



**BEST PRACTICE REVIEW
OF WORKPLACE HEALTH
AND SAFETY IN THE
NORTHERN TERRITORY.**

FINAL REPORT

10 JANUARY 2019

10 January 2019

The Honourable Natasha Fyles, MLA
Attorney-General
Parliament House
DARWIN NT 0800

Dear Attorney,

I am pleased to present you with the report of the Best Practice Review of Workplace Health and Safety in the Northern Territory.

I express my thanks to the members of the Reference Group, all stakeholders who contributed to this Review, to WorkSafe Staff, and to the officers of your Department who provided secretariat support to me during this process.

Thank you for the opportunity to contribute to the important task of ensuring safety at work for all Territorians.

Yours sincerely,

Tim Lyons
Independent Reviewer

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General findings

- While NT WorkSafe performs some of its functions well, there is need for a significant re-balancing of organisational priorities to meet Territorians' expectations about safety at work.
- NT WorkSafe must focus on its core functions of as a labour inspectorate with responsibilities across the Territory.
- There is a need for a greater level of visibility in workplaces by inspectors, particularly outside of Darwin and Palmerston. This was expressed in clear terms by inspectors, Unions, and employers. It was also expressed in equally clear terms by employees, both in the private and public sector.
- There is a need to upgrade the skills of the inspectorate in relation to both general compliance work and investigations, and to improve the system the inspectors rely on to be effective.
- NT WorkSafe places insufficient emphasis on prosecutions and other "hard" compliance. This requires a re-balancing that may require resources being re-allocated from management. Resources should not be withdrawn from engagement, educative and capacity building strategies. There is then an ongoing need to ensure that the balance between "directing compliance" and "encouraging and assisting compliance" is appropriate. This requires ongoing monitoring and adjustment by management.
- While there is no evidence of regulatory capture or of political interference in prosecutions or other regulatory decisions, there is a need to ensure that the reality and perception of independence is maintained, and delineation of functions is clear.

Recommendations.

General Findings

Recommendation 1. NT WorkSafe re-balance its priorities in favour of "hard" compliance work with a view to increasing on the ground visibility and activity of the inspectorate.

Recommendation 2. That, over time, NT WorkSafe move resources from management and administration and into frontline inspectorate activity.

Recommendation 3. It is appropriate for some structural separation of NT WorkSafe's operations into three streams:

- 3.1. Prosecutions and Investigations;
- 3.2. Inspectorate; and
- 3.3. Capacity Building and Engagement.

Recommendation 4. That an Injured Workers and Families Forum be established, actively supported, and consulted by both NT WorkSafe and the Work Health and Safety Advisory Council.

Recommendation 5. That NT WorkSafe develop a more effective system to ensure that the families of victims of fatalities are supported, modelled on best practice used by police services.

Inspectorate activity

Recommendation 6. NT WorkSafe develop a plan to increase inspector visibility, especially outside of Darwin and Palmerston, and seek stakeholder feedback after implementation.

Recommendation 7. That inspectorate activity in remote communities be increased, and a properly resourced annual program of visits to remote communities be established, including increased support for indigenous social enterprises in managing WHS risks for employees and Community Development Employment Project (CDEP) participants.

Recommendation 8. NT WorkSafe take additional steps to ensure all inspectors have a clear understanding of the availability of directed compliance as tool and of the systems used to track and support its use.

Recommendation 9. Given the size of the jurisdiction's Domestic Commercial Vessels fleet, NT WorkSafe, with the support of the Northern Territory Government, should work with the Australian Maritime Safety Authority to ensure that a larger number of inspectors exercising functions under both the *Marine Safety (Domestic Commercial Vessel) National Law Act 2012 (Cth)* and the *Occupational Health and Safety (Maritime Industry) Act 1993 (Cth)* are located in the Northern Territory.

