organisation. Behaviours will reflect those values and beliefs.

Attempts by employers to enforce compliance in their organisations will always struggle if values, beliefs and attitudes are not addressed first. Attitudes and behaviours, such as beliefs that:

- serious accidents are virtually inevitable
- safety rules are an external imposition which don't further the company's goals and may even undermine them
- safety discussions should be suppressed because they may conflict with 'getting the job done' as quickly as possible, and
- 'program' is more important than anything,

must first be addressed if an organisation is to achieve excellence in terms of safety outcomes.

Everyone—senior managers, middle managers, leading hands, foremen and the workers themselves—must all recognise and value the benefits of a safe worksite and accept their role in achieving that end. They must also recognise the fundamental importance of valuing and authorising discussions about safety. They must embrace the belief that *'we get things done around here – safely'*.

If this can be achieved, then all of the employees on a site will be able to 'own' safety as a concept that is both achievable and relevant to them. As one senior company executive said to the Inquiry Panel:

"If workers don't believe rules are relevant to them, they won't believe they are worth following."

Without industry ownership of what is trying to be achieved, genuine workplace leadership commitment to safety will be a constant struggle with both middle managers and workers disengaging and looking for short cuts rather than the safe way of doing a task. With ownership, the safe way of doing things can become the norm, with everyone alert to possible risks and feeling authorised to speak up about where they are and how they might be mitigated.

Building a safety culture is not simply the latest fad, as some would like to believe, it is the recommended approach arising from international research into what motivates workers to operate safely. It is workers, after all, who carry out the work tasks and who are most impacted when accidents occur. Checklists, rules and instructions can all contribute to a safe workplace, but only if the workers genuinely embrace them and accept them as *'part of the way we do things around here'*.

“
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”

²²HSE Human Factors Briefing Note No. 7: Safety Culture, Health and Safety Executive, London, 2002

Barriers to a Safety Culture

As noted above, the Inquiry Panel noted five features of the local construction industry which are particularly relevant to any consideration of safety culture, namely:

1. a very low level of recognition by the local industry of their current poor safety record
2. a poor understanding of how to identify, assess and mitigate risks
3. a sense of inevitability about the occurrence of serious incidents
4. a widespread acknowledgement of the importance of safety culture, accompanied by an extremely low level of understanding of how to do it, and
5. a blatant disregard for the value of safety by many in the residential construction sector.

These features present enormous challenges for embedding a strong health and safety culture in the ACT's construction industry.

WorkSafe ACT must accept some responsibility for the first of these – the low level of recognition that the ACT construction industry's safety record is one of the worst in the country.

Building a safety culture on ACT construction worksites will in many cases require fairly substantial change. Companies must take the initiative and choose to embark upon such change. By definition, a safety culture cannot be decreed by regulation. In order for companies to embark upon such a journey, they must see and accept the need to do so.

The regulator's educational activities should keep the local industry informed as to how it is performing, with national and other comparisons to assist stakeholders in benchmarking their own performance. The industry partners have a role here as well, and WorkSafe should work with employer organisations and unions to communicate this information to their respective members as well as the broader community.

Once the industry accepts that it needs to improve, it must consider where it currently stands. In terms of safety maturity, Dr Robert Long notes the Hudson model²³, which proposes that organisations evolve in five stages:

1. pathological – caring less about safety than about not being caught
2. reactive – denial until forced to comply, emphasis on engineering out hazards 'naturally'
3. calculative – command and control, knowledge compliance with legislation and regulations
4. proactive – beginning to embed ownership of risk in all organisational life as an owned process
5. generative – safety is seamless, creative and sustainable, integrated with organisational life.

The majority of the ACT's construction companies fit somewhere within the first three of these stages. Certainly, some would still be characterised as being within one of the first two stages. While many could lay claim to the third stage, only a few could truly be regarded as having reached the fourth.

“If workers don't believe rules are relevant to them, they won't believe they are worth following.”

²³Dr Robert Long, *What is a World Class Safety Organisation?*, Human Dimensions, 2012

Pathological, reactive and calculative systems in many ways depend on paperwork and procedures for their underpinning, creating an additional barrier that must be 'broken through' if they are to continue to evolve. This in part explains the current levels of concern over what many see as the increasing demands of paperwork. It also explains the high levels of resistance to attempts to move beyond such high dependence, despite the vigorous complaints against it.

Dr Long notes that the first step up the ladder beyond the calculative stage is to move from a reliance on systems controls to an acceptance of the importance of behavioural and cognitive controls – of the impact of workplace culture on how workers go about completing their assigned tasks

“...we should not continue to rely entirely on safety management to bear down on the number of fatalities each year. This will never eliminate fatalities or reduce significantly the number of serious accidents. There is an important distinction between safety management and safety leadership. Leadership and cultural change are essential if we are to eliminate fatal accidents ...”²⁴

While many appear to have come to recognise that the way forward is through building safety cultures, they will not be able to progress to the fourth or fifth stages without an understanding of how to achieve it. That understanding must then be accompanied by a genuine commitment by management to achieve that goal.

The Master Builders Association has taken some leadership in regard to a safety culture in recent times, fostering debate and trying to open the eyes of their members to what a safety culture can do for them. This needs to be supplemented by building an understanding that, in terms of safety, the local industry is lagging behind the other Australian states and territories, in some cases significantly so, and that change will be needed to address this performance. The regulator, employer organisations and unions all have a role to play, focusing on both the need for change and the constructive way forward.

Recommendation 5: The ACT construction industry partners should endorse the need to build positive, inclusive safety cultures on local worksites. The Master Builders Association and the Housing Industry Association should take the lead in moving the industry forward, from an approach to safety which is focusing on systems, compliance and reaction to one that focuses genuinely on people and attempts to create healthy safety cultures on construction sites.

There are many reasons why local construction companies are stuck in Dr Yeoman's 'second phase' or Dr Long's third or 'calculative' stage, focusing on their safety systems.

Some have argued that the approach taken by the Office of the Federal Safety Commissioner has both led them to this phase (a good thing), and then stopped them from moving on. The Commission's approach is widely regarded as having led to the development of safety systems in an industry which was in many cases largely devoid of such aids to performance. However, perceptions of the ongoing dependence on audits and paperwork is now serving unintentionally to maintain this focus on systems and paperwork, to the detriment of continuous improvement and a leap forward to building safety cultures.

Safety managers in local companies spend a great deal of their time ensuring that the much-valued Federal Safety Commission accreditation is maintained. They do not seem to allocate as much time or resources to consideration of whether the systems based approach is delivering good safety outcomes for their company, or

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²⁴Rita Donaghy, *One Death is too Many: Inquiry into the Underlying Causes of Construction Fatal Accidents*, United Kingdom, 2009, p.21

whether other approaches might serve them better. In many cases, accreditation is the outcome safety managers are employed to deliver.

Safety systems, while an important element in achieving safety outcomes, can serve to mask cultural and behavioural barriers. Even though a properly implemented safety system will identify and address culture issues, it is also the case that systems often draw the attention of those responsible for implementing and monitoring them to observable, measurable actions, at the expense of fostering a need to understand why such outcomes may be occurring.

In a safety system, the answer, for many, often lies in more detail, more checklists and more measurement. The Inquiry Panel has certainly found this to be the case in the ACT.

Recommendation 6: The Master Builders Association and the Housing Industry Association should work closely with the Office of the Federal Safety Commissioner to ensure that specific concerns of ACT employers regarding what they see as an undue focus on paperwork and systems are heard and that such a focus does not operate to the detriment of work health and safety outcomes but allows construction companies to focus their work health and safety priorities on practical initiatives which have meaning and value to employees.

Risk Management

While risk management is at the very core of work health and safety, its effectiveness is predicated on the understanding by those tasked with doing so of how to manage risk. A poor understanding, for example, of the hierarchy of controls can lead to inappropriate mitigation strategies and a misguided reliance on lesser controls when stronger mitigation strategies might be available.

In this regard, the second and third features of the local industry noted above are closely related. Many in the industry do not truly understand how to manage safety risks. In some cases at least this may be a consequence of attempts by companies to manage their legal or compliance risks, rather than their safety risks. Whatever the reason, the outcome can be that it leads to a sense that many risks are often beyond their control. This is fatalistic thinking which can lead to readily available solutions being overlooked.

Embarking upon a journey to build a safety culture will in itself help to overcome this obstacle. Genuine and open discussions about safety on worksites fosters a desire to understand risks and how they can be managed. Training in such techniques, which are generally well understood in the safety community, is a fundamental precursor to ensuring that safety discussions are both meaningful and productive.

A simple belief that a set of rules, if followed blindly, will lead to safer outcomes is dangerously misguided. The factors leading to significant safety failures are often complex and intertwined. Avoiding them requires an understanding of what the rules are trying to achieve and a willingness to question things that 'don't look right'. The rules provide a pathway to success but not a guarantee. Ultimately, it is behaviours and attitudes that will predominate.

Recommendation 7: WorkSafe ACT should work with the industry partners to develop training and guidance that will promote a greater understanding at all levels within the industry of how to manage work health and safety risks. WorkSafe ACT should seek to have this in place by 30 June 2013.

Safety systems, while an important element in achieving safety outcomes, can serve to mask cultural and behavioural barriers

Leadership in the Workplace

Most important of all, however, to a successful journey towards a safety culture, is genuine management commitment.

“Only with good leadership and worker participation combined can a safety culture become established.”²⁵

Genuine and sustained management commitment can ensure the success of such a journey, just as much as token or feigned commitment can signal its death knell. Australian workers have a good sense of ‘spin’. They know when what they are being told is not genuinely believed by those espousing it. Nowhere is this more likely to be true than in the construction industry.

“The only way an organization can attain a positive safety culture is by having the unconditional commitment from all its high level management. These are the people who will implement the safety program to the employees and it is imperative that their beliefs and attitudes match what they expect of their employees To be more precise, leaders must walk the talk.”²⁶

A number of senior safety managers presenting to this Inquiry, however, bemoaned the attitude of some local companies which suggested that safety was solely the safety manager’s responsibility – a view seemingly shared by company executives and site and other line managers alike and which allowed them to abrogate their own responsibility.

The UK’s Health and Safety Executive have identified five features of a safety culture²⁷. They suggest that a healthy safety culture is one where there is:

1. visible commitment to safety by management
2. workforce participation and ownership of safety problems and solutions
3. trust between shop floor and management
4. good communications
5. a competent workforce.

An outline of what such features might look like on an ACT construction site can be found in the following table, built on from the excellent work of the UK’s Health and Safety Executive:

“The only way an organization can attain a positive safety culture is by having the unconditional commitment from all its high level management.”

²⁵ Rita Donaghy, *One Death is too Many: Inquiry into the Underlying Causes of Construction Fatal Accidents*, United Kingdom, 2009, p.11

²⁶ *Safety Culture and Leadership*, Brent Macdonald, p.1

²⁷ UK Health and Safety Executive, *HSE Human Factors Briefing Note No. 7: Safety Culture*, 2002

²⁸ All management – not just the Safety Manager.

Table 2: Features of a healthy safety culture

A healthy safety culture is one where there is...	This is shown when management..	... and is helped when management...
<i>Visible Commitment to Safety by Management²⁸</i>	<ul style="list-style-type: none"> • Make regular <i>useful</i> visits to site • Discuss safety matters with frontline personnel • Will stop production for safety reasons regardless of cost • Spend time and money on safety e.g. to provide protective equipment, safety training, and conduct safety culture workshops or audits • Will not tolerate violations of procedures and actively try to improve systems so as to discourage violations e.g. plan work so that short cuts aren't necessary to do the work in time. 	<ul style="list-style-type: none"> • Makes time to visit site (not just following an accident or incident) • All show commitment • Have good non-technical skills (e.g. communication skills;) • Are also interested in worker safety when they are not at work, e.g. provide information on domestic safety • Shows concern for wider issues e.g. workers' stress and general health • Actively sets an example (e.g. always conform to all safety procedures)
<i>Workforce Participation and Ownership of Safety Problems and Solutions</i>	<ul style="list-style-type: none"> • Consults widely about health and safety matters • Does more than the minimum to comply with the law on consultation with workers • Seeks workers' participation in: <ul style="list-style-type: none"> - setting policies and objectives - accident/near miss investigations 	<ul style="list-style-type: none"> • Supports an active safety committee • Has a positive attitude to Health and Safety Representatives • Provides tools or methods that encourage participation e.g. behavioural observation programs & incentive schemes that promote safety
<i>Trust Between Workers and Management</i>	<ul style="list-style-type: none"> • Encourages all workers and contractors to challenge anyone working on site about safety, without fear of reprisals • Keeps their promises • Treats the workforce with respect 	<ul style="list-style-type: none"> • Promotes job satisfaction/good industrial relations and high morale • Promotes a '<i>just</i>' culture (assigning blame only where someone was clearly reckless or took a significant risk) • Encourages trust between all employees
<i>Good Communications</i>	<ul style="list-style-type: none"> • Provides good (clear, concise, relevant) written materials (safety bulletins, instructions, posters, guidance) • Provides good briefings on current issues day-to-day and in formal safety meetings; listening and feedback 	<ul style="list-style-type: none"> • Encourages worker participation in suggesting safety topics to be communicated • Provides specific training in communication skills • Has more than one means of communicating
<i>A Competent Workforce</i>	<ul style="list-style-type: none"> • Ensures that everyone working on their sites is competent in their job and in safety matters <p>Is supportive</p>	<ul style="list-style-type: none"> • Has a good competence assurance system

The features associated with workforce participation and trust between management and workers are almost as important as genuine management commitment. Workers must be able to participate in the identification of safety problems and the development of solutions. Although little hard evidence is available, we hear too often that attempts to voice concerns about safety issues are sometimes not only not heard, but are suppressed and ridiculed.

Suppression of workers' concerns about safety on sites is a recipe for disaster and should be exposed for what it is – a blatant disregard for the very people most companies would claim are their primary business asset. Such companies have no place in our community.

Workers should be encouraged to raise safety concerns. If those concerns are unfounded, then this needs to be explained to them. When there are genuine issues, workers need to be given the chance to participate in the development and implementation of solutions. Ownership of those solutions is dependent upon this key fact.

This does not have to lead to significant downtime. It should lead, however, to more constructive task induction, pre-starts and toolbox talks. At its core, it is dependent on better communication.

Traditionally, worker induction in the industry has focused on three areas:

- industry induction – General Construction Induction Training or the so-called 'White Card'
- site induction
- task induction.

Great emphasis has been placed on the first two of these three areas when the third, task induction, is probably the most important. Effective and regular task induction, or 'pre-starts', is where safety discussions can flourish, to the benefit of both program and work health and safety.

Recommendation 8: The ACT construction industry should place greater emphasis on the importance of effective task induction. This emphasis should be supported through education and enforcement activities by the regulator as well as education and other support from employer and worker representative bodies, including guidance on what makes a good pre-start or toolbox talk. This guidance and support should be in place by 30 June 2013

Brent Macdonald²⁹ outlines five fundamental general beliefs to build the foundation of a safety culture which he feels everyone in an organisation must hold:

1. The health and safety of workers has first priority and must take precedence over all other business objectives.
2. All injuries can be prevented. This can be done by managing and self-managing techniques and also means that injuries cannot be blamed simply on worker negligence.
3. Excellence in safety = excellence in business. Without this belief, cost-benefit trade-off thinking leads to compromises in safety.
4. Safety must be an integral part of every job. Just as for quality, safety must be reinforced by a "do it right the first time" attitude.

“
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²⁹ Brent Macdonald, *Safety Culture and Leadership*, CCOHS Dick Martin Scholarship Award, Saskatoon, Canada, 2006

5. The human factor: most injuries occur because of inattention—people take risks because they truly believe that they won't get hurt. This attitude, especially among young workers, is a recipe for disaster.

How many local construction companies can claim to have worksites that truly demonstrate even two or three of these beliefs? The observation of the Inquiry Panel is that the opposite of these five beliefs is on display on many ACT construction worksites.

Sub-contracting

The last, but not the least, of the barriers to building a safety culture lies in the predominance of sub-contractors on construction sites. Generally, around 85% of the work done on sites will be done by sub-contractors, that is, by workers not under the primary control of the principal contractor. This has become a feature of the local industry just as much as it has become so nationally and, in fact, internationally.

In the course of the Inquiry, many principal contractors have called upon WorkSafe ACT to enforce sub-contractors' compliance with safety obligations. The law requires that principal contractors accept responsibility for the activities of their sub-contractors and several recent court rulings have confirmed this. Local construction companies must not only accept, but embrace, this responsibility.

While WorkSafe does have a role to play, principal contractors have the strongest hand in this regard and it is for this very reason that the law places this responsibility upon them. Sub-contractors are operating on a principal contractor's site, side by side with the principal contractor's workers, under contractual arrangements set by the principal contractor. While sub-contracting companies have their own obligations under the law, and these should be enforced, their conduct cannot be seen in isolation to that of others at work on a principal contractor's site. It influences overall attitudes to safety on the site as well as the final project outcome.

Put simply, principal contractors must use their supply-chain purchasing power to enforce adherence to safety on their sites by their sub-contractors. In doing so, they must adopt the same strategies referred to above for their direct employees.

While imposing rules and paperwork has its place in achieving this, this approach alone is doomed to fail and is currently doing so in many cases. Sub-contractors across the ACT have become increasingly frustrated at the volume and complexity of paperwork required of them by principal contractors. As has occurred elsewhere in the ACT, the outcome for sub-contractors has been a disengagement from the safety process.

Sub-contractors, often too small and without the resources to develop the procedures expected of them, frequently resort to paying some external 'expert' to produce the documentation for them, with little or no involvement from the sub-contractor or their workers. They tend to sign on the bottom line, pass the documentation to the principal contractor and get back to doing what they believe they are really being paid to do.

More enlightened construction companies are including sub-contractors in their safety discussions, in task induction talks, in toolbox talks and pre-starts – shifting the emphasis away from paperwork to discussions about what needs to happen, how it can be done effectively and safely, by whom and why. They recognise which sub-contractors are large enough to stand on their own two feet and which will require assistance to meet their expectations.

“principal contractors must use their supply-chain purchasing power to enforce adherence to safety on their sites by their sub-contractors.”

Recommendation 9: Principal contractors must recognise and accept the responsibility they have for the conduct of sub-contractors operating on their sites and should include them in any initiatives to improve approaches to safety within their business. Principal contractors should consider what can be done to impose safety requirements on sub-contractors which are commensurate with the size and sophistication of the sub-contractor involved. WorkSafe ACT, through its educational and enforcement activities, should reinforce this emphasis.

If the local industry is to lift its game, to respond to the challenge of moving from the bottom of the construction industry serious injury league table, to making its workplaces significantly safer, then it must embrace new ways of thinking.

More of the same will not do the trick! Similarly, more effective regulation, though clearly having an important part to play, is not the sole answer. It can, however, create the motivation for innovative thinking about ways to improve. It can create the environment for safety to flourish.

Embracing the concept of building healthy safety cultures is the way forward. There is no reason why this approach, being embraced as it is by many of the bigger national construction companies, can't be embraced by smaller companies as well.

There are some tentative signs that this is beginning to happen in the local industry. The local industry partners, working with the regulator, should endorse and promote such attempts.

4—Processes and Procedures – Commonsense?

The Inquiry Panel spent considerable time discussing the day-to-day management of construction sites, as everyday practice is foremost in the minds of construction workers. While a range of issues common to all that the industry must focus on emerged, the Panel found that the way safety is managed varies considerably across the ACT.

Larger construction companies tend to employ a safety manager. Sometimes, depending on the size of the business, this manager will have a small team of staff at their disposal to assist them in their role of overseeing adherence to safety requirements. The bigger companies will also commonly rely on third party accreditation for their safety management system and will seek to obtain Federal Safety Commission accreditation, even though they may have no intention or likelihood of bidding for Commonwealth work. Both third party and Federal Safety Commission accreditation will necessitate ongoing periodic certification, though these will tend to be largely based on desk-audits. Maintaining third party and Federal Safety Commission accreditation tend to be one of the safety manager's primary objectives.

Medium sized companies may also have a safety manager, though they are more likely to add this responsibility to the site manager's raft of duties. Some medium companies will also seek third party accreditation of their safety management system as well as Federal Safety Commission accreditation³⁰, though this will become less common as the size of the business diminishes.

The smaller operators are unlikely to have dedicated safety managers. Instances of them seeking third party accreditation of their safety management system or Federal Safety Commission accreditation will be much rarer. They are more likely to seek the assistance of a consultant to develop any safety processes or procedures they require to secure work.

For many of the smaller operators in the residential sector, management of safety onsite will be problematic at best. In many cases sub-contractors will come and go with little if any involvement and even less oversight by the principal contractor, who may be working across multiple sites at the one time.

With this diversity in mind, the Inquiry Panel saw a clear need for guidance for the varying sectors and company sizes on what framework might work best for them. While the legislation makes little allowance for this diversity, imposing an overall requirement for a Work Health and Safety Management Plan, construction companies would obviously benefit from clear and practical suggestions for a framework for managing safety that takes into account the sector they are working in and the realities associated with the size of their business.

The *Work Health and Safety Act 2011* also includes new requirements for company directors, or 'officers', and a requirement for them to demonstrate that they have exercised 'due diligence' to ensure their business is fulfilling its safety responsibilities³¹. A suggested framework for the management of safety by the differing types and sizes of companies would also help company leaders to meet this requirement.

The Panel believes that this is something that the industry representative bodies should develop for their members. While it would be appropriate for them to seek input from the various regulatory bodies (e.g. WorkSafe ACT and ACTPLA), and they may want to

“Construction companies would obviously benefit from clear and practical suggestions for a framework for managing safety that takes into account the sector they are working in and the realities associated with the size of their business.”

³⁰ This is largely because such accreditation recognises their safety *bona fides* and can be useful as a display of the company's reputation as a good employer.

³¹ Section 27 of the *Work Health and Safety Act 2011*

consider involving the relevant unions, it is essential that development of guidance of this nature be driven by industry representatives with an appreciation of the day-to-day realities facing different parts of the industry. WorkSafe ACT participation will be essential to ensure that the guidance conforms with any regulatory requirements pertaining to WHS Management Plans³².

It is also essential that this guidance be practically, rather than procedurally, oriented. It should emphasise the role of company executives, directors or owners in providing leadership to ensure that safety is not seen as simply another 'compliance annoyance', and in meeting their due diligence obligations. It should also recognise the key role effective project management plays in securing and maintaining a safe site.

Recommendation 10: The Master Builders Association and the Housing Industry Association should lead the development of clear frameworks for the management of safety on ACT construction sites, recognising the practical needs of varying sized businesses and the differing sectors, such as civil, commercial and residential, and recognising the importance of good planning in achieving safer worksites. WorkSafe ACT and ACTPLA should provide input to this process to ensure that legislative requirements are addressed. These frameworks should be available to businesses by 31 March 2013.

While the development of a framework will assist construction companies in deciding what form of safety management best suits their situation, the Inquiry Panel felt that it was appropriate for it to turn its attention to some specific matters of concern in this area.

Safety Managers

While it is understandable for smaller companies to not have a dedicated safety manager, where such managers are employed the arrangements can vary considerably. No rules apply, for example, to the level of training or competence which should apply to such a role. In practice, their background varies considerably.

In many cases a Certificate IV in Occupational Health and Safety is seen as the relevant desired level of qualification. It is the Inquiry Panel's view that a higher level of qualification should be sought for personnel responsible for advising at least the bigger companies on how to manage safety in a business with such a high level of inherent risks as that which exists within the construction industry. It may be appropriate for the ACT Building and Construction Industry Training Fund Authority to provide substantial assistance to companies in order for them to achieve this.

More concerning, however, is the authority given to safety managers. A small proportion of the safety managers questioned by the Panel had the absolute authority to stop work or an activity. Many fulfil more of an advisory role, with the ultimate call being made by the site manager. Assigning complete authority over safety decision-making to site managers risks an imbalance towards decisions that are more focused on 'program' rather than safety consequences.

The Inquiry Panel's view is that construction companies should assign appropriate levels of authority to safety managers, with the necessary governance processes and checks and balances in place to ensure that their decisions are well-considered.

The Panel recognises the complexities associated with such decision-making processes and that this may be an area which would benefit from some guidance for companies from their relevant employer representative body.

³² Requirements for WHS Management Plans for construction projects with a value of \$250,000 or more are set out in sections 309 to 311 of the *Work Health and Safety Regulation 2011*. Further guidance can be found in the *Work Health and Safety (Construction Work) Code of Practice 2011*.

Recommendation 11: The Master Builders Association and the Housing Industry Association should include in any guidance on safety frameworks for their members the allocation of responsibility for overlooking safety on projects, the recommended minimum training and competencies for such roles and the appropriate safety governance processes which should be in place, recognising the varying types and sizes of employers in the industry.

Safety Management Systems, Safety Audits and Accreditation

Work Health and Safety Management Systems have an important role to play in the effective management of workplace risks.

In many cases they have been acquired or developed by construction companies in response to what they see as their increasing exposure to liability. Lawyers, in some cases, have helped to build and sustain this belief, even though, ultimately, courts will want to see evidence of how such systems are actually being applied at the coalface. The mere production of a comprehensive safety system will often go some way towards mitigating an employer's liability should something go wrong.

Systems alone will not make worksites safer. Worse than this, they may make them less safe by creating an 'illusion of safety' in the mind of management.

Construction companies must not lose sight of this fact and need to consider the effectiveness of their systems. Third-party accreditation has become, for some at least, the de facto measure of the effectiveness of their safety system. While third-party auditors will, in theory at least, provide an appraisal of the completeness of such systems and whether they address key factors such as legislative compliance, any appraisal must consider whether the system is actually working and achieving safer worksites. Third party accreditation, while it has its place, can create a false sense of security among company leaders that all is well.

Safety systems have a tendency to become more and more complex over the course of their life. Processes and procedures have a tendency to almost inevitably lead to checklists and a 'tick-box approach', at which point the outcome originally sought tends to be forgotten.

WorkSafe ACT cited the example of one site visited by its inspectors which produced an extremely thorough set of checklists which were completed for all mobile plant at the commencement of work, but when the plant itself was examined by the inspector, a large percentage of the items studiously ticked off by the workers each day were found to be patently faulty, to an extent that could not possibly have been the subject of a simple mistake.

A large number of contributors to this inquiry complained that safety has become largely a paper-based exercise in the Territory. The obvious question is – why?

It is the view of this Inquiry Panel that no one single factor can be blamed. Almost all of the stakeholders involved have had a role to play in allowing this to happen. This includes:

- WorkSafe ACT, through its inspectors focusing too often on the letter of the law at the expense of its intent
- the Federal Safety Commission, through not responding sufficiently to concerns, real or otherwise, that their auditors will only be satisfied by the thoroughness of the paperwork
- employers, through a focus on what they believe will satisfy the regulator or the Federal Safety Commission rather than on achieving genuine safety outcomes for their workers

“Systems alone will not make worksites safer. Worse than this, they may make them less safe by creating an ‘illusion of safety’ in the mind of management.”

- unions, through also focusing too often on the letter of the law rather than the spirit of the law
- lawyers, through their advice to employers to protect themselves from legal action by accumulating large paper-based systems
- auditors and other accreditors, through a primarily desk or paper-based assessment of safety systems.

Safe Work Method Statements

Safe Work Method Statements (or SWMS, colloquially known as 'Swims') have come to epitomise this undue focus on paperwork.

Safe Work Method Statements are, basically, a set of instructions for how to complete a prescribed task as safely as can reasonably be expected. The current *Work Health and Safety Act 2011* only requires such documents for eighteen specific high-risk construction activities. The current mythology, however, which has proved enormously difficult to dislodge, is that all risks must be managed, and documented, and have a corresponding SWMS that can be produced when an inspector calls or if the employer ends up in court.

This mythology has been perpetuated by some in the industry for varying reasons, few if any of which are valid. Auditors, safety consultants and inexperienced or less qualified safety managers have all been culprits in perpetuating this myth, despite attempts by the local industry to lay most of the blame at the feet of the Federal Safety Commission.

Some of the Territory's most senior safety managers are still yet to be convinced, despite protestations by WorkSafe ACT to the contrary, that they are not required to have a SWMS in place for workers walking over uneven ground on a construction site, or walking up stairs on a multi-level site. This is despite the fact that most people mastered such activities in early childhood.

Perhaps what the perceived issues surrounding SWMS actually represent is the inability of the local industry to see beyond the most basic of responses to demands for safer worksites. Whether this is due to an undue focus on profit margins, with safety seen as a mere 'embuggerance', or whether the responsibility for this lies more broadly among all of the stakeholders, it nonetheless has become an obstacle to seeing the bigger picture.

Dr Long's model would suggest that this is not only a characteristic of an industry at the 'calculative' level of maturity, but an obstacle to progression to a 'proactive' level of maturity.³³

For this specific issue, the answer is to comprehensively debunk the SWMS myth. To do this alone, however, and not shift the focus from paperwork to work practices, from systems-based controls to behavioural and cognitive controls, will not achieve the safety outcomes we must all expect from the construction industry.

WorkSafe ACT should continue the work it has begun with the industry partners to clarify expectations regarding Safe Work Method Statements and to shift the emphasis from paperwork to safe work practices and from process to outcomes.

“
safety has
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a paper-based
exercise in the
Territory.”

³³ Dr Robert Long, *What is a World Class Safety Organisation?*, Human Dymensions, 2012

Engineers

A further issue encountered by the Inquiry Panel was that of engineers and the critical role they play on many building and construction projects. Amongst other things, employers and regulators rely on their expertise to verify the structural soundness of complicated designs and structures.

Around the world, engineering failures have been responsible for a number of catastrophic building and structural failures, both during and following construction and contributing to injuries and fatalities. Many of these failures were due to inadequate design or to inadequate oversight or verification of elements of construction.

Similar problems have been experienced in the ACT, often with catastrophic consequences for human lives and with significant financial impact on the community. A number of the ACT's most significant construction accidents have had an engineering aspect to them, if not an engineering issue at their very core. The Barton Highway bridge collapse, the Belconnen wall collapse and the Marcus Clarke Street slab collapse are but some of examples of this—each of which could easily have led to a number of fatalities.

The Inquiry Panel was advised of a range of concerns relating to engineers in Canberra. There were comments that appropriately qualified engineers can be difficult to access here in the ACT, possibly as a result of demand for their services arising from the mining boom. Concerns were also expressed about inappropriately qualified or poorly experienced engineers 'signing off' on certain types of structures outside their field of expertise or beyond their experience. There was even anecdotal evidence from credible and experienced industry participants to suggest that there have been instances of some engineers having signed off on work they have not personally sighted, or of signing off on complex structures based on visual observations alone. All of these represent potentially significant concerns.

Two crucial issues impact on the professional standards of engineering advice on construction projects. One is the need for assurance that engineers who are signing off on design or construction elements have the appropriate accredited certification and experience in the relevant field. The other is assurance that engineers' skills and experience remain current and, therefore, valid. Desirably, clients should be able to check that a particular engineer has maintained an ongoing level of professional development to ensure their skills remain relevant and up-to-date and that they continue to be deemed to be competent.

Assurance may be obtained through an engineer being a member of the National Professional Engineers Register. This register is administered by Engineers Australia and is based on achieving a required qualification, having sufficient practical experience under supervision and demonstrating the necessary competencies for independent practice. It is a requirement to re-register every five years on the basis of an audited statement of experience and record of continued professional development activities. Engineers who are also members of Engineers Australia commit to practice in accordance with the Code of Ethics and Guidelines on Professional Conduct.

In the ACT, as for all states and territories other than Queensland, there is no legislation to prevent an unqualified person from practicing as an engineer. In the event of a failure, prosecution may be pursued through the courts or else complaints can be made to Engineers Australia. Complaints to Engineers Australia, however, can only be dealt with if they are put to them in writing, relate to one of their members and will only be assessed in the context of the values and principles of the Engineers Australia's Code of Ethics.

there is no legislation to prevent an unqualified person from practicing as an engineer.

Clearly, there is a strong case for registration of engineers in the ACT, with a provision that engineers not be able to practice here unless they are registered. Along with this would come the capacity to respond to complaints about engineers' performance, with the prospect of them being de-registered for certain types of conduct.

At the moment there is no uniform regulatory regime for engineers across Australia. Queensland is the only State with a comprehensive registration scheme where engineers must be registered to provide unsupervised professional engineering services. Western Australia is considering introducing similar requirements. In the other states and territories engineers generally operate under a self-regulatory system. Some states have de facto registration schemes where engineers performing particular work must be registered on a national engineering register. However, standards and rules for engineering practice in particular sectors are applied differently across jurisdictions. Some jurisdictions are already moving towards establishing their own registration scheme for engineers.

The Panel was particularly encouraged to learn that the National Engineering Registration Board, comprising nominees from peak engineering associations, industry, all state and territory governments and the community, was working to establish a nationally consistent, statutory and mandatory registration scheme for engineers across Australia. In addition, it is apparent there have already been discussions with Engineering Australia and members of the ACT government about establishing an ACT registration scheme, which may rely on the National Professional Engineers Register, pending the establishment of a state or nationally legislated system.

The successful scheme that has been adopted and operating in Queensland for many years is seen as the foundation for a national model. The National Engineering Registration Board is advocating that a national registration scheme needs to be based on assessment against:

- approved qualifications criteria
- national engineering competency standards
- ongoing professional development requirements
- commitment to a code of ethics.

Given that it is likely to take some time to establish a national scheme, and given the crucial role played by engineers in the construction industry, there is a strong case for immediate action to raise the bar on the level of recognised engineering qualifications acceptable in the jurisdiction. It was put to the Inquiry by Engineers Australia that they were not able to readily identify an instance where a major catastrophe in the ACT had occurred with the involvement of a registered engineer practising in their own registered discipline—the suggestion being that the engineers who have been involved have not been ones who are registered with Engineering Australia.

While it isn't anticipated that an engineer's registration, per se, will eliminate catastrophic failures, the anecdotal evidence suggests a correlation between a reduced number of failures and the involvement of an engineer practising in their own discipline and authenticated by their registration.

Pending the implementation of a national, mandated registration scheme, the ACT Government should take the lead by engaging only formally registered engineers (under the National Professional Engineers Register) for all Government construction related activities. This would help to ensure that Government sponsored project design and construction activities are not determined by commercial imperatives which might risk sub-standard engineering outcomes. In addition, the ACT

there is a strong case for immediate action to raise the bar on the level of recognised engineering qualifications acceptable in the jurisdiction.

Government could require the demonstration of the use of registered engineers in all non-government commissioned design and construction approvals processes.