NT Worksafe Capabilities

Recommendation 10. While recognising that as a small jurisdiction there is a requirement for inspectors to be generalists, NT WorkSafe should ensure:

- 10.1. That inspectors with industry specific experience are appropriately used in both general compliance and investigations;
- 10.2. That greater Continuing Professional Development (CPD) opportunities are made available to inspectors;
- 10.3. Identify industry experience gaps in the inspectorate and target that experience in future recruitment and CPD of existing inspectors; and
- 10.4. Consider reaching an agreement with a larger jurisdiction to access specialist inspectors in high risk sectors (including mining and construction) for both general compliance and investigations.

Recommendation 11. That the employee engagement survey be carefully monitored for evidence of improved morale and job satisfaction amongst the inspectorate in particular.

Recommendation 12. That NT Worksafe work to upgrade systems and processes to meet best practice standards, including by consolidating IT platforms to avoid duplication, and by providing inspectors with tablet-based auditing and compliance tools.

Recommendation 13. That skills development program be developed with a view to bringing inspector qualifications and competencies up to a level of leading regulators

such as the Health and Safety Executive in the United Kingdom. The program should aim to move the qualifications of inspectors to Diploma level, up from Certificate 4.

Investigations

Recommendation 14. Consistent with recommendation to functionally separate the compliance and business engagement functions of NT WorkSafe, a Complex Investigations Unit (of 2-3FTE) led by an experienced senior investigator should be established to report to the Director of Work Health and Safety Prosecutions. Consideration should also be given to using the expertise of the Major Crime unit of NT Police.

Recommendation 15. NT WorkSafe, with the support of the Northern Territory Government, should take steps to ensure the Australian Maritime Safety Authority properly performs its agency duties contained in the Memoranda of Understanding.

Prosecutions

Recommendation 16. A new independent statutory office be created to exercise all functions in relation to work health and safety prosecutions under the *Work Health and Safety (National Uniform Legislation) Act 2011 (NT) (WHS Act)*. The new independent statutory office should:

- 16.1. be headed by a part-time Director of Workplace Health and Safety Prosecutions to be appointed by the Administrator-in-Council for a five year renewable term and be supported by existing staff reporting to the Director; and
- 16.2. not affect the current powers held by the Director of Public Prosecutions under section 230 of the WHS Act to bring proceedings.

Recommendation 17. That the Work Health and Safety Advisory Council monitor trends in relation to prosecutions in relation to the number of proceedings, success rate and penalties awarded.

Enforceable undertakings

Recommendation 18. In relation to the enforceable undertakings framework:

- 18.1. The WHS Act be amended to require judicial oversight and approval to permit enforceable undertakings being accepted for contraventions, or alleged contraventions, of the WHS Act that relate to circumstances involving a fatality.
- 18.2. Enforceable undertakings not be accepted (unless exceptional circumstances exist) where:
 - 18.2.1. the applicant has a recent prior conviction connected to a work-related fatality;
 - 18.2.2. the applicant has more than two prior convictions arising from separate investigations; or
 - 18.2.3. the application relates to an incident involving a very serious injury.

- 18.3. For consistency, 'very serious injury' should be defined as stated in the WorkCover New South Wales Enforceable undertakings: Guidelines for proposing an enforceable undertaking.

Negligence Causing Death

Recommendation 19. That two new offences be created in the WHS Act to be called 'Industrial Manslaughter' in line with the following objectives:

- 19.1. create a 'senior officer' offence and an 'employer offence' where conduct negligently or recklessly causes death of a worker;
- 19.2. apply the existing standard in NT law for criminal negligence;
- 19.3. ensure that prosecution decisions in relation to these offences by the new Director of Work Health and Safety Prosecutions is subject to DPP approval as for Category 1 offences and that the DPP may take over any prosecutions under these sections; and
- 19.4. provide for the same maximum custodial sentence for an individual as available for manslaughter under the Criminal Code (life imprisonment) and a fine of up to 65,000 penalty units (\$10,075,000) for a body corporate.

Penalties for work-related fatalities and injuries

Recommendation 20. The new Director of Work Health and Safety Prosecutions advocate to seek to increase the penalties ordered by the courts in appropriate cases over time.

Further measures

Recommendation 21. NT WorkSafe develop a comprehensive plan to support Health and Safety Representatives (HSRs) and Health and Safety Committees, and encourage uptake in industry, particularly within priority industry sectors.