Recommendation 12: The ACT Government should work with other jurisdictions to encourage a national approach to the registration of engineers as soon as is practicable. If a national scheme is likely to be delayed, the Government should 'go it alone' and implement its own scheme for the registration of engineers practising in the ACT by 30 June 2014. In the meantime, all construction companies operating in the ACT should be encouraged to use engineers who can demonstrate their current registration on the National Professional Engineers' Register. The ACT Government should mandate this for any work it procures.

Legislative and Regulatory Requirements

With the *Work Health and Safety Act 2011* comprising more than 200 pages, the *Work Health and Safety Regulation 2011* providing a further 320 or so pages, and several hundreds of pages within the approved Codes of Practice, not to mention the various Australian Standards, it came as no surprise that the Inquiry Panel found little if any desire for more laws and regulations in this field.

At the same time, no convincing argument was put that would establish a case that fewer laws would result in better outcomes. In fact, the performance of the Australian jurisdictions as outlined in Graph 3 belies this suggestion, to some degree at least. With little significant variance in the volume of laws and regulations applying in each jurisdiction, most of the other states and territories have seen better outcomes for their construction sector than have been achieved in the ACT.

Nonetheless, the current legislative framework is regarded by many as weighty and burdensome, and this is particularly so for small businesses. The language adopted under the harmonised laws could be made more accessible to those businesses which do not have ready access to the resources available to larger companies – so that they can more easily understand what is required of them. The codes of practice, in particular, are lengthy documents that would benefit from greater brevity and a more practical focus.

The Panel did also detect a small number of specific issues with the current legislative requirements which are worthy of consideration.

Health and Safety Committees

Section 78 of the *Work Health and Safety Act 2011* requires that a Health and Safety Committee must meet at least once every three months and at any reasonable time at the request of at least half of the members of the committee.

While a three monthly interval between committee meetings is probably appropriate for many working environments, it is not appropriate for a construction site, where the duration of the entire project may not allow for more than two or three such meetings. Most construction sites recognise this and hold weekly, if not more frequent, committee meetings.

On some sites, however, the employer has interpreted the legislation as allowing them to refuse to hold meetings more than once every three months.

Consideration should be given to ensuring employers understand that 'at any reasonable time' could mean at a frequency much greater than once every three months on a construction site. This would allow health and safety committees the freedom to hold meetings as frequently as the nature of the work being done at the site requires, should committee members request it, while not removing the constraint of what is reasonable, with the regulator as the ultimate arbitrator should this be in dispute.

the current legislative framework is regarded by many as weighty and burdensome, and this is particularly so for small businesses.

The ACT Government should consider what means are available to it to clarify the requirements of Section 78 of the *Work Health and Safety Act 2011* to ensure that employers do not see three months as a lower limit on frequency of health and safety committee meetings.

Training for health and safety committee members is also an issue raised by a number of parties with the Inquiry Panel.

The *Work Health and Safety Act 2011* includes requirements for health and safety representatives to be allowed to attend a five day course if they request to do so. The Act contains no provisions, however, for training of health and safety committee members.

A number of Inquiry participants put the case that:

- health and safety committees play an equally important role as do health and safety representatives
- the legislation provides for health and safety representatives to be members of committees
- the legislation provides for health and safety representatives to be allowed to attend a five day course if they request to do so
- the legislation contains no provisions, however, for training of health and safety committee members
- the result can often be that worker representatives on health and safety committees have received substantial health and safety training, whereas management representatives may have no health and safety training at all.

This peculiar situation could be rectified, in part at least, by including a provision in the legislation for health and safety committee members to receive training. Such training would not need to be the same as that currently available to health and safety representatives. The latter have particular powers under the legislation which are specific to their role and not relevant to other committee members. An appropriate duration of a course for committee members may be one, or at most, two days, focusing on the role of the committee and how committee members can contribute.

Recommendation 13: The ACT Government should urge the other Australian work health and safety jurisdictions, through Safe Work Australia, to include provisions for training for health and safety committee members in the harmonised work health and safety legislation.

5—School's Out?

Education is a vitally important element in ensuring that managers, workers and others have the necessary skills and competence to help make ACT construction sites as safe as they can reasonably be.

Education comes at a cost, but should rightly be seen as an investment in a high quality and healthy workforce. There a myriad of players involved in this sector, and some of the key players are listed at Appendix 5.

How Construction Industry Training is Delivered

Quality task as well as health and safety training for all participants in the construction industry are essential requirements in such a potentially dangerous and high risk business. Training to equip people to work safely on construction sites needs to take into account the way the construction industry operates in an environment where hazards and risks are changing frequently as construction work progresses and as workers move from project to project.

In the ACT, many construction workers receive formal training provided through the vocational educational framework as well as further on-site training, instruction and supervision provided by their employers. While much of this training will have a work health and safety component, some work health and safety specific training may also be provided to supplement what is offered through the vocational educational framework.

The ACT Building and Construction Industry Training Fund Authority plays a pivotal role in supporting the provision of training for construction workers and employers. The Authority was established under the *Building and Construction Industry Training Levy Act 1999* to administer a building and construction industry training fund. It may fund up to 70% (though more commonly closer to 30%) of the cost of training or for the development of skills identified as being in short supply for eligible workers within the industry in the ACT.

The training fund is financed by a 0.2% levy on all building and construction work in the ACT worth more than \$10,000, as set out in the *Building and Construction Industry Training Levy Act*. The fund is administered in accordance with an annual training plan. The training plan provides a policy framework for the funding of training for entry-level and existing workers in a wide range of occupations as well as other training, promotional and research-related activities within the industry.

In the current financial year, the Training Fund Authority expects to provide \$3.4 million for construction industry training and will continue to provide incentives to employers and Group Training Organisations that employ and train construction industry apprentices. These training incentives are in addition to any other Commonwealth or ACT Government training incentives that an applicant may be eligible to receive.

The Training Fund Authority will provide funding to eligible workers where the course they undertake is provided by a Registered Training Organisation which is accredited under the Australian Quality Training Framework or is otherwise approved by the Training Fund Authority. Accredited Vocational Education Training courses are assessed under the Australian Quality Training Framework to determine whether they satisfy industry needs and have appropriate outcomes, competencies standards, structure, delivery, credit transfer and monitoring and evaluation. For eligible workers to receive Training Fund Authority support, their training needs to be consistent with the Authority's training plan.

Education comes at a cost, but should rightly be seen as an investment in a high quality and healthy workforce.

The use of Registered Training Organisations and accredited courses is favoured so that competencies gained can be recognised in other jurisdictions and be combined to form nationally recognised qualifications. Registered Training Organisations and Group Training Organisations collect data on their performance, and the Australian Skills Quality Authority monitors this data to track the quality of outcomes. Based on this monitoring, the Australian Skills Quality Authority makes decisions on the frequency, scope and depth of their audits of training organisations.

What Construction Industry Training is Delivered

The *Work Health and Safety Act 2011* provides a broad requirement for all employers to provide relevant information, training, instruction and supervision to ensure that all workers can carry out their work safely. This means that it is the employer's responsibility to provide information, training and instruction to employees and to ensure it is suitable and adequate, having regard to:

- the nature of the work being carried out
- the nature of the risks associated with the work, and
- the control measures implemented.

White Card Training

At the industry-wide level, the *Work Health and Safety Regulation 2011* requires that all workers on building and construction sites must have completed General Construction Induction Training and obtained a General Construction Induction Card (also known as the White Card) from The Office of Regulatory Services. Possession of the White Card is the minimum, mandatory, formal training required before anyone can work on a construction site.

The White Card is designed to provide all construction workers with a basic knowledge of:

- their rights and responsibilities under work health and safety law
- common hazards and risks in the construction industry
- basic risk management principles, and
- the standard of behaviour expected of workers on construction sites.

This training can only be delivered by Registered Training Organisations which have this particular competency unit within their scope of registration. The accredited competency unit takes approximately six hours to deliver.

Although this training was deemed to be appropriate in theory, the Inquiry found very few advocates of it as a practical and comprehensive training tool. Because White Card training is included in the legislation as part of a national initiative, any changes that the Inquiry Panel might consider necessary in this area could have implications for local workers and employers in terms of mutual recognition of such cards with other jurisdictions.

Nonetheless, as the card constitutes the primary entrance requirement for all workers coming into the construction industry, and as local employers will probably have spent over \$1 million collectively on this training to date, it is important that the quality of the delivery and content of this training is assessed, as well as the outcomes being achieved from a work health and safety perspective. The Inquiry Panel notes that the Australian Skills Quality Authority has announced recently its intention to undertake a strategic review of White Card training, in conjunction with industry and the Construction & Property Services Industry Skills Council.

Recommendation 14: The ACT Government should provide input to the Australian Skills Quality Authority review of White Card Training to ensure that local industry concerns are heard and that there is proper assessment of the method and quality of delivery as well as the competencies gained from this training.

General Construction Induction Training is only one aspect of work health and safety training for the construction industry. Formal and vocational training will take a variety of forms and ideally will be ongoing throughout an individual's engagement with the industry.

Apprenticeships and Traineeships

Many young people enter the building and construction industry through an apprenticeship or traineeship. Apprenticeships may be offered through a registered Group Training Organisation, through an Australian School Based Apprenticeship program, or through a contract with an employer or construction company. An apprenticeship will typically last three to four years and will consist of on-the-job training with one or more employers as well as technical classroom based training. The Australian School Based Apprenticeship program enables Year 11 and Year 12 students to undertake a traineeship part-time while still attending a school or college and being enrolled in a program leading to a senior secondary certificate.

Australian Apprenticeships, a program provided by the Commonwealth, state and territory governments, is 'competency based', which means training can result in a nationally recognised qualification as soon as the required skill level is reached.

The Inquiry Panel is concerned that young people are especially vulnerable in the workplace. It is therefore very important that entry-level apprenticeship training be of sufficient quality and comprehensiveness to equip new starters in the construction industry with a good basis for understanding risks and hazards and good practice work health and safety as a basis for their effective operation in the workplace.

High Risk Work Licence Training

Training in high risk work needs to be undertaken before a construction worker can satisfy the requirements to obtain specific high risk work licences. Only Registered Training Organisations are able to provide training in high risk work under the *Work Health and Safety Act 2011*. This training is provided in the form of an accredited course or unit of competency delivered in accordance with the Australian Quality Training Framework. There are six categories of high risk work:

- scaffolding
- dogging and rigging
- crane and hoist operation
- reach stackers
- forklift operation, and
- pressure equipment operation.

A High Risk Work Licence must be renewed every five years and licence holders need to satisfy WorkSafe ACT when applying for renewal that they are still competent to perform the high risk work. Such programmes should be reviewed regularly for the quality and relevance of their content.

The Inquiry Panel notes the mining industry's practice of verifying competency in areas associated with high risk work on an annual basis. Although this is not required under the harmonised work health and safety legislation, it is a practice worthy of consideration where the competence of high risk work licensed operators contributes substantially to a company's risks on certain construction sites, or at certain times in the life of a construction project.

*the competence
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work licensed
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construction sites*

Workplace Specific Training

Workplace specific training is usually provided by a person with management control at the workplace, by the principal contractor for the construction project, or by a relevant sub-contractor. This training will include site induction, pre-start meetings and toolbox talks. These are opportunities for all workers to become aware of management procedures, reporting arrangements and particular site issues. Topics included in workplace specific training may include:

- safety documents, including the work health and safety management plan and Safe Work Method Statements
- supervisory, consultation and reporting arrangements
- workplace safety rules, including first aid provisions and emergency procedures
- workplace-specific hazards and control measures
- how safety issues are resolved and how to report hazards and accidents
- task-specific training relating to tasks, processes, plant and substances which might impact on health and safety.

From discussions with stakeholders and observation on site visits, the Inquiry Panel suspected that the quality and frequency of workplace specific training received by workers, particularly in relation to work health and safety, was variable, ad hoc and generally not comprehensive. Once again, this is an area which may benefit from guidance for companies from the employer representative bodies.

Middle Managers, Site Supervisors, Foremen and Leading Hands

A common view put to the Inquiry Panel from employers, unions and others was the important role that middle managers, site supervisors, foremen and leading hands played on construction sites. The Civil Construction Safety Issues Advisory Committee, established by the Work Safety Council earlier this year, also found that this layer of middle management has enormous capacity to influence site cultures, work practices and overall outcomes, be they 'program' or otherwise.³⁴

Foremen and supervisors are key personnel on construction sites engaged in managing work schedules, overseeing work quality and ensuring health and safety requirements are met. In addition, supervisors play a key role in providing specific workplace instructions and ensuring workers have the level of supervision necessary for the task at hand, along with any associated risks, including assessing workers' competency to undertake the work they are assigned. This group, therefore, is a particularly crucial cohort on a building site with the potential to significantly influence work health and safety.

The Inquiry found that because foremen and supervisors tend to be more mature workers who have progressed into more responsible positions, any formal training they have received is likely to have occurred some time ago and was most likely for a high risk activity or was trade or skill related. Few have received managerial or supervisory training and generally they are unlikely to have sought additional training to maintain currency with new and emerging technologies. This often leads to a reliance on conducting work in the 'old, tried and trusted way', which in their view is validated on the basis that 'I am still here to tell the tale'.

Foremen and site supervisors are also under constant and considerable pressure to ensure their project stays on schedule. This can become a self-limiting cycle in respect of work health and safety as it means they often cannot be spared for ongoing training.

the quality and frequency of workplace specific training received by workers, particularly in relation to work health and safety, was variable, ad hoc and generally not comprehensive

³⁴ The Final Report from the Civil Construction Safety Issues Advisory Committee is at Appendix 6 to this Report.

Middle managers need management and supervisory training to supplement and update their underlying skills and competencies. They also need to have a comprehensive understanding of how to apply risk management techniques and how to routinely question work practices and identify safer ways of completing a task.

Problem solving is a specific skill which is essential for managers and supervisors to operate effectively. Program as well as work health and safety outcomes can only be enhanced by improving this capacity amongst this cohort.

The Panel notes that many employers respond to these issues by sending supervisors on a one-day Health and Safety for Managers and Supervisors course. A number of participants to the Inquiry indicated that they believed this course is chosen because it is the cheapest one available with the shortest time period away from the job. The Panel believes that a course of such short duration, while perhaps appropriate for supervisors in an office environment, is completely inadequate given the skills and competencies required and the important role middle management play on construction sites.

Site managers have an even more critical role than supervisors and leading hands and may need some extra attention. The part they play in project management is perhaps one of the most critical of all on a construction site.

While risk management skills and competencies lie at the core of understanding how to manage health and safety risks, project management failures are one of the most common causes of safety failures. When project management goes awry, tasks begin to overlap, different trades come into conflict, often competing for access to the same space, communication begins to break down and the potential for mistakes to occur increases, sometimes almost exponentially.

Good project management is, arguably, one of the most fundamental 'controls' that can be put in place to manage both work health and safety as well as 'program' risks. Good project managers, however, are highly sought after and are usually quickly snapped up, leaving the remaining projects to be run by those with lesser skills, experience and competencies.

Given the importance to safety of good project management, and the relative dearth of experienced, highly qualified, effective project managers, one proposal put to the Inquiry Panel was for the local industry to develop a 'cadetship' or 'internship' style program to develop the skills of local or aspiring project managers. Such a program might run over several months and involve placements in various companies or on projects of varying size, nature and complexity. This would expose participants to the variety of approaches to project management across the industry and enable them to consider different levels of risk and hazard management, worker communications and team management, all of which are crucial to workers getting home safely.

While such a program could be relatively expensive to run, particularly given the need for 'trainee' project managers to be released or funded while undertaking the cadetship, as well as the need to fund specialised training in a range of competencies, the benefits to the industry could be very substantial, not just in work health and safety, but also in budget, timing and program management.

Some of the more experienced companies have indicated a willingness to assist with mentoring participants, offsetting at least some of the costs. It would also seem a fitting program for the Training Fund Authority to invest heavily in.

The Civil Construction Safety Issues Advisory Committee reached similar conclusions about the importance of middle management, without emphasising the importance of project management. It suggested, amongst other things, that:

When project management goes awry, tasks begin to overlap, different trades come into conflict... communication begins to break down and the potential for mistakes to occur increases, sometimes almost exponentially.

- the Work Safety Commissioner, Master Builders Association, and the CFMEU jointly sponsor a range of workshops focussing on leading hands and site supervisors, addressing initially Safe Work Method Statements and Work Health and Safety Plans (Civil Construction Safety Issues Advisory Committee Recommendation 10)³⁵.
- the workshops commence as soon as possible and be run as required, but not less than bi-monthly, with the aim that industry and employee organisations work together to ensure all leading hands and supervisors attend the course; the frequency of courses to be reviewed depending of the number of persons covered (Civil Construction Safety Issues Advisory Committee Recommendation 11)
- the Construction Industry Training Council be asked to identify or develop a safety management and construction industry focused course for site managers and supervisors (Civil Construction Safety Issues Advisory Committee Recommendation 12).

The Inquiry Panel supports recommendations 10 and 11, but suggests that the Master Builders Association and the Housing Industry Association take responsibility for development of the course for supervisors indicated in Recommendation 12. They may choose to do this through the Construction Industry Training Council if they believe that is the best way to progress the matter. This work should be done in consultation with the relevant industry partners.

The Panel believes that this work should be supplemented by further work on the proposed cadetship for construction industry project managers.

Recommendation 15: The Master Builders Association and the Housing Industry Association should undertake further work to investigate the viability of developing a 'cadetship' style program for construction industry project managers including, should the program prove viable, a proposal for a significant level of funding from the ACT Building and Construction Industry Training Fund Authority. A cadetship program should be implemented by the beginning of 2014.

Strategic Approach

The Inquiry is pleased that there are substantial funds allocated to building and construction industry training in the ACT. This funding is available from the ACT Building and Construction Industry Training Fund Authority, along with support from the Commonwealth and ACT Governments. The Inquiry noted that the Training Fund Authority holds around \$2.4million in reserve.

While this augers well for training in the ACT, the Inquiry considered that there was significant scope for a fresh look at who determines what competencies need to be provided, what training is actually being delivered, and how the training is being evaluated against immediate and longer term industry priorities. It is essential for the ongoing value and effectiveness of training for the construction industry, that such training sit within an over-arching strategic framework.

This is particularly the case given the sums of money involved. The Training Fund Authority has budgeted \$3.4 million for training fund activities in 2012. Given the level of subsidies offered, the total cost to employers of training courses covered by the fund, before any subsidies are paid, may be in excess of \$10 million. This does not include training not subject to subsidies from the fund, which may push the overall cost of construction industry training considerably higher.

“It is essential for the ongoing value and effectiveness of training for the construction industry, that such training sit within an over-arching strategic framework.”

³⁵ These have already commenced and several sessions held by the Master Builders Association with the support of the Work Safety Commissioner have proved so popular as to be repeatedly over-subscribed.

The Training Fund Authority and the Construction Industry Training Council ostensibly provide the strategic oversight needed. In reality, however, while they have done much good work, the operation of both of these bodies is too heavily influenced by participants with a vested interest—that is, organisations which have a substantial conflict of interest in both setting the direction and then, potentially, benefitting from that outcome.

The Authority and the Council also tend to focus more on operational issues and less on the needs of the industry from a strategic perspective. In the Construction Industry Training Council's case, this is probably the inevitable consequence of a number of member organisations providing junior officers as representatives rather than more senior staff who might be more likely to take a strategic rather than an operational view.

Despite this barrier, the Council has delivered some excellent outcomes – the recent development of asbestos awareness and asbestos management training for the local industry is a perfect example of this, providing as it does national best practice in regard to a vitally important work health and safety hazard. The fact that this project has struggled at various times, however, to secure complete stakeholder commitment reflects the unwillingness of some bodies to provide more senior participants.

In the Training Fund Authority's case, the development of annual rather than three or five-yearly training plans reduces the likelihood of a more strategic approach being taken.

In a small jurisdiction, such difficulties can be difficult to overcome. Training organisations connected with the employer and employee representative bodies have an important role to play in the ACT and are, arguably, more closely attuned to local needs.

The Inquiry Panel was of the view, however, that strategic oversight of training for the construction industry must be able to rise above sectional interests, and certainly needs to reduce the potential for those with a conflict of interest to dominate decision-making. This could be achieved by either:

- leaving the current bodies in place to respond to and manage operational issues and creating a new body to provide and review the overall strategic direction, or
- creating a new framework to oversight construction industry training which addresses the needs of managing both operational issues and strategic oversight.

Better strategic oversight might be achieved by utilising, in addition to those currently involved:

- academics with a good understanding of the national education framework
- local training experts from organisations not involved in any substantial way in delivery of training in this industry
- work health and safety and program management policy experts, both from within ACT Government and, say, from Safe Work Australia.

Recommendation 16: The ACT Government should work with the construction industry to review all current training arrangements with a view to providing a more strategic oversight of construction industry training and providing higher quality courses and more effective training outcomes. As part of this review, the Government should consider reducing the influence of organisations with the potential for a financial conflict of interest arising from chosen strategic directions.

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Training Priorities

The strategic framework should determine the training priorities for the industry. Even though the Training Fund Authority's Training Plan attempts to do this, it has become more of a list of all of the training that is available to the industry. While all of this training is useful, much of it does not belong in a strategic plan.

The training priorities should highlight the high priority areas for training. This would include, for example, middle management and project management training, and training associated with the types of shifts in thinking required to build better safety cultures. High risk work competency training would clearly belong among the priorities—not because it is mandatory, but because by its very nature it responds to the highest risk activities undertaken on construction sites. The priorities might also include training relating to height safety, the use of electricity on sites, or plant management—issues which have been statistically shown to be among the most likely causes of fatalities and serious injuries—and more effective entry level training in work health and safety.

A precursor to establishing the training priorities would be an analysis of current industry performance, as well as future industry trends, and an assessment of where we are and where we want to go. If the target of 35% improvement in the rate of serious injuries is agreed to,³⁶ the training priorities should be designed to help the industry reach this goal.

This does not mean that there will be no need for any training beyond the priorities. The training priorities simply indicate those areas that warrant the most attention.

An Entitlement, a Burden or an Investment?

An important consideration for any strategic approach is the question of which training should attract training fund subsidisation.

Anecdotal evidence presented to the Inquiry suggested that many employers are disinclined to provide training for their workers which is not the subject of training fund subsidisation. Many of the training courses which are subject to subsidies are also courses which the employer is obliged to provide.

The Inquiry Panel believes that subsidisation of almost all courses, regardless of whether an employer is obliged to provide them, may be creating an entitlement mentality among construction industry employers with regard to training. This can lead to a corresponding view that any training not the subject of subsidisation is a burden and should not be agreed to.

Construction industry employers need to move beyond this type of thinking. It correlates with Dr Long's 'Calculative Phase' of thinking and probably acts as yet another barrier to companies moving beyond technical and engineering solutions to safety issues to embrace the need for behavioural, cognitive and cultural solutions. Desirably, construction companies should recognise training as an investment in what many claim to be their most important resource—their workers.

A better use of the training fund would be to utilise the funds collected for training initiatives that are directly related to the industry's overall goals—the identified training priorities—leaving the more tactically or operationally based training for employers to fund wholly, without subsidisation. This would involve providing support for training that many companies would otherwise simply not entertain, because it is not mandatory, but which should provide those same companies with significant benefits. This would also help to improve the performance of the industry in ways that might not otherwise be achievable.

“Construction companies should recognise training as an investment in what many claim to be their most important resource—their workers.”

³⁶ Recommendation 4

Recommendation 17: The ACT Building and Construction Industry Training Fund Authority should review its approach to subsidisation of training costs to focus on high priority areas which align to the industry's strategic medium to longer term goals.

Evaluating the Effectiveness of Training Delivered – The Courses and the Deliverers

It is difficult to find comprehensive information on the health and safety competencies being achieved or indeed any measure of safety outcomes as a result of the overall training expenditure. The Inquiry found it impossible to measure if, or by how much, the application of industry training funds has had an impact on work health and safety. The focus seems to be on how many people have undertaken the training programs with little or no objective assessment of outcomes achieved.

The Inquiry is of the view that this situation is a consequence of short term planning horizons which lack a holistic, strategic and long term view of building and construction industry training requirements. There is no objective evaluation of industry training needs derived from an analysis of industry performance. In addition, the planning that is undertaken appears to be consequence of the aspirations of the training organisations on one hand and employers seeking cost subsidies for activities that are probably, more appropriately, their direct responsibility on the other.

While development of appropriate strategic oversight of construction industry training is critical, especially given the large sums of money involved, it is equally important that the training which is provided, and subsidised, is periodically evaluated to determine whether it is achieving the goals expected of it.

Current assessment tends to focus on numbers of courses subsidised and numbers of participants attending the training. More useful information would be gleaned from evaluation of course delivery (the quality of the organisations delivering the training and the quality of the curriculum and the delivery itself) as well as assessment of the outcomes the courses are seeking to achieve (the competencies and/or skills participants are expected to gain as a result of the training). Such evaluation must be professional, competent and undertaken with a suitable level of independence.

By way of example, this type of evaluation would have identified issues associated with the quality of delivery of White Card training as well as whether any useful outcomes were being achieved from participation in this course. In the absence of such evaluation, the industry has been awash with anecdotal evidence criticising the usefulness of this training.

While the Australian Skills Quality Authority is responsible for ensuring the quality of Registered Training Organisations, the body is relatively new and is yet to convince stakeholders of its capacity to adequately oversight training organisations. The Authority's responsibilities also lie more in the assessment of training organisations than in evaluation of training outcomes from approved courses. The Authority has no role in relation to training organisations which are not registered or training courses that are not approved as part of the national training framework.

Recommendation 18: The body responsible for strategic oversight of construction industry training should commission or obtain appropriately qualified independent evaluation of key training programs to determine whether anticipated outcomes are being achieved—that is, whether the industry is getting value for money from its investment in training. This information should inform future strategic planning. A proportion of the ACT Building and Construction Industry Training Fund Authority's resources should be set aside for this activity.

It is important that the training which is provided, and subsidised, is periodically evaluated to determine whether it is achieving the goals expected of it.

6—Creating the Environment for Safe Practices to Flourish

The primary responsibility for safety rests with employers. While workers and others also have safety responsibilities, including an obligation to take reasonable care of their own health and safety, employers have the most control over what happens in their workplaces and on their worksites, and they have the means to make safety a priority.

Governments have a special role to play in creating the right environment in which better safety practices can flourish. Governments establish the legislative framework, they regulate the industry and they have the capacity to act as model clients through their capital works programs. Each of these functions has the capacity for an impact on industry behaviour.

The Federal Safety Commission

The Commonwealth Government has a substantial role to play in the construction industry in the ACT through its role as a purchaser of construction services and through the related activities of the Office of the Federal Safety Commissioner.

The Federal Safety Commissioner works with industry and government stakeholders towards achieving the highest possible occupational health and safety standards on Australian building and construction projects. The Office of the Federal Safety Commissioner is part of the Department of Education, Employment and Workplace Relations. The Office aims to promote and improve occupational safety and health in the Australian building and construction industry, by providing administrative support to the functions of the Federal Safety Commissioner.

The key functions of the Federal Safety Commissioner include:

- promoting sustainable occupational safety and health cultural change in the building and construction industry
- developing and administering the Australian Government Building and Construction Occupational Safety and Health Accreditation Scheme
- identifying and progressing initiatives to improve occupational safety and health performance.

The fact that the Commission is not a work health and safety regulator is not fully understood by many construction companies. In many ways, the issue is a moot one in any event. Federal Safety Commission accreditation has become a highly valued prize for medium to major construction companies. Meeting Federal Safety Commission requirements has, accordingly, become an important requirement for those companies.

There are some 255 Federal Safety Commission accredited companies across Australia, with 63 of these operating in the ACT. As Federal Safety Commission accreditation is a mandatory precursor for tendering for Commonwealth Government construction projects, many companies regard this accreditation as being more important than any action that may be taken by WorkSafe ACT.

Nonetheless, despite the fact that there are a large number of Federal Safety Commission accredited construction companies operating in the ACT, the Inquiry Panel detected little support for the Federal Safety Commission's approach. Sadly, many see Federal Safety Commission accreditation as a 'necessary evil'. Many complained about what they perceived as its undue focus on paperwork through its contracted auditors. Only one of the construction companies presenting to the Inquiry spoke in favour of the Federal Safety Commission and the rigour it brought to their systems.

Governments have a special role to play in creating the right environment in which better safety practices can flourish.

This has become a significant issue for many local construction companies as their perception of the Federal Safety Commission's undue requirement for paperwork is being passed down to their sub-contractors, often in varied forms, with the result that there is no consistency in what is required of sub-contractors by principal contractors.

This in turn is creating a high level of dissatisfaction among sub-contractors, which is then translating into frustration and a low level of ownership or understanding of the safety outcomes these requirements seek to achieve. The consequence is that sub-contractors, often too small and without the resources to develop the procedures and paperwork expected of them, too often resort to paying an external 'expert' to produce the documentation for them.

A strong view expressed to the Inquiry by many participants was that recent attempts by WorkSafe ACT to move the focus of compliance away from paperwork to what is actually happening at the task level on worksites are being undermined by what they believe to be a continued strong emphasis by Federal Safety Commission auditors on paperwork. The Federal Safety Commission, for its part, vehemently refutes this perception of its approach.

While the Federal Safety Commission is a Commonwealth body, subject to Commonwealth Government policy decisions, the ACT Government, through WorkSafe ACT, may be able to broker a better understanding between these competing views. By encouraging local companies and their representative bodies to open a better dialogue with the Federal Safety Commission, the industry may find that some of their dissatisfaction stems from past behaviours and attitudes, rather than from current requirements.

At a more strategic level, the Federal Safety Commission may need to re-think its approach. While the Inquiry Panel could see that much good had come from the creation of the Commission, it may be time to consider whether it is 'locking employers in' to a systems-based approach at the expense of evaluating how to build safety cultures in line with more recent work health and safety thinking.

Two large national construction companies indicated to the Panel that they share this concern and that it may be time for a re-think of the current Federal Safety Commission approach.

Recommendation 6 in this report responds to these concerns.

WorkSafe ACT

WorkSafe ACT is the body currently responsible for the regulation of the Territory's work health and safety laws.

Workcover, the current regulator's predecessor, was established following the Coroner's report into the hospital implosion and the death of Katie Bender in 1997. It was headed by an independent Commissioner. This process also led to the combination of what had been two separate units within Government – Workcover and the Dangerous Goods Unit.

Workcover became part of the Office of Regulatory Services within what is now the Justice and Community Services Directorate of the ACT Government in July 2006 as part of the ACT Government's structural reforms which were announced in the 2006-07 budget.

WorkSafe ACT was created in mid-2010 by combining Workcover ACT and the Office of the Work Safety Commissioner (which had two staff and responsibility for education and advice only). The renamed WorkSafe ACT received five additional staff at that time.

Perception of the Federal Safety Commission's undue requirement for paperwork is being passed down to sub-contractors.

WorkSafe ACT is currently led by a Senior Director, Mr Mark McCabe, who has filled that position since May 2010. Mark McCabe also holds the title of Work Safety Commissioner, a statutory appointment which he has held since February 2008.

WorkSafe ACT's role is that of regulator of the ACT's work health and safety laws, which cover all ACT employers, except those which form part of the Australian Public Service and a small number of licence holders under Comcare's legislation (such as The John Holland Group, which is regulated by Comcare).

WorkSafe ACT also regulates the ACT's workers' compensation laws for private sector employers in the ACT. Workers' compensation for ACT Government employers and their workers is covered by Comcare's workers' compensation scheme.

At the moment, WorkSafe ACT has 34 staff distributed over work groups broadly providing training and education, operations and operational support. An additional three staff are funded from the Commonwealth Government as part of a three-year program to foster health and wellbeing initiatives in workplaces. The Operations Group, which is responsible for work health and safety and dangerous goods inspections across all industry groups (not just construction), comprises 18 staff. These staff are allocated to one of three teams:

- Reactive Inspections (11 staff) – responsible for site visits conducted by inspectors in response to a reported incident or issue; includes two staff dedicated to bullying issues
- Proactive inspections or audits (3.5 staff) – responsible for planned site visits usually based on targeted audits relating to particular hazards or issues
- Investigations (3.5 staff) – responsible for more detailed investigation of incidents which are likely to require stronger enforcement responses such as prosecutions and/or a report for the Coroner.

While the construction industry accounts for some 25% of workers' compensation premiums and 15% of workers' compensation claims, it accounts for more than 60% of WorkSafe ACT's field work – that is, inspections and investigations. Other significant industries are retail (14% of workers' compensation premiums and 25% of claims), property and business services (18% of premiums and 13% of claims) and health and community services (11% of premiums and 13% of claims).

Inspectors are trained to follow the Office of Regulatory Services regulatory approach of 'Engage, Educate and Enforce', preferably in that order. This approach involves engaging with the stakeholders involved in a particular issue on a worksite in the first instance, providing advice or education where appropriate and then, if necessary, applying enforcement tactics as required.

The regulator has a key role to play if the ACT is to achieve better safety outcomes for its construction industry. While employers have the primary safety responsibility, effective and credible regulation is a fundamental motivator of employer behaviour, and therefore a vital element in any effective work health and safety jurisdiction.

No matter how many resources are made available to WorkSafe ACT, however, it will never have the capacity to identify all safety breaches on all sites. There are simply too many worksites and the nature of work on those sites is changing too frequently for there to be an expectation that this can be achieved.

The unions have responded to this reality by suggesting they should be given some of the powers of inspectors, namely the power to direct that work should cease if they deem it to be unsafe, despite the fact that workers and health and safety representatives already have this right under Division 5.6 of the *Work Health and Safety Act 2011*.

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This would be an unprecedented power for a union to hold and might only serve to cement levels of distrust between employers and the unions. Implementing such a change would also represent a significant breach of the ACT Government's commitment to the Intergovernmental Agreement on work health and safety harmonisation. Employers would also be concerned about the potential for misuse of such a power for other industrial purposes. Nor is it necessary.

The Inquiry Panel found almost unanimous support for the integrity of WorkSafe ACT as an honest broker between workplace parties. There was a clear view that the Government's reforms which led to the creation of WorkSafe ACT in 2010 had created a more responsive and well-rounded regulator with a good balance between education and enforcement functions. This was, however, accompanied by unanimous agreement that the regulator is comprehensively under-resourced to provide effective proactive regulation of worksites.

The answer lies not in assigning some of the regulator's powers to others, but in adequately resourcing the regulator itself – ensuring that it has the capacity to both respond adequately to serious incidents or worker concerns and provide a visible and effective proactive presence on local worksites.