Recommendation 22. The WHS Act be amended to:

- 22.1. require mandatory training for HSRs within six months of an HSR being elected to the role and refreshed at three yearly intervals; and
- 22.2. require persons conducting a business or undertaking to forward to the regulator a copy of all Provisional Improvement Notices (PINs) issued by HSRs.

Recommendation 23. The WHS Act be amended to provide a framework for the appointment of Work Health and Safety Officers. The appointment of Work Health and Safety Officers should not be mandatory.

Recommendation 24. As per the current arrangements for codes of practice under the WHS Act, the appointment of a Work Health and Safety Officer should be permissible as evidence that a duty holder has taken action to mitigate health and safety risks at a workplace. This should also apply to duty holders whose workplaces have an elected and trained Health and safety representative.

Recommendation 25. In relation to NT WorkSafe's response to, and notification to industry of, serious incidents:

- 25.1. NT WorkSafe refocus the content of incident alerts to address the public interest and stakeholder desire for information by providing information about the investigation process, communicating how further information about incident causation and preventative action will be provided (i.e. incident updates, eSAFE articles, safety alerts) and providing information about previous incidents similar in scope that might offer a relevant safety learning;
- 25.2. NT WorkSafe expand the scope of incident alerts to include all matters required to be notified to the regulator under the WHS Act and publish the refocused incident alerts on its website.

Recommendation 26. That the status of Codes of Practice that existed under the *Work Health Act 1995* (NT) be restored and that Codes of Practice in operation in the Northern Territory be regularly reviewed.

Recommendation 27. That WorkSafe, in collaboration with WHS regulators in other Australian jurisdiction develop and implement an action plan to assist workers and employers to eliminate psychosocial hazards in workplaces.

Observation

During the course of the review's visit to Central Australia the Reviewer met with NT Public Servants from a variety of agencies. These discussions and submissions from public sector Unions revealed that the standard of housing provided to workers employed by different agencies in different locations varies enormously.

While outside the scope of my review, housing in remote communities for Government employees is a WHS issue¹. There seems no sound basis for NT Government employees to receive fundamentally different standards of housing. Accordingly, I recommend that the NT Government develop and adopt a Quality Housing Policy to apply to all agencies that deals with issues of amenity, security, and adequate maintenance.

¹ Section 19(4) of the WHS Act extends the duty of care owed by a PCBU to employer provided housing.

TOR 1. The appropriateness and effectiveness of the current organisational structure, systems and processes in the administration of public safety and compliance

1.1 Function and Purpose of the Work Health Authority

The Reviewer has examined the role of the Work Health Authority, as established by the Work Health Administration Act (NT) that came into force on 1 January 2012. The Work Health Authority is granted powers and functions under the WHS Act and the Return to Work Act.

The Attorney-General and Minister for Justice is responsible for the WHS Act and the Work Health Administration Act.² The Ministers responsible for the Work Health Administration Act are responsible for appointment of the Work Health Authority. Part 2 (5) of the Work Health Administration Act provides:

- (1) The Authority has the following functions:
 - (a) to be the regulator under the Work Health and Safety (National Uniform Legislation) Act;
 - (b) the functions conferred on it under the Return to Work Act; and
 - (c) any other function conferred on it under any Act.
- (2) The Authority has the powers necessary to perform its functions.

The Work Health Authority is also granted powers and functions under the Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act and Regulations. Part 2 (22) of the Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act provides:

- (1) The Work Health Authority is the Competent Authority for this act.
- (2) The Competent Authority:
 - (a) may exercise all the powers and perform all the functions of an authorised officer; and
 - (b) when exercising those powers or performing those functions, has all the immunities of an authorised officer.

The Reviewer has found no issues with the legislative functions of the Work Health Authority and accordingly makes no recommendations regarding that body.

1.2 NT WorkSafe Corporate Information

Functions of the Work Health Authority are performed by NT WorkSafe, a division of the Department of the Attorney-General and Justice. NT WorkSafe is the statutory body responsible for the Northern Territory-wide provision of advice, information and regulation of workplace health and safety, dangerous goods, electrical safety, and rehabilitation and workers' compensation.

NT WorkSafe presently comprises the following business units:

- Executive
 - Regulatory Reform
 - Communications

² Administrative Arrangements Order 13 August 2018, Schedule 2.

- Business Administration
- Training
- Operations
 - Electrical Safety
 - Remote Safety
 - General Safety
- Permissioning and Advisory Services
 - Small Business Safety Program
- Rehabilitation and Compensation

NT WorkSafe, as a Division of the Department of Attorney-General & Justice, is responsible for developing and implementing appropriate and effective policy and regulatory responses with respect to workplace health and safety, workers compensation, dangerous goods regulation and electrical safety regulations. The regulatory responses include licensing, monitoring and compliance enforcement. As the administrative arm of the Work Health Authority, NT WorkSafe is also responsible for investigation and prosecution of offences under the legislation administered by NT WorkSafe.

As part of the terms of reference for the review, the Reviewer considered the appropriateness and effectiveness of NT WorkSafe's organisational structure, systems and processes in the administration of public safety and compliance. The Reviewer also considered the factors that influenced NT WorkSafe's compliance and enforcement policy. These factors are:

- the legislative framework which includes the WHS Act and the Work Health and Safety (National Uniform Legislation) Regulations (NT) (the Regulations) and associated regulations, codes of practice and guidance;
- the National Compliance and Enforcement Policy which has been adopted by regulators as part of the national harmonisation process; and
- Australian and Northern Territory work health and safety strategies which include commitments to targets for a reduction in injuries and fatalities as well as the identification of key priority industries and disorders.

During 2017-18 and 2016-17, the Work Health Authority was provided with 62 full-time equivalent staff (FTE) as per the Figure below.



Figure 1 – NT WorkSafe Organisational Figure³

From this chart, 16 per cent of FTE staff are Executive and only half are Operations. This is of concern. Further, staff were overwhelmingly located in Darwin with only one staff

³ Work Health Authority, Annual Report 2017-18, p 4
(<http://www.worksafe.nt.gov.au/PDF%20Conversion/wha-annual-report-2017-18.pdf>)

member in Katherine and three in Alice Springs. That is, approximately 94 per cent of staff are located in Darwin. This top-heavy and Darwin centric organisational structure has been commented upon by Unions and some inspectorate staff as being insufficiently focussed on 'coal face' operations. There is some strength to this view, however it may be simply too that there are sufficient established positions, but they are too often left vacant for extended periods. It might also be that the efforts of inspectors are hampered by a lack of technology. On numerous occasions the Reviewer was informed by both the inspectorate and Unions that the technology used by inspectors, for both site inspections and record keeping, was not fit for purpose. Inspectors need to be provided real time access to References, advice, note taking and electronic filing.

The present model of inspecting does not allow inspectors to go to worksites in urban areas with two inspectors. This is a hindrance as senior inspectors are not able to mentor other inspectors in the field. Shared corporate knowledge and quality control is therefore limited. Further, it seems to the Reviewer that that an increase in the size of the inspectorate would allow staff to better service regional areas.

The legislative and policy framework must reflect current best practice in safety management. Best practice is driven by the emergence of new health and safety challenges. Lessons may also be learned from sustained poor performance in relation to known hazards and risks. To address these issues, a legislative response is often required to ensure that NT WorkSafe has the enforcement and compliance tools necessary to improve work health and safety outcomes.

1.3 NT WorkSafe capability (resources, service delivery and training)

The classifications and formal education requirements contained in the relevant job descriptions of the inspectorate are as follows:

- Senior WorkSafe Inspector (A06) (Tertiary qualification highly desirable / Diploma of Government (Workplace Inspection) desirable);
- Senior WorkSafe Inspector – Electrical (A06) (Tertiary qualification highly desirable / Diploma of Government (Workplace Inspection) desirable / electrical trade qualification essential); and
- Principal WorkSafe Inspector – Team Leader (A07) (Tertiary qualification highly desirable / Diploma of Government (Workplace Inspection) desirable).