Carrots or Sticks

Three elements must be in place for a regulatory regime, such as that which exists for work health and safety in the ACT, to operate effectively:

- education – those with a health and safety obligation under the legislation, such as employers, workers, etc., must have the opportunity to know what their obligations are and how to fulfil them
- inspection – there must be a reasonable chance that duty holders will get caught if they do not comply with their legislative obligations
- enforcement – there must be a credible prospect that there can and will be consequences associated with non-compliance.

While there are a range of duty holders under work, health and safety legislation, generally employers have the primary responsibility as they have the most control over what happens at workplaces. Section 19 of the *Work Health and Safety Act 2011* specifically identifies a person conducting a business or undertaking,³⁷ or employers, as having the primary duty of care.

Ideally, employers will embrace work health and safety as an inherent aspect of running a business. The Industry Commission Inquiry into Occupational Health and Safety in 1995, however, found that “*employers and their employees have insufficient incentive to prevent injury and disease at work by themselves*”.³⁸

In 1999, in a review of the factors motivating CEOs and supervisors in achieving work health and safety performance, Professor Neil Gunningham indicated that regulation was the most important motivator of behavioural change.³⁹ He identified personal liability, reinforced by credible enforcement, as the single most important motivator of CEOs. Research by the UK's Health and Safety Executive in 2004 also indicates that advice and information, while very important, is less effective in the absence of the possibility of enforcement.

Clearly, enforcement has an important part to play in any work health and safety system. There is also an argument for an increased need for a strong regulator in a

“ advice and information, while very important, is less effective in the absence of the possibility of enforcement.”

³⁷ The term ‘person’ will generally refer to a company or corporation, not an individual.

³⁸ Industry Commission, *Work, Health and Safety: Inquiry into Occupational Health and Safety*, Report No 47, Canberra, Australia, 1995, Section 27 of the *Work Health and Safety Act 2011*

³⁹ Gunningham N, *CEO and Supervisor Drivers: Review of Current Literature and Practice*, NOHSC, Canberra, 1999

tough sector such as the construction industry, with its heavy emphasis on adhering to deadlines and responding to cost pressures and competition. More than this, those businesses which are doing the right thing should be supported by ensuring that their competitors cannot undercut them by avoiding work health and safety obligations.

“Those parts of the industry which are leading the way, both large and small companies, should be supported by ensuring that those out of sight below the Plimsoll line are more extensively monitored and standards improved.”⁴⁰

Resourcing

Definitive comparisons between the staffing levels of WorkSafe ACT today and its predecessor, Workcover, are problematic for a range of reasons – the foremost of which is the differing roles and corporate structure of the two organisations. While it is clear that WorkSafe ACT has fewer resources at its disposal than were available to its predecessor, few public sector agencies across the country could say otherwise. The growth of the health and education sectors within public administration alone has forced tough choices on all Governments and the ACT Government has by no means been immune from these pressures.

One of the most consistent themes from the written and oral submissions to this Inquiry has been the observation that WorkSafe ACT does not currently have enough resources to provide a credible presence on construction worksites, particularly given the surge in activity in this industry in recent years. This observation has come from all sides of the table – employers and their representative bodies, workers and their representative bodies, safety managers, safety professionals and training organisations. This has been accompanied by an equally consistent call for numbers of WorkSafe inspectors to be increased substantially.

While stakeholders have been complimentary of WorkSafe’s approach, of the attitude of its inspectors when dealing with issues, of its increased educative role and the quality of resources available through its online presence, the overwhelming cry has been that all this is compromised by a need for ‘more cops on the beat’.

Ideally, WorkSafe inspectors will be in the field on a regular basis, identifying areas of potential or actual non-compliance for those requiring assistance and advice, and creating the prospect for others that they may get ‘caught’ if they don’t comply with the law. As a relatively small organisation, WorkSafe ACT necessarily adjusts its resource allocation across the teams within its Operations Group, depending upon circumstances.

Reactive inspections, however, necessarily have the first priority. If a serious incident occurs, it is imperative, indeed the community demands, that WorkSafe ACT attend the site to determine:

- what happened and why
- what, if anything, can be done to avoid a recurrence of the incident on that or some other site in the future
- whether any enforcement action is warranted
- in some instances, whether the matter should be referred to WorkSafe’s Investigations Team for consideration of stronger or more formal enforcement action, such as referral for possible prosecution.

“*Ideally, WorkSafe inspectors will be in the field on a regular basis, identifying areas of potential or actual non-compliance for those requiring assistance and advice, and creating the prospect for others that they may get ‘caught’ if they don’t comply with the law.*”

⁴⁰Rita Donaghy, *One Death is too Many: Inquiry into the Underlying Causes of Construction Fatal Accidents*, United Kingdom, 2009, p.11

In a small jurisdiction such as the ACT, with only nine inspectors available (once bullying issues are put to one side) to cover reactive inspections across all industries, and when staff absences through planned and unplanned leave are taken into account, any surge in serious incidents and the resulting reactive inspections necessarily impinges upon the resources available for proactive inspections.

Similarly, a surge in serious incidents can lead to an increase in the number of matters referred to the investigations team. Strong enforcement is dependent upon such action being taken in a timely manner. Magistrates will take the time taken to bring a matter to court into account when sentencing, the community expectation is that wrong-doers will be subjected to penalties in a timely manner, and the demonstration effect of strong enforcement action such as prosecution will be significantly blunted by lengthy delays in bringing matters to finality. Once again, the resource requirements of these activities can impinge upon the resources available for proactive inspections.

WorkSafe ACT therefore, despite attempts to become more proactive, has limited capacity in practice to maintain a consistent presence that is more than reactive in nature. It also faces difficulties in bringing matters before the courts in a timely manner, potentially undermining the value of one of its strongest deterrents. Added to this, any reduction in the regulator's proactive presence in the field can inevitably lead to higher levels of non-compliance and an increased call on WorkSafe's reactive presence, creating a vicious cycle which can be difficult to halt.

The tight allocation of resources has an additional impact on the capacity of WorkSafe to provide training and learning opportunities for its inspectors outside of experience in the field. Both the credibility of inspectors as well as their capacity to apply effective advice and/or enforcement can be compromised by their level of understanding of the work being undertaken in what is at times a complex industry.

WorkSafe ACT's capacity to attract quality inspectors is also undermined to some extent by the relatively low pay rates on offer for an inspector compared to the pay rates on offer as a safety manager or advisor in industry. An experienced inspector might expect to earn anything between \$30,000 and \$50,000 more per annum working for a construction company than for the Government. Many will nonetheless make the choice to work for the inspectorate, even if this is a stepping-stone to a career in industry at some later point.

Overall, WorkSafe ACT has sufficient resources to meet its obligations in respect of reactive inspections. It also has sufficient resources, though not at the right level of experience and qualification, for conducting investigations of matters to be brought before the courts.

WorkSafe does not have adequate resources to establish and maintain a sufficiently effective proactive presence in the field.

The industry would reap significant rewards from a regular proactive regulatory presence in just residential construction alone, let alone other sectors. Many workers get their grounding in this part of the industry and there is significant crossover from residential housing to commercial and civil construction, particularly when it comes to sub-contractors.

Workers and contractors moving from residential construction to commercial or civil often have great difficulty accepting the stronger emphasis on compliance amongst what are generally bigger firms with more to lose. Federal Safety Commission accreditation alone drives a higher commitment to compliance amongst these larger businesses.

In some cases workers have queried why various rules apply to commercial or civil construction when they don't apply in residential construction. The reality is that

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the rules are the same across all three sectors, it is just that often neither these workers nor their bosses have been held accountable to them while working in residential construction.

Indeed, some representations to the Inquiry did call for different rules to apply to the residential sector than those applying in commercial or civil construction. This was offset by a call from others for greater regulation of the residential sector than currently occurs in order to instil a baseline recognition in the industry that safety rules do apply wherever you work and they must be adhered to.

WorkSafe ACT conducted a campaign in residential construction in early 2011 which identified significant non-compliance and was able to achieve significant improvements in compliance levels. The campaign, however, could not be sustained due to other demands.

Construction of some 2150 new residential houses commenced in 2011-12 (not including units). The number of houses commenced earlier but not completed must be added to this figure to get a sense of the workload for WorkSafe's inspectors in the residential sector. It must also be remembered that the type of work being undertaken, and even the trades involved, changes regularly on residential sites. One site visit alone would barely scratch the surface in terms of assessing the approach to managing the risks facing workers on these sites.

The virtual absence of a regulatory presence in this part of the industry allows those seeking to avoid their obligations, the 'cowboys', to flourish, to the detriment of those companies wanting to do the right thing. While an environment exists which allows the cowboy operators to cut corners and thereby produce lower quotes, more responsible businesses will continue to struggle to maintain standards. The result can be a segment of the industry where bad habits prevail and almost everyone comes to see the rules as something to be avoided or dodged, if not simply ignored. On a recent inspection of residential construction sites, one WorkSafe ACT inspector issued 15 compliance notices in the course of one afternoon.

Ideally WorkSafe should have an ongoing presence in this part of the industry with at least three or four inspectors out in the new suburbs almost every day of the week, noting that much of this work occurs at the opposite ends of the Territory's physical layout.⁴¹ WorkSafe should focus on the basic aspects to begin with – fencing of sites, provision of amenities for workers, white cards and site maintenance. A regular and ongoing presence should be able to reduce non-compliance in these areas very quickly, allowing inspectors to then shift their focus to more substantive issues such as safe work method statements, working safely at height, electrical safety and high risk work licensing.

Similarly, WorkSafe must establish a regular, visible and ongoing presence on commercial and civil sites. These are often complex workplaces with a vast array of complicated activities underway, sometimes across a large physical space. Thorough inspections often require the presence of a number of inspectors working in tandem. Flying squads of inspectors should also be able to respond quickly and thoroughly to identified areas of concern right across the sector.

Employers making submissions to this Inquiry have indicated that this would strengthen their hand in explaining the importance of compliance with the law to their workers. Where appropriate, action should be taken against contractors, sub-contractors, and in some cases workers, for flagrant instances of non-compliance. While education and advice will often be appropriate, and suffice, there must also be the real prospect of a consequence for non-compliance.

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⁴¹ It should be noted that inspectors cannot spend all of their time in the field. Paperwork documenting inspections, findings and action taken must be completed and, where notices or other enforcement action occurs, documentation must be prepared to allow for decisions to be defended should they be challenged through internal review or appeal.

If an issue arises with local practices in respect of concrete pours, to take a recent example, then WorkSafe should have the resources to target the issue quickly and comprehensively. The industry must see that areas of significant non-compliance can and will be dealt with quickly, effectively and, if necessary, forcefully, by the regulator.

An appropriate proportion of any additional resources will need to be allocated to managing or oversighting this work.

Recommendation 19: The ACT Government should fund twelve additional inspector positions for WorkSafe ACT in the 2013-14 budget on an ongoing basis. WorkSafe ACT should utilise the majority of these additional positions for proactive field work, including establishing a regular field presence in all three sectors – residential, commercial and civil construction.

The logical consequence of creating a regulatory environment of this nature will be an increased willingness amongst industry participants to strive to comply *before* matters come to the attention of the regulator. This in turn should lead to a more positive approach to compliance and greater demand for proactive education and advice rather than remedial action after something has gone wrong.

Enforcement Tools

While prosecutions tend to attract the most community attention, there are a range of other enforcement options open to the regulator. WorkSafe ACT's enforcement toolkit also includes Improvement Notices, Prohibition Notices, Infringement Notices (akin to on-the-spot fines) and Enforceable Undertakings.

Infringement Notices

In an industry which is driven quite strongly by costs and the bottom line, Improvement Notices and Prohibition Notices are sometimes not enough to encourage compliance. A builder who decides not to fence his worksite, for example, may receive an Improvement Notice requiring that the site be fenced. They will then do so, in the knowledge that they have already saved the cost of hiring fencing from the time work commenced to the time they were required under the Improvement Notice to put up a fence. With no financial penalty for the period of time during which the site was unfenced, for some there will be little incentive to fence a site until such time as they are instructed to do so, that is, until they get caught.

Behaviour such as this could be curbed through greater use of Infringement Notices, or on-the-spot fines, by inspectors. If a builder faced the prospect of a \$1,500 or \$2,000 fine, for example, for not fencing their site appropriately, and if there was the real prospect that they might get caught and that such a fine might be levied, a much higher level of compliance would probably be in evidence. Making the public and others in the industry aware of who was being fined and for what misdemeanours would also assist in deterring these instances of non-compliance.

Under the current legislative regime, WorkSafe ACT has quite limited capacity to issue Infringement Notices. For simple matters such as fencing, provision of site amenities and the like, the only option available to an inspector, beyond issuing an Improvement Notice instructing a builder to rectify the non-compliance, is to refer the matter for prosecution. This involves administrative effort in the preparation of a brief of evidence and liaison with the Department of Public Prosecution (DPP) to bring the matter before a court, with a likely outcome of a relatively low fine (or even no fine) given the nature of the misdemeanour.

While it is appropriate for certain matters to go before a court, there are a number of more straightforward areas of non-compliance which could be dealt with quickly and effectively through the use of Infringement Notices and without diverting inspectors substantially away from their presence in the field.

Flying squads of inspectors should also be able to respond quickly and thoroughly to identified areas of concern right across the sector.

The list of matters for which Infringement Notices can be issued can be found in the *Magistrates Court (Work Health and Safety Infringement Notices) Regulation 2011*.⁴²

The fine applicable varies from issue to issue with a few matters attracting \$3,600 penalties for businesses (these are largely associated with requirements associated with health and safety representatives and committees), some carrying a penalty of \$2,160 and the remainder \$720. The penalty for a business is usually five times that for an individual. Examples of the current regime include:

- failure to report notifiable incidents to WorkSafe ACT must be prosecuted through the courts; an infringement notice can only be issued in respect of failure to keep copies of such reports
- regulations require employers to ensure that appropriate personal protective equipment, such as helmets, gloves, etc., are used; workers must follow any reasonable instruction to wear such equipment – employers can only be prosecuted for breaches of this relatively straightforward requirement through the courts; workers can be issued with an infringement notice.
- no infringement notices can be issued in respect of failures to provide reasonable facilities, such as toilets, first aid equipment, emergency plans or adequate fencing – all of these matters must be prosecuted through the courts
- no infringement notices can be issued in respect of failure to adhere to fall protection regulations
- the only infringement notices that can be issued in respect of safe work method statements are in relation to employers supplying copies of these documents to principal contractors and keeping records of same; all issues associated with their development and use, including ensuring work is carried out in accordance with safe work method statements, must be prosecuted through the courts
- almost no infringement notices can be issued in respect of issues associated with the use of plant and equipment (there are two minor exceptions to this)
- infringement notices can be issued for allowing workers to carry out work without a relevant high risk work licence
- Infringement notices can be issued for failure to have electrical equipment appropriately tagged and tested
- infringement notices can be issued in respect of not providing appropriate signage on their sites
- infringement notices can be issued for failure of an employer to provide a worker with general construction induction training and for workers failing to have a White Card available for inspection.

Recommendation 20: The ACT Government should increase the number of work health and safety matters for which Infringement Notices can be issued on both employees and employers, including sub-contractors. This work should be completed by 30 June 2013. Infringement Notices should be published to ensure that the public is aware of malfeasance and has the opportunity to take their future business elsewhere to safer companies.

Prosecutions

WorkSafe ACT currently allocates inspectors to investigate and prepare the necessary briefs of evidence for matters likely to proceed to prosecution. Inspectors' competence and experience, however, is more closely related to inspection and investigation than the preparation of briefs of evidence for submission to the DPP and eventual consideration by a court.

This is a function which often requires the allocation of more senior staff with specific skill sets if cases are to be given the best chance of success. The provision of

“there are a number of more straightforward areas of non-compliance which could be dealt with quickly and effectively through the use of Infringement Notices”

⁴² This is available on the ACT Legislation Register, under Subordinate Laws, at www.legislation.act.gov.au

more suitably qualified staff to undertake this work, while still requiring inspector involvement, could be expected to improve the quality and timeliness of prosecutions while also considerably reducing the time inspectors need to allocate to this task.

Recommendation 21: The ACT Government should consider whether provision of one or two appropriately qualified legal staff dedicated to WorkSafe would improve the quality and timeliness of prosecutions while freeing inspectors up for more field work. This could be achieved within the twelve positions referred to in Recommendation 19.

When cases do come to court, unlike many other jurisdictions, where an Industrial Court with experience and knowledge of work health and safety and the likely impact of sentences hears matters, in the ACT such matters are considered by the Magistrates Court. An examination of outcomes reveals that ACT courts tend to impose significantly lower penalties than those applied in other jurisdictions. It is relatively rare in the ACT to see penalties higher than the low tens of thousands of dollars, if a fine or even a conviction is recorded at all. Penalties in other jurisdictions often run closer to \$100,000, if not more, for similar offences.

In one recent case, the court recorded no conviction for an offence which resulted in burns to a worker, despite agreeing that the case was proven, because the employer responded promptly to rectify matters after the accident occurred. In this case, the outcome presented no deterrent for other employers contemplating similar non-compliance, other than the costs of defending the matter in court.

In another recently concluded case associated with the slab collapse at Marcus Clarke Street in October 2008, when a dozen or more workers escaped injury if not death by a matter of seconds, despite the case being proven against two of the defendants, no conviction was recorded and no penalty applied. A third defendant received a \$15,000 fine.