AO6 and AO7 are well paid positions which should attract the candidates NT WorkSafe is hoping to attract. The classifications and formal education requirements stated for Senior WorkSafe Inspectors and Principal Workplace Inspector (Tertiary qualification and Diploma in Workplace Inspection), is supported. Ongoing and Continuing Professional Development (CPD) in relevant and broader industry skills is supported.

Considering the powers an inspector holds with in the WHS Act, the generalist criteria for an AO6 and AO7 level employee is inhibiting the skills and subject knowledge required to be a competent inspector. This limits the ability to be competitive with other employment opportunity with far better remuneration and incentives available throughout the NT and interstate.

The Reviewer believes that as a condition of permanent employment, and perhaps to be achieved within the first 12 months of hiring, an AO6 inspector should hold a Certificate IV qualifications and Diploma level for AO7 inspectors. If their skills are to be

upgraded, then staff need to be adequately resourced to perform their enforcement duties and promote their programs.

All SAO1 staff and above should ideally hold degree level qualifications and / or deep industry experience in relevant areas upon hiring. Relevant areas should include sciences such as chemistry and engineering. Deep knowledge of the physical sciences will assist management in its capacity to deal with NT WorkSafe's statutory obligations regarding Major Hazardous Facilities, transport of dangerous goods, and radioactive ores. Further, a small number of inspectors should be required to hold mariners' qualifications so that they can bring specialist knowledge to that field. Inspectors with prior work experience in a field should be encouraged to exercise their knowledge inspecting areas with which they are familiar. It would seem to the Reviewer that NT WorkSafe is blessed with inspectors holding a wide range of work experiences. However, it is also clear to the Reviewer that these experiences are unsatisfactorily drawn upon.

A CPD program should also be developed to address current best practice across industries and include communications training (a matter raised by inspectors given the nature of their role.) This must not be Darwin-centric but include all inspectors. Likewise, a formal mentoring program should be developed for all AO6 and AO7 inspectors. This should be run by the AO5 training officer.

1.4 Stakeholder Feedback

Stakeholders provided the following feedback in relation to service delivery:

- Stakeholders suggested that there are minimal consultation and participation mechanisms between NT WorkSafe and employers and workers. This is especially so in regional and remote areas. Unions repeatedly raised the issue that there are also minimal consultation and participation mechanisms between Health and Safety Representatives (HSRs) and the NT WorkSafe inspectorate.
- Stakeholders generally agreed that the work of the inspectorate is too reactive. The reasons advanced for this include resources, internal process and systems.
- Various stakeholders indicated that there was a lack of engagement with HSRs by the inspectorate and WorkSafe more generally.
- Unions submitted that there was inadequate use of directive compliance in relation to Government Departments when non-compliance is identified by HSRs or inspectors.
- Unions identified what they say is an inappropriately low number of prosecutions, detracting from any deterrent intent the Act imposes. Some inspectors agreed.
- Employers sought Greater collaboration with Chamber NT and its membership network. Greater use of web-based resources i.e. webinars/videos/podcasts.
- That the IT systems of Worksafe are archaic and "not easy to use" creating a significant administration burden.
- Inspectors indicated that there should be greater consideration given to the structure and content of notices to fulfil the legal requirement and still provide education, advice, direction and guidance.
- Several stakeholders requested more resourcing and more training for inspectors.

- Inspectors noted that they are expected to visit remote workplaces alone. Inspectors sought a range of changes to these arrangements, including: provision of a companion to travel with, safe means of transport to get to these areas, guaranteed communication for safety reasons, Time Off In Lieu (TOIL) if overtime is required and safe systems of work.
- Various stakeholders raised issues about a lack of activity and visibility by the inspectorate and WorkSafe more generally outside Darwin. Stakeholders suggested that resources need to be allocated to allow more workplace visits across NT especially in remote areas.
- Unions noted that Government Departmental workers are being required to work in remote workplaces have either no Policy, Risk Assessments, or safe systems of work whilst working in remote areas.
- Unions suggested that the WorkSafe NT Website publish all instances of Directive Compliance issued to PCBU's.
- Remote communities in the NT as a generalization are less informed and knowledgeable about work safety and therefore the regulator must take a more active role to protect these communities and workers. Attitudes of many PCBUs operating remotely implies "no rules" apply attitude. Cultural barriers and a lack of knowledge pertaining to the NT remote regions are barriers.
- In remote communities, delivering content, information and resources in languages appropriate to the audience. The ability to provide the right tools and training to create safe workplaces. The cost of training (travel and down time in attending for courses etc) particularly of health and safety representatives.
- Greater provision of web-based training was suggested. Videos similar to those on the NT WorkSafe website in relation to workers compensation are supported.

1.5 Remote Communities & Primary Industries

Very remote indigenous communities have safety issues that require specific consideration. The first of these is the risks posed to workers in driving long distances on remote roads. Roads are largely unfenced, and the risks of animal strikes and roll-overs can be mitigated but rarely prevented. Further, accessibility for tradespeople and training consultants is difficult. It may cost several thousand dollars for a single call-out for minor works. This is a cost difficult to absorb by small organisations and hence tradespeople and consultants are used sparingly. The joint use by community organisations of such tradespeople and consultants could reduce such costs, but co-ordination between community groups (and government for that matter) seems to be rare. There is a concern that if regulation is too onerous then enterprises in very remote indigenous communities may become unviable.

Language barriers present a difficulty for work, health and safety consultants. Consultants often fail to use translators when delivering courses, and many trainee's do not understand the English being used. This then effects attendance and many trainee's do not attend the full course.

The standard of work provided by tradespeople in very remote communities is mostly of a lesser standard than that accepted in urban areas. The Warnayaka Art and Cultural

Aboriginal Corporation gave two examples of this to the Review. The first was of a tradesperson being paid to install fire extinguishers, who instead of installing them they left them at different points around the building with no brackets and stands to secure them. Another example was the failure to fit electric fire alarms to a building as part of renovations. This was only identified three years later. The Warnayaka Art and Cultural Aboriginal Corporation raised the concern that being a manager in such circumstances has risks as managers are often held responsible for work, health and safety.

While NT WorkSafe has a program of visits to remote communities and has partnered with Traditional Owners in Arnhem Land to produce WHS materials in the appropriate language, overall the review finds that current arrangements are sub-optimal. Greater engagement with Indigenous social enterprises is also necessary

The Chief Executive of the Department of Primary Industry and Resources, Mr. Alister Trier, submitted to the Review the importance of having a workplace health and safety authority that has "... the capacity to deliver both advice and compliance action to regional and remote areas". Mr. Trier noted that, unlike larger organisations such as mines and agricultural conglomerates, smaller organisations do not necessarily have well-defined workplace health and safety policies and systems. The Reviewer largely agrees with Mr. Trier, although adds that it is clear from his meetings that many larger organisations operating in regional and remote areas also do not have well-defined workplace health and safety policies and systems. A remedy for both smaller and larger organisations is for NT WorkSafe to establish fly-away teams specifically to service regional and remote communities.

1.6 Inspectorate and Adviser Activity

NT WorkSafe inspectors and advisors work with industry to ensure health and safety standards are met and sustained, and contribute to NT WorkSafe's compliance activities by:

- responding to work health and safety complaints and incident notifications;
- undertaking workplace assessments;
- providing practical guidance and compliance support to businesses;
- participating in state-wide compliance campaigns; and
- working with industry to seek solutions to work health and safety problems through a variety of programs and interventions.

Visits to workplaces by NT WorkSafe's inspectors and advisors remain a key part of engagement with business and it is only during these visits that an assessment of compliance can be made. Table 1 shows that the number of workplace visits in any given year varies, but on average represents about 6,000 per year. The focus on particular industries depends on the risk profile of that industry and the number of workplaces or worksites that the industry represents. The dominant focus on construction reflects the number of workers employed in this industry, the temporary nature of workplaces and the rapid change in the nature and environment of these workplaces as construction proceeds.