An earlier case arising from the collapse of a wall at Belconnen onto a pedestrian walkway which crushed a number of vehicles parked at the location resulted in a \$10,000 fine. Yet another case, in which a trainee worker fell six metres from scaffolding, resulted in a fine of \$5,000 being imposed on the scaffolding company.

A recent campaign by WorkSafe Victoria presented comparative costs for four scenarios from that jurisdiction:

- an incident where a worker's finger was crushed and another's fingertip was amputated – cost to prevent the injury = \$5,000, company fined \$124,000
- an incident where a worker's hand was crushed and burned – cost to prevent the injury = \$2,000, company fined \$50,000
- an incident where a worker's thumb was crushed – cost to prevent the injury = \$2,000, company fined \$30,000
- an incident where a worker's arm was crushed – cost to prevent the injury = \$5,000, company fined \$90,000.

Such cost comparisons would not hold for the ACT. A more likely scenario would be: cost to prevent the injury \$2,000, company fined \$5,000. With such a comparison in evidence, more cynical business owners might decide to take the chance that an accident would not occur and that there would be little likelihood of them ending up in court.

A number of submissions noted the low penalties in the ACT, the duration of time taken to bring matters to court, indeed the low number of matters pursued through to prosecution. In an industry where liquidated damages for failing to meet a deadline can run to many tens of thousands of dollars per day, penalties for non-compliance

It is relatively rare in the ACT to see penalties higher than the low tens of thousands of dollars, if a fine or even a conviction is recorded at all.

with health and safety requirements in the order of \$15,000, for example, are perceived as representing little if any deterrent for recalcitrant businesses. Savings from 'cutting corners' or from deliberate non-compliance can amount to many times this figure.

The result is patchy and inconsistent application of deterrents, with penalties, low though they might be, usually applying only to those who have 'rolled the dice and lost' – generally with a worker or workers bearing the brunt of the consequences. The outcome of a predominant focus on reactive work is that businesses which take significant risks without incurring a systems failure can often escape without detection and without penalty. This creates a gross inequity for those businesses which are committed to abiding by the law. In a competitive commercial environment this can be a significant disincentive to compliance with the law.

The introduction of harmonised work health and safety legislation has resulted in higher maximum penalties under the law in an attempt by all of the jurisdictions to respond to what has been seen to be a low level of penalties being imposed by courts – albeit penalties that have been much higher in other jurisdictions than has commonly been the case in the ACT.

Division 2.5 of the *Work Health and Safety Act 2011* now includes penalties for three categories of offence in respect of the primary health and safety duties:

- *Category 1 – Reckless Conduct, Risk of Death or Serious Injury:* a duty holder has a safety duty and without reasonable excuse engages in conduct that exposes an individual to a risk of death or serious injury/illness and the duty holder is reckless as to that risk. Maximum Penalty: Corporation \$3 million, Officer or Senior Executive \$600,000 and/or 5 years jail, an Individual \$300,000 and/or 5 years jail.
- *Category 2 – Failure to Comply, Risk of Death or Serious Injury:* a duty holder has a safety duty, fails to comply with that duty and the failure exposes an individual to a risk of death or serious injury/illness, no element of recklessness. Maximum Penalty: Corporation \$1.5 million, Officer or Senior Executive \$300,000, an Individual \$150,000.
- *Category 3 – Failure to Comply:* a duty holder fails to comply with their safety obligation. Maximum Penalty: Corporation \$500,000, Officer or Senior Executive \$100,000, an Individual \$50,000.

The onus will now be on the courts to apply appropriate penalties within this new regime, noting that not all offences will be in respect of the primary safety duty and may be for other specific offences with much lower maximum penalties. It will be incumbent upon courts when considering penalties to consider, among other things, the likely deterrent effect of the fine or penalty imposed.

Recommendation 22: The ACT Government should appoint an Industrial Magistrate who could develop knowledge and experience of work health and safety matters and the impact of deterrents on the behaviour of duty holders.

Asbestos

The regulation of asbestos assessment and removal warrants some specific comment in this report, particularly as it highlights the need for greater synergies and opportunities for cooperation between the ACT Planning and Land Authority, or ACTPLA, and WorkSafe ACT.

In the ACT, ACTPLA has responsibility for the licensing of asbestos assessors and removalists, an important control for the effective management of asbestos on building or construction sites. While regulation of licensees is the responsibility of ACTPLA, inspection and investigation of the activities of licensees on worksites is the responsibility of WorkSafe ACT. This creates the prospect of differing approaches to regulation of these parties.

“The outcome of a predominant focus on reactive work is that businesses which take significant risks without incurring a systems failure can often escape without detection and without penalty. This creates a gross inequity for those businesses which are committed to abiding by the law.”

WorkSafe, for example, may decide to pursue prosecution of a licensed removalist as a result of their conduct, but ACTPLA may decide there is no case for action to be taken in terms of continuation of the removalist or assessor's approval to hold a license. The reverse could also apply. There is an argument that certain action taken by WorkSafe ACT should automatically have consequences for license holders under ACTPLA's legislation (e.g. suspension or cancellation of a licence, for example).

A similar argument exists in respect of certain prescribed occupations, including builders themselves. ACTPLA operates a points-based penalty system with licences / approvals being put at risk once a certain number of points accumulate (much the same as the system applying to driver's licences). Consideration should be given to whether certain actions taken by WorkSafe ACT under the *Work Health and Safety Act 2011* should contribute to the accumulation of points by these parties.

Similarly, both WorkSafe ACT and ACTPLA have inspectors in the field on a regular basis in the construction industry, albeit regulating differing aspects of the work being undertaken. While an informal relationship between the two organisations is clearly in place, offering opportunities for information sharing and intelligence gathering, consideration should be given as to whether there would be additional benefits from an even closer working relationship, joint compliance audits or inspections, or similar arrangements.

Other benefits might flow from such arrangements. A number of participants to this Inquiry observed that there is a correlation between those businesses which repeatedly and deliberately seek to avoid their work health and safety obligations and businesses associated with poor building quality outcomes.

The Government must ensure that such cooperation does not result in an increase in inspectors' expected knowledge and competence (through, for example, the extension of delegations across both bodies) without the allocation of any additional resources. While efficiencies should be able to be achieved through greater collaboration, these alone are likely to have little significant impact on the overall resource deficiencies confronting WorkSafe ACT.

Recommendation 23: The ACT Government should consider whether there are structural or other opportunities which would enable ACTPLA's and WorkSafe's inspectors in the field to collaborate and co-ordinate targeting of specific concerns on worksites and to link their enforcement and demerit points systems.

Management Information

WorkSafe ACT inspectors currently record details of inspections, site visits, action taken and evidence collected in a database. The database in use is quite old, has very limited reporting capabilities such that even day-to-day management reports which would enable monitoring of current investigations are difficult to obtain, and it does not permit any useful analysis of or reporting on the types of matters investigated, outcomes achieved, etc. All of this information is vitally important to the ongoing management and review of WorkSafe ACT's inspection and enforcement activities.

WorkSafe ACT not only needs real time and periodic access to management information that would enable it to better target and manage its activities, it also needs to be able to provide regular feedback to industry on the types of non-compliance encountered, in what sectors this occurs, the remedial action taken and any consequences for the relevant duty holder(s). A number of companies participating in this Inquiry indicated that they would see benefit in having such data and analysis made available to them. WorkSafe currently depends primarily upon its workers' compensation database for trend and similar reporting.

The ACT Government has already provided funding for an IT solution to support the management of the ACT public and private sector workers' compensation arrangements. The new system will be used by the Justice and Community Safety Directorate (which encompasses WorkSafe ACT) and the Chief Minister and Treasury's Directorate to execute their respective roles in the oversight and management of work safety and workers' compensation in the ACT private sector and public sector schemes.

The system will be used to capture, store and report on the performance of the ACT private sector workers' compensation scheme and allow for scheme information to be published regularly and in a timely way and it will also enable the regulator (WorkSafe ACT) to execute their workers' compensation compliance role using up-to-date data and new technologies.

The Inquiry Panel proposes that additional funding be provided to enable this solution to be expanded to provide a single end-to-end solution for the identification, inspection and management of workplace incidents and the associated work safety compliance activity.

Recommendation 24: The ACT Government should allocate funds to allow the expansion of the current IT solution under development for workers' compensation data to include a single end-to-end solution for the identification, inspection and management of workplace incidents and the associated work safety compliance activity.

Purchasing Power of the Government as a Major Client

As well as a 'push' effect, through its role as regulator, Government, through its role as a major client with significant purchasing power, can also have a 'pull' effect on the local industry.

"Public procurement is important because of its size and its potential for insisting on driving up standards including health and safety."⁴³

ACT Government projects should set a high safety standard that could then be expected to flow through to some of the other projects being undertaken by the companies involved. While the principal contractor on a Government project has the primary control of the site involved, and therefore the primary responsibility, the Government can ensure a high standard on its sites by:

- ensuring through its tendering process that only contractors with good safety records and the capacity to complete a project as safely as can be reasonably expected are allocated Government work, and
- ensuring that contractors working on Government contracts are then fulfilling their responsibilities to the best of their ability throughout the course of a project.

In this respect Shared Services Procurement, the ACT Government body responsible for the management of the tendering process, has done much work over the past year. The Shared Services Procurement proposed approach, while primarily dealing with the second of these two aspects, should nonetheless have an impact on both objectives.

The current ACT Government approach is based on third-party certification as part of the pre-tender process. In order to be eligible to tender for Government construction work, a contractor must achieve pre-qualification, one aspect of which involves

“ACT Government projects should set a high safety standard that could then be expected to flow through to some of the other projects being undertaken by the companies involved”

⁴³ Rita Donaghy, *One Death is too Many: Inquiry into the Underlying Causes of Construction Fatal Accidents*, United Kingdom, 2009, p.12

third-party accreditation of their work health and safety systems. Once a contract is allocated, Government scrutiny of health and safety on a Government site then becomes largely passive in nature, responding to issues that come to their attention. The problems with this approach are two-fold:

- third-party accreditors, though ostensibly oversighted by JAS-ANZ,⁴⁴ are paid for their assessment work by the company being assessed, thus potentially calling into question the willingness of such assessors to objectively assess their clients
- scrutiny of contractors once they have won a tender and commenced a project is largely, though not entirely, reactive rather than proactive.

Active Certification

Shared Services Procurement's proposed new approach will be for the Government to employ its own auditors who will conduct regular as well as ad hoc audits on Government work. These audits will not only ensure that the necessary paperwork is in place, but will be field-based as well, testing that what is said will be done is actually occurring on-site. Various levels of deficiencies identified through these audits will attract demerit points, with accumulation of 100 points resulting in immediate pre-qualification suspension, with a review after three months. In addition to this, significant deficiencies may be referred to WorkSafe ACT for investigation and enforcement action as appropriate, and/or to the client Government Directorate for consideration as to whether the contractor should be served with a 'show cause' notice for possible termination of their current contract.

This proposed approach is supported by the Inquiry Panel, though it is expected to require some fine-tuning following consultation with stakeholders. It should result in a significant improvement to the management of work health and safety on Government sites.

Recommendation 25: The ACT Government should proceed with development and implementation of Shared Services Procurements' proposed 'active certification' approach following consultation with stakeholders. This should happen by 30 June 2013.

Comparative Assessment of Tenders

Shared Services Procurement has indicated that it believes assessment of tenders should continue to be based on an objective assessment of each tenderer's safety capacity. That is, in their view, tenderers either meet pre-qualification requirements in terms of safety or they don't. There should be no comparative assessment of one tenderer's capacity to conduct a project safely against another's. The argument behind this approach is that such an assessment could lead to a successful tenderer winning a project, even though it has a poor safety record, because it excels in a number of other criteria.

The Inquiry Panel disagrees with this approach. Failing to comparatively assess tenderers' approach to, and record in respect of, safety discourages contractors from doing more than the bare minimum required to demonstrate compliance. Not only will attempts to achieve the bare minimum logically fall short of the mark, such an approach works against any attempt by the Government to present an exemplary approach on its sites.

In the situation where ACT construction sites have the worst safety record in the country, the Government should be encouraging construction companies to outdo each other in terms of safety in order to win Government work. Far from deterring

⁴⁴ JAS-ANZ is the government-appointed accreditation body for Australia and New Zealand responsible for providing accreditation of conformity assessment bodies in the fields of certification and inspection. Accreditation by JAS-ANZ demonstrates the competence and independence of these conformity assessment bodies.

companies who are making an investment in safety in a bid to excel or gain competitive advantage, these companies should be encouraged and rewarded.

There needs to be a balanced approach to assessment, where safety and a range of factors, including price, are all weighted comparatively and assessed. While this won't necessarily mean that being the best safety performer will guarantee a given contractor will win a tender, it will give them an advantage over their competitors and, if all other factors are relatively equal, it could very well be the deciding factor. The weighting given to the safety criterion will also play an important part in determining tender outcomes.

To ensure that poor safety performers do not win tenders simply because their performance on other criteria outweighs their safety deficiencies, a minimum threshold may also need to be established for the safety criterion. This threshold may be able to be raised over time as the performance of the local industry improves.

These reforms to the procurement process will send a strong message to industry about the value the Government places on safety on its sites.

Recommendation 26: The ACT Government should encourage excellence in health and safety performance by introducing comparative assessment of contractors' safety record and capacity as part of the tender selection process for Government construction projects.

The Government could also consider withholding a percentage of the final contract price for its major works and paying it out on completion, subject to the contractor having met certain requirements, such as a healthy and safe workplace. A system of this sort is operating in Commonwealth Government contracting and is worth further investigation.

Civil Construction Roundtable

In June of this year, at the urging of the Master Builders Association, the Government chaired a Civil Construction Roundtable, which led to the establishment of a Civil Construction Safety Issues Advisory Committee under the auspices of the ACT's Work Safety Council.

That Advisory Committee, which was reportedly the subject of a high degree of cooperation and agreement between all of the stakeholders, has now completed its deliberations and its report is attached to this report as Appendix 6. With the exception of the Committee's Recommendation 12, which is replaced by Recommendation 15 in this report, the Inquiry Panel supports the findings of the Committee and urges the ACT Government to implement its recommendations at the earliest opportunity.

The Inquiry Panel notes in particular the Committee's recommendations relating to the Government taking steps to ensure that design issues are thoroughly considered before projects go to tender and to ensure that unreasonable project completion dates are not set on Government projects. Both of these issues were raised with some vehemence by civil construction companies during the course of the Committee's deliberations. While these issues affect all construction projects, the Government, once again, can set the example by taking steps to minimise their impact on Government projects.

Effective planning before work commences is a vitally important step in achieving good work health and safety outcomes on construction sites. Too often, thorough planning follows the winning of a tender, rather than preceding it. At times this is driven by tight tender timeframes, at others by a lack of recognition of the importance of this phase by the companies involved.

“
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”

“This is an industry of people that do, not an industry of people that always plan well.”⁴⁵

Recommendation 27: With the exception of the Committee’s Recommendation 12, which is replaced by Recommendation 15 in this report, the ACT Government should implement the recommendations of the Civil Construction Safety Issues Advisory Committee.

Stocktake

Finally, the Government should review what has been achieved by 30 June 2016 as a result of this Inquiry and the recommendations contained therein to identify what has worked, what hasn’t, what is yet to be implemented and what more needs to be done. As indicated in Recommendation 4, it would be appropriate to then set new targets to further improve performance from that point on.

Recommendation 28: The ACT Government should conduct a stocktake of the construction industry’s work health and safety performance as at 30 June 2016 to identify what has been achieved, what is yet to be achieved, and what new targets or strategies should be put in place.

⁴⁵ Professor Dennis Else, University of Ballarat and Group General Manager Sustainability & Health with Brookfield Multiplex.

Appendix 1 – Terms of Reference

Inquiry into compliance with and application of work health and safety laws in the ACT's construction sector.

Background

The recent death of a worker on an Australian Capital Territory (ACT) construction site marks the fourth work related fatality in the ACT in seven months and the third within the ACT's construction sector in that same period.

The ACT Government considers the number of fatalities in the construction sector since December last year to be unacceptable.

The Government has, therefore, committed to undertaking an enquiry into compliance with and application of work health and safety laws in the ACT construction sector.

The aim of this inquiry is to inform Government, employers, workers, and the general community about the state of compliance with health and safety laws in the ACT's construction sector and to identify further measures which could be taken to improve the level of compliance.

Scope of the inquiry

The Inquiry Panel is to examine and report to the Attorney-General on compliance with work health and safety laws in the ACT's construction sector, having regard to:

1. Recent studies or research into construction sector compliance conducted in other Australian work health and safety jurisdictions, or overseas where appropriate
2. Factors affecting both the commitment and capacity of construction businesses to comply with the Territory's work health and safety laws, including any systemic or cultural behaviours on construction sites, employment and labour utilisation practices which may affect work health and safety practices and the impact on ACT construction companies of requirements imposed by external regulators such as the Federal Safety Commission
3. The participation of training providers and relevant stakeholder bodies including the unions, employer representative bodies and professional groups
4. Tools available to the Territory's work health and safety regulator to improve compliance in this sector
5. Strategies adopted by the regulator to improve compliance in this sector, including operational and educational activities
6. The comparative effectiveness of educative and regulatory approaches in this sector
7. Recommendations arising from the Work Safety Council's Civil Construction Safety Issues Advisory Committee including matters pertaining to Government procurement, processes, training and information sharing and work cultures on construction sites.

Inquiry Process

The Inquiry Panel will have the powers of the regulator under section 155 of the *Work Health and Safety Act 2011*.