Description of Industry	Workplace Visit No.
No industry recorded	624
Accommodation, cafes and restaurants	279
Agriculture & fishing	64
Communications services	10
Construction	2427
Cultural and recreational services	128
Education	89
Electricity, gas and water supply	92
Government administration and defence	158
Health and community services	71
Manufacturing	163
Mining	61
Personal and other services	105
Property and business services	143
Retail trade	594
Transport and storage	93
Wholesale trade	70

Note: Workplace visits carried out under *Work Health and Safety (National Uniform Legislation) Act*, *Return to Work Act*, *Dangerous Goods Act*, *Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act*, *Radioactive Ores and Concentrates (Packaging and Transport) Act* and the *Electricity Reform Act*. (This report as at 16 October 2018 built in Microsoft Reporting)

Table 1 – Number of Workplace Visits Conducted by NT WorkSafe Inspectors⁴

During these visits, the inspector or advisor may be focussed on particular workplace issues or risks (e.g. falls from height, ergonomic issues, storage and use of chemicals, machinery guarding, UV radiation or asbestos) or they may focus more broadly on the overall work health and safety performance of the workplace and compliance with legislative requirements by the person conducting a business or undertaking. The location of the workplace, the inspector or advisor’s familiarity with that particular workplace, the complexity of the workplace and the complexity of the issues encountered, all contribute to high variability in the time taken for the inspection and the regulatory tools used to gain work health and safety improvement and regulatory compliance.

Where an inspection or audit reveals that a person conducting a business or undertaking must take action to ensure that they comply with requirements in the legislation, inspectors and advisors can cooperatively secure this compliance through the provision of guidance and advice or, in the case of inspectors, use enforcement powers to ensure compliance. Enforcement by an inspector generally involves issuing an improvement, prohibition or infringement notice. Advisors cannot issue notices, but they can seek the support of an inspector to do so.

Seeking voluntary compliance through agreed or negotiated outcomes is a flexible and discretionary way in which inspectors can achieve compliance. These range from an inspector identifying a hazard at a workplace and it being rectified immediately (also known as verbal directions), to a longer-term strategy of continuous improvement that is recorded in a safety performance improvement plan which is closely monitored. While at all times during this process the use of enforcement action remains available, it is only

⁴ Work Health Authority, Annual Report 2017-18, p 20.

applied by the inspector if the duty holder fails to be co-operative or fails to achieve the identified outcomes within the prescribed timeframes.

1.7 Stakeholder Feedback

Stakeholders provided the following feedback in relation to inspectorate and advisor activity:

- Various stakeholders suggested greater training in industry methods of operation and best work practices for inspectors.
- Greater engagement with HSRs and workers generally on-site visits.
- More proactive visits and activity.
- Greater use of directive powers and sanctions.
- Appropriate technology and database systems to assist inspectors and advisors when they are doing on site visits and assessments.
- Employers sought a partnership arrangement to ensure businesses have the right access to resources to improve their capability to create safe workplaces.
- Mentoring and training for inspectors should be improved, and more specialist skills developed and used.
- A need to streamline and modernise the processes used to issue prohibition notices and escalate to investigation.
- Inspectors generally agreed that their work is reactive and not proactive. Despite having the intention to be proactive, it was suggested this was a function of workload, an inadequate number of inspectors, lack of back-filling and administrative burdens.
- Lack of focus on high risk industries.
- Unions highlighted the number of workplace fatalities in the NT, which shows the NT has a fatality rate of 5.8 per 100,000 workers. This is nearly 300% more than Tasmania, the next highest, at 2.0 per 100,000 workers. Unions further submitted that this was unacceptable and needs to be addressed as a priority.
- NT WorkSafe could make use of analytics of the data accumulated to identify high risk areas and emerging trends.
- Unions suggested work needs to be done by the inspectorate to ensure Licensing and RTO's in the NT are more closely monitored.