The Inquiry Panel will call for submissions from interested parties and may also call for documents and question people as required.

The Panel will consult with employers, workers, OHS professionals and other stakeholders including through the ACT Work Safety Council.

Persons providing information or documents will be afforded the protection under section 172 of the *Work Health and Safety Act 2011*, namely that any information provided because of the giving of an answer or the production of a document is not admissible in evidence against the person in a civil or criminal proceeding, other than a proceeding arising out of the false or misleading nature of the answer, information or document.

Timeframe

The Inquiry Panel shall provide a written report of its findings and recommendations to the Attorney-General by 16 November 2012. (Note: This timeframe was subsequently extended to 23 November 2012.)

Appendix 2 – Inquiry Methodology/Process

Background

On Tuesday 28th August 2012 the Attorney General, Mr Simon Corbell, MLA, announced an inquiry into safety compliance in the Australian Capital Territory's (ACT) construction sector. The ACT Construction Industry Inquiry followed four work related fatalities in the ACT in seven months, three of these having been from within the ACT's construction sector.

The aims of the Inquiry are to:

- inform Government, employers, workers and the general community about issues impacting on health and safety and levels of compliance with health and safety laws on ACT construction sites; and
- recommend how improvements can be made to health and safety compliance in the ACT's construction sector.

The Terms of Reference (Appendix 1) were developed in consultation with employer and employee unions and industry representative groups and a cross section of industry stakeholders.

The Inquiry Panel was made up of the chair, Ms Lynelle Briggs, former Australian Public Service Commissioner and former Chief Executive of Medicare Australia and the ACT Work Safety Commissioner, Mr Mark McCabe. The Inquiry Panel was supported by a small secretariat comprising Ms Julia Mulligan and Ms Amanda Sibree (part-time).

The Inquiry Panel was originally requested to report its findings and recommendations to the Attorney General by 16 November 2012. A one week extension was granted until Friday 23 November 2012.

Process

In conducting its investigations the Inquiry Panel consulted a wide range of stakeholders, visited civil, commercial and residential construction sites and received written submissions.

The work of the Inquiry Panel was made public through a media release from the Attorney General, Simon Corbell MLA, the placement of advertisements in the press, the provision of information on the WorkSafe ACT website and a call for written submissions. The period for submissions closed on 20th September 2012 and some late submissions were also accepted. Altogether the Panel received 17 written submissions.

The Inquiry Panel conducted more than 20 interviews with employers, workers, occupational health and safety professionals and other industry stakeholders.

The Inquiry Panel also visited a number of ACT construction sites to gain a sense of the on-site work environment and to learn from employers and employees about key issues impacting workplace health and safety. The sites visited included commercial office, large scale residential, small scale residential, and the Cotter Dam construction sites as well as some of the sites of the recent fatalities.

A literature search was conducted to draw from the workplace health and safety experience and record in other jurisdictions, nationally, and to a more limited extent, internationally.

Powers

The Inquiry Panel was able to take submissions, call for papers and question people as required. It had the powers of the regulator under the *Work Health and Safety Act 2011* (the ACT) including section 155 compelling a person to provide information relating to possible contraventions of the Act, or where that information will assist in monitoring and compliance under the Act.

All those providing oral or written information to the Inquiry have been afforded protection under section 172 of the *Work Health and Safety Act 2011*. In particular, any information provided because of the giving of an answer or the production of a document is not admissible in evidence against the person in a civil or criminal proceeding, other than a proceeding arising out of the false or misleading nature of the answer, information or document.

While all individuals presenting information to the Panel were advised that their submission could be made in confidence in whole or in part, in practice, this option was rarely taken.

Appendix 3 – Acknowledgements

The Inquiry Panel is grateful to all those who have generously offered their time and shared their experience to assist in the deliberations of the Inquiry Panel, the development of this report and the determination of recommendations. The following have assisted by presenting their views to the panel through written submissions, interviews, organising and participating in site visits and engaging with the Inquiry Panel.

In particular the Inquiry Panel would like to thank:

ACT Construction Industry Training Fund – Mr Gary Guy, Chief Executive Officer

ActewAGL – Ms Dianne King, Director, Environment Health, Safety and Quality Division

ACT Government:

- Chief Minister and Cabinet Directorate – Mr Andrew Cappie-Wood, Head of Service and Director General, Mr Andrew Kefford, Deputy Director General Workforce Capability and Governance Division and Commissioner for Public Administration, Mr John Rees, Senior Manager, Office of Industrial Relations, Mr Michael Young, Ms Meg Brighton
- ACT Planning and Land Authority (ACTPLA) – Mr Craig Simmons, Director, Environment and Sustainable Development Directorate, Mr David Middlemiss, Mr John Meyer, Mr Sean Moysey
- Shared Services Procurement – Mr Peter Murray, Executive Director
- Education and Training – Ms Jayne Johnston, Executive Director, Tertiary Education and Performance, Ms Ann Goleby, Director, Training and Tertiary Education

ACT Regional Building and Construction Industry Training Council (CITC) – Mr Vince Ball, Executive Director

Australian Vocational Training Academy – Mr Tim van Dalen, Chief Executive Officer

BLOC ACT Pty Ltd – Mr Drew Mathias, Construction Manager, Mr Allan Dillon, Safety Manager, Mr Damien Schmidt, Mr Glenn Hart

Building Trades Group – Construction, Forestry, Mining, Energy Union (CFMEU) – Mr Dean Hall, Secretary, CFMEU ACT Branch, Mr Jason O'Mara Assistant Secretary

Bulk Water Alliance, (GHD, John Holland and Abigroup Ltd) – Mr Sean Welsh, Program Safety Manager, Mr John Vida, Project Manager

Mr David Cavill

Construction Control – Mr David Gloede, Safety Manager

Creative Safety Initiative – Mr Jason Jennings, Chief Executive Officer

Department of Finance and Deregulation – Mr John Grant, Procurement Division, Mr Rick Scott-Murphy, Property and Construction Division

Professor Dennis Else, University of Ballarat and Group General Manager Sustainability & Health with Brookfield Multiplex

Empire Building Group – Mr David Green, Project Manager, Mr Richard (Dick) Hook, Safety Manager (Pacific Formwork Australia)

Engineers Australia – Mr Doug Mitchell, President 2012, Canberra Division, Mr John Anderson, Director Engineering Practice & Continuing Professional Development, Ms Vesna Strika, Director, Mr Michael Bevan, Associate Director Registration, Registrar, National Engineering Registration

Hindmarsh – Mr Glenn Hobbs, Safety Manager

Housing Industry Association (HIA) – Mr Stephen Smith Planning and Building Services Advisor ACT and Southern NSW, Ms Belinda Josey, Executive Director, OH&S Policy, Mr David Humphrey, Senior Executive Director, Business, Compliance & Contracting

Human Dymensions – Dr Robert Long, Chief Executive Officer

Lend Lease – Mr James Bodsworth, Environmental Health and Safety Manager; Mr Terry Whitehead, Miles Mesic

Master Builders Association (MBA) – Mr Ross Barratt, President, Mr Mike Baldwin, Director, Industrial Relations

Matrix National Group Pty Ltd – Mr Darren Sterzenbach, National General Manager

Mr Anthony Noakes

Mr John Ross

Office of the Federal Safety Commissioner – Mr Jeff Willing, Federal Safety Commissioner; Ms Julie Rheese, A/g Federal Safety Commissioner, and Ms Cassie McCall

OzHelp – Glenn Baird, Support Services Manager, ACT Office

PBS Property Group – Mr Peter McIntyre, Safety Manager

Project Coordination (Australia) Pty Ltd – Ms Lisa Dart, System Manager

Safety Institute of Australia – Mr John Everett, Chair, Safety Institute of Australia, ACT Branch

Safety Logistics Pty Ltd – Mr Tim Cody

Slater and Gordon – Mr Gerard Rees, State Practice Group Leader

UnionsACT – Kim Sattler, Secretary

Woden Contractors – Mr Peter Middleton, Managing Director

Appendix 4 – Stakeholders with an Interest in Work Health and Safety in the ACT

In the ACT, the **Office of Industrial Relations** (OIR) in the Chief Minister and Cabinet Directorate is responsible for the policy aspects of the comprehensive system of laws and regulations to control materials and situations that could cause significant injury to people or damage to property. OIR works with the ACT Parliamentary Counsel's Office to oversight the development and maintenance of the ACT's work health and safety laws.

WorkSafe ACT is responsible for ensuring compliance with and enforcement of the law. It was created in May 2010 and replaced ACT Workcover with a charter to enforce the ACT's health and safety and workers' compensation laws through a mix of education and compliance activities. It operates as a business unit within the ACT Justice and Community Safety Directorate's **Office of Regulatory Services** (ORS).

The **Work Safety Council** is also established under the WHS Act and its primary functions are to advise the Minister on matters relating to work safety or workers compensation and to report to the Minister on matters referred to it relating to work safety or workers compensation. Its membership comprises employee and employer representatives as well as other relevant experts appointed by the Minister.

WorkSafe ACT is a member, along with the other Australian safety and workers' compensation authorities, of the **Heads of Work Safety Authorities** (HWSA). HWSA comprises the General Managers of the peak bodies responsible for the regulation and administration of occupational health and safety across jurisdictions in Australia and New Zealand. HWSA mounts national compliance campaigns targeted at specific industries across all jurisdictions and, with the advent of harmonisation, works to develop and implement a harmonised approach to regulation and enforcement of the new harmonised laws.

Safe Work Australia is the national organisation established as part of COAG's 2008 IGA. In 2009 Safe Work Australia began operating as an independent statutory agency with primary responsibility to improve work health and safety and workers' compensation arrangements across Australia. Safe Work Australia has evolved from the National Occupational Health and Safety Commission (NOHSC), first established in 1985, which then became the Australian Safety and Compensation Council in 2005, and later Safe Work Australia as part of the Department of Education, Employment and Workplace Relations.

Under the *Safe Work Australia Act 2008* and through a partnership of government, employers and employees, Safe Work Australia drives national policy development on work health and safety and workers' compensation matters to:

- Achieve significant and continual reductions in the incidence of death, injury and disease in the workplace
- Achieve national uniformity of the work health and safety legislative framework and a nationally consistent approach to compliance and enforcement policy
- Improve national workers' compensation arrangements.

Efforts to improve Australia's work health and safety performance have been guided by the National Occupational Health and Safety Strategy 2002-2012. The Strategy for the next decade – the Australian Work Health and Safety Strategy 2012-2022 was launched by Safe Work Australia in October 2012.

Other key ACT government organisations with roles that impact on work health and safety in the construction sector are:

- **ACT Land and Planning Authority (ACTPLA)** – is part of the Environment and Sustainable Development Directorate with its core function land use planning and development assessment. It is also responsible for building regulation, lease administration, land information and development and Territory Plan administration.
- **The Land Development Authority (LDA)** – is part of the Economic Development Directorate and its core function is to facilitate land delivery processes across the residential, commercial, industrial and community sectors.
- **Shared Services, Procurement** – is part of the Treasury Directorate and provides procurement related services across the ACT Directorates for infrastructure and capital works, goods and services. It is responsible for the preparation of construction-related contracts, devising prequalification policy and administering the prequalification scheme.

Other peak bodies representing employers and employees in the ACT include:

- **Civil Contractors Federation ACT (CCF)** – part of the national Civil Contractors Federation and represents local employers. It operates under the auspices of the MBA.
- **Communications Electrical and Plumbing Union (CEPU)** – represents employees in the communications, electrical, plumbing and allied services.
- **The Construction, Forestry, Mining and Energy Union (CFMEU)** – an employee representative body with its prime membership in the civil and commercial construction sectors.
- **Housing Industry Association (HIA)** – the primary representative body for the residential construction sector.
- **The Master Builders Association (MBA)** – the primary representative body for construction industry employers.

Appendix 5 – Key Entities Involved in Vocational Training in the ACT for Building and Construction

Organisation	Role
ACT Education and Training Directorate (ACT ETD)	The ACT Education and Training Directorate administers government programs for vocational education, training and higher education in the ACT, including vocational learning and career and transition support for students as they progress through school sectors and from school to post-school options.
Construction Industry Training Council (CITC)	The Construction Industry Training Council is the industry's peak body on training and oversees all matters relating to training for the construction industry in the ACT. The Council works closely with the ACT Building and Construction Industry Training Fund Authority, employer and employee organisations, government and RTOs. Its objectives are to: <ul style="list-style-type: none"> • improve and facilitate training for the purpose of improving knowledge and skills and to disseminate information about training assistance • identify the training and manpower needs of the industry and develop and implement policies and programs to meet these needs • promote the benefits of training, job satisfaction and personal development • liaise with training bodies to further these objectives, and • promote or assist the interchange of training information either within Australia or overseas.
ACT Building and Construction Industry Training Fund Authority (TFA)	The Training Fund Authority is an ACT statutory body responsible for administering funds for the training of eligible workers in the ACT building and construction industry. Its primary goal is to fund training for entry level and existing workers (including unemployed people who usually work in the industry and injured workers seeking to return to the industry). Allocation of funds is assessed against priorities determined by the Training Fund Authority. Financial incentives are also provided to employers and group training organisations to assist them in employing apprentices and trainees in areas of special skills shortages.
Registered Training Organisations (RTOs)	Registered Training Organisations in the ACT are registered by ASQA. Registration is a requirement for access to government funding and recognises that the Registered Training Organisation has the ability to deliver, assess and issue qualifications that are recognised under the national quality system. Registered Training Organisations may include TAFE institutes, private providers, community providers, schools, higher education institutions, industry organisations and unions.
Group Training Organisations (GTOs)	Group Training Organisations acts as primary employers to apprentices and trainees and places them with other businesses known as 'host employers'. They arrange and monitor on and off-the-job training (i.e. through TAFE or other Registered Training Organisations) and provide support for the host and trainee. They are responsible for all paperwork including wages, superannuation and other employee benefits, and will move trainees to different businesses to ensure they get the right experience. All members of the Group Training Association of NSW and the ACT are independent, not-for-profit organisations and have met the National Standards for Group Training administered by ASQA, a requirement for access to government funding.
Australian Skills Quality Authority (ASQA)	ASQA is the national regulator for Australia's vocational education and training sector responsible for registering training organisations and accrediting courses. ASQA regulates courses and training providers to ensure nationally approved quality standards are met. Its functions include registering Registered Training Organisations, accrediting VET courses, and ensuring Registered Training Organisations comply with the conditions and standards for registration including by carrying out compliance audits. ASQA was established under the <i>National Vocational Education and Training Regulator Act 2011</i> .

Appendix 6 – Civil Construction Roundtable
Final Report

REPORT TO ACT WORK SAFETY COUNCIL

**CIVIL CONSTRUCTION SAFETY ISSUES
ADVISORY COMMITTEE**

REPORT

SEPTEMBER 2012

TERMS OF REFERENCE

The ACT Work Safety Council established the Civil Construction Safety Issues Advisory Committee [under schedule 2 (2.16) of the *Work Health and Safety Act 2011*]. The Council tasked the Advisory the Committee with the following terms of reference:

In respect of the Civil Construction Industry:

1. Identify safety issues, including:
 - a. unsafe behaviours and work practices
 - b. unsafe systems of work
 - c. systemic, behavioural and cultural issues.
2. Recommend responses and measures to address safety issues including:
 - a. short, medium and long term measures
 - b. targeted education and awareness raising
 - c. review of guidance material for relevance and clarity
 - d. any required legislative/policy reform.
3. Where appropriate, implement and report on agreed measures.
4. Serve as a key consultative forum for the current ACT Government review of procurement policy in relation to WHS outcomes.
5. Identify opportunities for tripartite and stakeholder partnerships to respond to issues and drive industry change (such as a tripartite safety charter).
6. Consider resource implications and identify opportunities for stakeholder participation and partnerships in implementing measures and driving change

EXECUTIVE SUMMARY

The Committee acknowledges the importance of the Capital Works Program and the Civil Construction Industry to the ongoing development of ACT economy and employment. The Committee is of the view that for this development to be successful, both Government and Industry must recognise a safe workplace is fundamental.

The Committee accepts that the solution to safety issues on civil construction sites requires government, employee organisations, industry peak bodies and individual companies working collaboratively to foster a positive workplace safety culture and by exposing unacceptable behaviour and taking fresh steps to drive cultural change where needed.

More needs to be done on a tri-partite basis to identify and implement best practice procurement, awareness, education and enforcement measures. More needs to be done to reward those who embrace a best practice safety culture, and at the same time address those individual behaviours that put workers and the public at risk. Education and awareness raising campaigns supporting effective reporting and incident handling require additional focus. Likewise, employers who are looking for practical support and advice to improve their safety systems, and build a positive work culture must be encouraged.

Codes of Practice and guidance material must be easily accessible and as specific as possible and meet the needs of both large and small construction firms. In this context, The Committee acknowledges the importance of reducing red tape and prescription, and where possible allow companies to undertake what they do best, that is, operate profitable businesses.

RESPONSIBILITY OF GOVERNMENT

ACT Government Directorates who commission civil construction projects, and Shared Services Procurement who are responsible for the issuing of government contracts on civil construction projects, have duties under the *Work Health and Safety Act 2011*, to ensure, as far as reasonably practicable, the safety of workers and others involved in those projects. Ultimately this responsibility falls to the Director-General of the Directorate.

The Act imposes a positive duty on Directorates to exercise due diligence, be proactive and continuously ensure the project complies with the relevant duties and obligations.

The scope of this duty is directly related to the control and decision making in respect of the project. It requires a persistent examination and care to ensure the resources, systems and decisions taken in respect of the project are adequate to comply with the duty of care required under the Act. Where the Directorate relies on the expertise of a manager or other person, the person's expertise must be verified and the reliance must be reasonable.

The *Australian Work Health and Safety Strategy 2012-2022* was recently endorsed by the Select Council on Workplace Relations and represents the commitment of governments, industry and unions to work together to improve work health and safety in Australia.

The Strategy provides that *"Governments have the capacity to strongly influence work health and safety through their leadership as policy makers and regulators, through their procurement practices and good management of their workers."*

It sets out the commitment of Governments to improve safety through proactive management and states *"Governments are also major purchasers of products and services. By incorporating work health and safety and safe design requirements*

into government investment, procurement arrangements and contracts, they can actively encourage their suppliers to improve their health and safety practices and performance. In addition to their role as regulators, governments have obligations as do all other employers to ensure the highest level of protection of their workers. The community expects that government agencies should lead by example by implementing systematic risk management”.

One of the overarching strategic outcomes for the draft Strategy is for ‘governments to use their investment and purchasing power to improve work health and safety.

In considering safety issues on Civil Construction sites, and drawing on the Work Health and Safety Strategy, The Committee is of the view the ACT Government through Shared Services Procurement, and the work of the ACT Work Safety Commissioner, is in a position to strongly influence safety outcomes.

Given their responsibilities under the Act, The Committee is of the view that Government agencies which have responsibilities for projects must ensure timeframes to complete the relevant project are realistic and are set prior to tender in consultation with employee organisations, civil industry representatives and project sponsors. This will allow for a sufficient period to complete work health and safety planning and project delivery in an environment encouraging a methodically planned delivery.

Further The Committee is of the view that to meet their obligations under the Act, Government agencies which have management influence over civil construction projects must ensure that contracts are awarded to organisations with the experience, resources and safety record appropriate to the safety risk profile of the project.

These responsibilities also extend, in The Committee’s view, to the relevant agencies ensuring the ongoing safety performance monitoring of the project and the undertaking of a post tender evaluation of safety performance

RESPONSIBILITY OF DESIGNERS

Designers of Civil Construction projects have responsibilities under the Act. Designers, as part of the design process, are required to consider the safety of all persons who may be directly involved in the construction of the project, for any person who may carry out an activity on the project (such as delivery drivers) and any other person who may be in the vicinity of the project.

The Act requires designers to provide all relevant safety information concerning the design to the person responsible for the Civil Construction project. This is to ensure any risks can be mitigated in the project planning process, and also ensure that sufficient information is available to identify any ongoing risks in the tender documentation.

The Committee is of the view that Government agencies and Shared Services procurement must ensure all designs for Civil Construction projects meet the requirements of the Act.

RESPONSIBILITY OF CIVIL CONSTRUCTION INDUSTRY

As with Government Directorates, persons undertaking a business or undertaking (PCBU) are required, as far as is reasonably practicable to ensure the safety of workers and other persons who are involved in the work being undertaken by the PCBU.

The *Work Health and Safety Act 2011* requires businesses to take positive steps to ensure the health and safety of workers and others people at their enterprise through

managing risk. They must provide and maintain a safe workplace and systems of work and report incidents to WorkSafe ACT. In the same way, workers must not expose themselves or others to risks because of their work. The Act covers a range of people as 'workers' including contractors, apprentices and volunteers.

The *WHS Act* requires a proactive approach, placing new obligations on individuals to ensure safety. It requires officers of businesses to exercise due diligence to ensure the business complies with its duties. This includes taking reasonable steps:

- to acquire and keep up-to-date knowledge of work health and safety matters;
- to gain an understanding of the nature of operations and generally of the hazards and risks associated with them;
- to ensure the business or undertaking has available for use, and uses, appropriate resources and processes to eliminate or minimise risks from work carried out;
- to ensure the business or undertaking has appropriate processes for receiving and considering information about incidents, hazards and risks and timely responses;
- to ensure the business or undertaking has, and implements, processes for complying with any duties under the *WHS Act*; and
- to verify the provision and use of these resources and processes.

The Committee believes that the Civil Construction Industry has a significant role to play itself in addressing safety issues. The Industry should adopt a philosophy and work culture that provides that safety is enshrined as a key performance indicator for their business and that poor performance in regard to this KPI will affect the ability to undertake further work for the ACT Government.

The Act is implicit in requiring civil construction companies to be pro-active in addressing Directorates who place unreasonable and unsafe demands on the completion of a project, by bringing those issues to attention, rather than accepting them, and by refusing to agree to time restraints that would require any safety standards being compromised.

The Committee believes that to meet their safety obligations under the *Work Health and Safety Act*, Civil Construction companies can only accept a contract where they can show the work can be completed without comprising the safety standards on the project.

RESPONSIBILITY OF EMPLOYEE ORGANISATIONS / WORKERS

The *Work Health and Safety Act 2011* and the *Fair Work Act*, allow employee organisations to address safety issues.

In particular, the Act allows representatives of employee organisations to:

- enter a workplace to inquire into a suspected safety breach; and
- consult with workers and provide advice on work health and safety matters.

In this context, The Committee believes that employee organisations can assist in improving safety standards by drawing to attention safety issues they identify not only with the principal contractor on site, but also with WorkSafe ACT.

The Act requires PCBUs and Principal Contractors to consult with workers on any matters that may impact on their safety. In this context The Committee believes that there is much to be gained by the Principal Contractors, Work Health and Safety Representatives and Work Health and Safety Committees developing a project specific Work Health and Safety plan and ensuring this consultation is maintained throughout the project.

Further, The Committee believes there is much to be gained by employee representatives joining industry participants and the Work Safety Commissioner in an ongoing education and awareness program.

FINDINGS

The Committee found that there was a range of factors impacting on safety on Civil Construction Sites, but considered three key issues as being the most significant,

1. Government Procurement processes;
2. Training and Information sharing; and,
3. Cultural Issues.

Part 1-Government Procurement Processes

The Committee believes that there is room for improvement in the way the ACT Capital Works Program is developed, the way tenders are developed to deliver the program and the way civil construction contracts are managed.

The Committee believes that, in some cases, the capital works program is based on a range of operational and financial imperatives. The Committee is concerned that, despite the best endeavours of Shared Services Procurement, some client Directorates make unreasonable demands on project completion times, using the threat of financial penalties should timeframes be not met, rather than considering the wider implications of such an approach.

The Committee is concerned that the Government's Capital Works program is not co-ordinated resulting in competition for resources and materials, and believes that provision should be made to consolidate and co-ordinate all capital works projects across all directorates. In addition, The Committee believes that in determining the capital works program, consideration needs to be given to the capacity of both industry and government to deliver the program.

The Committee was also concerned that there is a lack of understanding of who is ultimately responsible for decisions regarding civil construction projects.

The Committee is also concerned that the Government's budget allocation process is too restrictive. The present arrangements of requiring allocations to be spent during a financial year, and not allowing the "rolling over" of this funding has the potential to seriously impact on safety outcomes.

The Committee believes the following recommendations will assist in improving safety outcomes.

Recommendation 1: The Committee recommends Shared Services Procurement develop a contact list to be attached to each tender awarded, which identifies the relevant persons to contact who are able to address issues requiring resolution, if and as they arise.

Rationale: There is concern there is no clear understanding of who is ultimately responsible for making decisions when issues arise.

Recommendation 2: The Committee recommends, as part of the pre-qualification and performance review processes, Shared Services Procurement develop procedures to ensure all information held by Government Directorates in respect of a particular Tenderer's compliance with work safety and industrial relations requirements is obtained and considered before a tender is issued. Any information provided by third parties would also be investigated.

Rationale: Concern was expressed that information held by ACT Government agencies on a particular company's compliance with work health and safety and industrial relations legislation was not taken into account when considering awarding a tender. This recommendation is intended to place a positive obligation on Shared Services Procurement to make inquiries of relevant Directorates as part of their process.

Recommendation 3: The Committee recommends Government strengthen the present post project evaluation process to include all aspects of the completed project, including compliance with safety requirements [measured by improvement / prohibition notices issued and remediation instituted and notifiable incidents reported] and IR requirements [measured by audits]. This post evaluation process would then form part of any future tender applications from the same company.

Rationale: Concern was expressed that the present post project evaluation process was focussed on the on-time and on-cost completion of the project and little if any regard being given to the safety and IR record of the company during the project.

Recommendation 4: The Committee recommends Government not call tenders for a project until the project design and documentation is completed appropriate to the form of tender being let.

Further The Committee recommends Government not allocate funding to a Directorate until a Final Sketch Plan is complete.

Recommendation 5: The Committee recommends establishing a process to ensure safety issues and potential hazards in construction are considered throughout the planning and design process. The process must enable Civil Industry Representatives, Shared Services, Employee Organisations and designers to discuss design safety issues throughout the design and planning process to ensure, where possible, construction and ongoing maintenance risks are mitigated by the design and any remaining risks to be addressed during construction are identified in the tender documentation.

Recommendation 6: The Committee recommends Government ensure that to promote a culture of a planned, consultative approach to project safety, contract periods for Civil Construction projects include a sufficient period of time to develop the safety plan for the project in full consultation with the organisation's health and safety representatives. The government should ensure that sufficient and appropriate resources are available to ensure the safety plan is appropriately reviewed and commented on prior to commencement of a project.

This planning period will also allow time to address any outstanding design and safety matters and resolve any issues with the client directorate prior to work commencing. In this context, The Committee believes a period of four to six weeks would be appropriate.

Recommendation 7: The Committee recommends Government make changes to the funding arrangements for the Capital Works program, so that there is no insistence on completing a project within a financial year when such an approach is likely to impact on safety outcomes.

Rationale: The Committee discussed ongoing issues in connection with the period between a tender being issued, and the requirement for work to commence, and work to be completed.

The Committee is also concerned that the present capital works funding process requires monies allocated to be spent within a financial year. This inflexible approach results in Contractors rushing to complete works, putting safety at risk.

There is a concern amongst Civil Contractors that tenders when released are not 'ready to go', requiring a process to be established where contractors and Shared Services Procurement can discuss any concerns at an early stage in the process. There is also the view amongst civil contractors that designers are not taking into account safety requirements, resulting in the contractors needing to take time to ensure these issues are addressed. At present this 'pre-commencement' period is not translated into the works brief resulting in works being rushed.

Recommendation 8: The Committee recommends that as the Government's Capital Works program is being developed, provision for a 'pre-commencement' assessment is built into the planning cycle for each project. Further, The Committee recommends the establishment of a capital works infrastructure coordinator position to consolidate the Territories capital works program across all Directorates.

Rationale: The Committee is of the view changes need to be made to the Government's capital works planning process to allow for work to be undertaken safely. There is a need for Government to take a responsible approach and not be dictated by unreasonable time-frames. There is also a need for Government to consider the capacity of industry in the Territory when deciding its capital works program. Whilst an expanded program may be seen as economically beneficial, it can also lead attracting companies with less capacity to deliver a safe outcome, particularly if the industry is over-stretched to complete multiple projects.

Recommendation 9: The Committee recommends that Superintendents and Clerks of Work are trained in, authorised to, and are responsible for addressing safety issues on the sites where they have responsibility.

Rationale: The Committee acknowledges that it may not be possible to have a full time Government representative present on all civil construction sites. Given this, The Committee is of the view changes should be made to the role of Superintendents who are appointed to oversee Government capital works projects. The Committee is of the view that Superintendents must play a proactive role in terms of work safety matters and must be suitably trained and authorised to take action when safety issues arise.

Part 2 – Work Culture, Training and Information sharing

The Committee believes that there needs to be a stronger focus on addressing ingrained work culture issues, at the grass roots level of construction workers, that place the health and safety of workers at risk.

The Committee believes that this is the opportunity to acknowledge that these cultures exist and to address the issues on a tri-partite basis.

The Committee is of the view that the Government, as the procurer of the majority of civil construction work in the Territory, should be the exemplar, and set the standards for safety.

The Committee believes the majority of accidents and near misses could be avoided. The Committee is also of the view that best practice should dictate that when the circumstances of a job changes there is a need to review the risk assessment of that particular job.

The Committee discussed a number of incidents that have occurred in the ACT, and those experiences suggest that, occasionally, time and cost imperatives (such as not proceeding with a concrete pour, for example) outweigh a delay to a project to

readjust these risk assessments.

The Committee is of the view that there is a culture within the civil construction industry where workers and indeed management, in many cases due to the years or experience they may have, believe that they are immune to risks. This in turn can lead to complacency resulting in a risk that an accident will not happen being taken rather than making a readjustment. Whilst in the majority of situations no accident will occur, when one does it is often catastrophic.

Whilst acknowledging that construction is a particularly dangerous industry, there needs to be a change in culture, so that there is acceptance that no worker should be put at risk. The Committee believes there are a small number of companies who take the view that “they won’t get caught” and this attitude is driving safety standards down.

The Committee is concerned of the growing number of inexperienced project and safety managers who are in turn responsible for signing-off on Work Health and safety plans.

The Committee believes that there is a danger that the requirement for paper-work such as Safe Work Method Statements (SWMS) is overshadowing the need to ensure that every worker understands the detail of the SWMS and importantly where they fit into and what their responsibilities are, i.e. what are they required to do?

The Committee was also concerned that safety audits are only focussing on the paper work and whether or not a SWMS has been completed rather than establishing if the specific items in the SWMS are actually being done.

The Committee believes it is vital to understand that we achieve safe work places by involving everyone in a culture of change. Managers, leading hands and workers should all work on developing SWMS together, not to have them “force fed” down the line.

Anecdotal evidence suggests that persons from non-English speaking backgrounds, or those with limited literacy are not being provided with sufficient information, from the SWMS and more generally, to be able to carry out their work safely. Further anecdotal evidence suggests that ‘tool-box talks’ and site induction briefings are infrequent, and of little value for this cohort of workers.

The Committee noted that there is also anecdotal evidence that some workplace accidents are not reported, and are dealt with directly with the employer and the injured worker. In addition, the Committee acknowledged that many ‘near-misses’ on civil construction work sites go unreported.

The Committee noted and supports the Work Safety Commissioner’s decision to publish a construction specific safety newsletter as a positive step.

To address these specific issues, The Committee makes the following recommendations:

Recommendation 10: The Committee recommends the Work Safety Commissioner, Master Builders Association, and the CFMEU jointly sponsor a range of workshops focussing on leading hands and site supervisors, addressing initially Safe Work Method Statements and Work Health and Safety Plans.

Rationale: By aiming the workshops at leading hands and site supervisors, addressing what is required in terms of completing a SWMS and the need to ensure all workers are included in consultation process undertaken to complete SWMS and have a full understanding of tasks required, should assist in improving safety culture.

Recommendation 11: The Committee recommends the workshops commence as soon as possible and be run as required, but not less than bi-monthly, with the aim

that industry and employee organisations would work together to ensure all leading hands and supervisors attend the course. The frequency of courses will be reviewed depending of the number of persons covered

Rationale: The Committee believes that there is a need to move quickly, and prior to the end of year slow down in the Industry.

Recommendation 12: The Committee recommends CITC be asked to identify or develop a safety management and construction industry focussed course for site managers and supervisors.

Rationale: Site managers and supervisors are critical to improving the safety culture and safety outcomes on civil construction sites. Developing a construction industry specific safety management course for site managers and supervisors should assist in improving safety culture.

The course would also focus on consultation skills for managers and supervisors.

Recommendation 13: The Committee recommends CITC be asked to identify or develop an OHS safety course that would be appropriate to deliver to all civil construction workers on a bi-annual basis.

Rationale: Providing ongoing and consistent training for all civil construction workers would provide workers with the knowledge and skills to identify, and the confidence to deal with unsafe work practices resulting in improving safety culture.

Recommendations 14: The Committee recommends the Work Safety Commissioner, as a matter of urgency, consider opportunities to improve the training available and provided to Work Health and Safety Committees.

Rationale: Work Health and Safety committees are critical to addressing safety issues in business and on sites. Often Committee members are not trained, nor skilled in conducting meetings. There is an urgent need to provide training to Committees on the process of conducting meetings, including minute taking and conflict resolution.

Recommendation 15: The Committee recommends that on ACT Government Construction projects, client site meetings include an agenda item to enable a review of relevant Work Health and Safety Committee minutes to ensure issues are being raised and addressed.

Rationale: Given the role Work Health and Safety committees play, it is vital that they are accountable and their minutes of meetings, decisions and follow-up actions are recorded and available.

Recommendation 16: The Committee recommends that on ACT Government construction contracts above a specified amount, include a requirement that the Principal Contractor appoint a dedicated safety manager for the project, and further that safety managers appointed by construction companies have an appropriate level of qualification, such as a Certificate IV or Diploma and experience in the construction industry.

Rationale: The Committee is concerned that some safety managers employed by construction companies do not have relevant training or experience to be making decisions that impact on safety outcomes. This needs to be addressed.

Recommendation 17: The Committee recommends the Office of Industrial Relations introduce infringement notice penalties for PCBUs that do not report incidents.

Rationale: The Committee is concerned from reporting that companies are not reporting incidents to WorkSafe. There is anecdotal evidence that companies believe Work safe will not go through a prosecution process for these offences. Introducing an infringement penalty would go some way to ensuring companies comply.

ACT Work Safety Council

Civil Construction Safety Issues Advisory Committee

List of Recommendations

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