TOR 2. Determine the effectiveness of NT WorkSafe's compliance regime and enforcement activities (including inspection, investigations and prosecutions), dispute resolution processes and policy development

2.1 Background

In determining the most appropriate enforcement action to undertake, NT WorkSafe are guided by the need to balance the community's expectations that duty holders will be

monitored and held accountable for non-compliance and the need to work with industry to support and build compliance capacity.⁵

NT WorkSafe's approach to enforcement and compliance is based on the *National Compliance and Enforcement Policy*⁶ (National Policy) and seeks to encourage compliance through a responsive regulatory model that combines the deterrence and accommodative regulation into a multifaceted enforcement regime. This approach recognises that regulatory tools such as persuasion and cooperation are just as important to achieving compliance as the imposition of punitive sanctions. This approach is aimed at achieving a balance between the two forms of regulation which acknowledges that the willingness and ability of a duty holder to comply is a key driver in determining the most appropriate enforcement action to be taken in a particular circumstance.

In deciding what the most appropriate regulatory response is, NT WorkSafe are guided by the National Policy and its enforcement pyramid (see Figure 1).

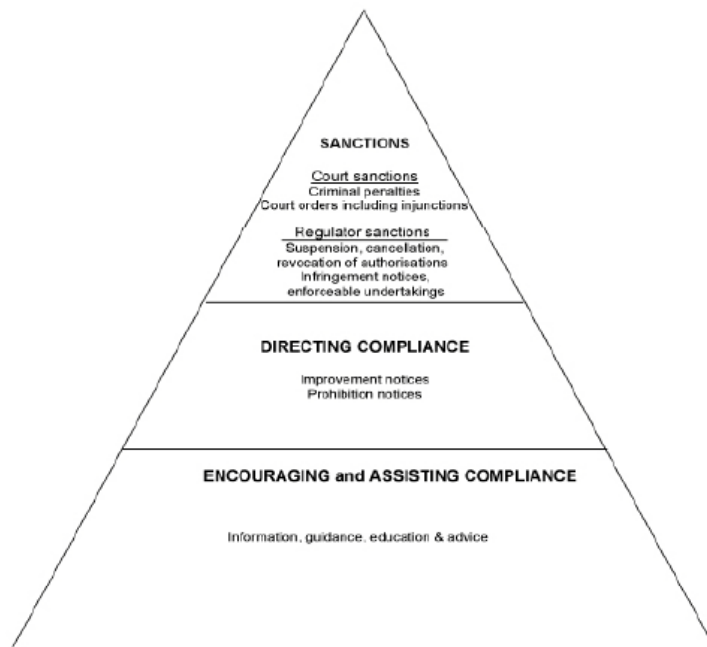


Figure 2 – National Compliance and Enforcement Policy Pyramid

The regulatory pyramid represents a proportional approach to the application of enforcement tools and shows that, as a regulator escalates up the pyramid, the regulatory strategy intensifies from persuasion through to sanctions of increasing severity. The premise behind the regulatory pyramid is that where an individual being regulated is being cooperative, the regulator in turn should attempt to achieve compliance through cooperative 'persuasive' measures. Conversely, where an individual is being uncooperative the regulator should escalate through the pyramid until punitive sanctions are required thus creating a framework where refusal to comply will result in increasingly severe enforcement action. This approach is not intended to suggest that enforcement

⁵ National Compliance and Enforcement Policy, p2.

⁶ <http://www.safeworkaustralia.gov.au/sites/swa/about/publications/pages/national-compliance-enforcement-policy>.

and compliance action should always commence with persuasive measures, but rather it acknowledges that more often than not compliance can be achieved through cooperative measures.

Other factors considered by NT WorkSafe in determining the most appropriate enforcement action to undertake include:

- the severity or extent of the potential risk or harm;
- the seriousness of the potential breach and the culpability of the duty holder;
- the duty holder's compliance history, attitude and the likelihood that the offence will be repeated;
- whether the duty holder was licensed or authorised to undertake the work;
- whether the enforcement tool used will encourage compliance or deter non-compliance;
- whether the duty holder has taken action to try and control a risk and whether the risk is imminent; and
- whether immediate action or a plan to take action will address the safety issue.⁷

Other activities undertaken by NT WorkSafe such as compliance campaigns use a combination of directive measures and other mechanisms to achieve outcomes. Sometimes an educative phase is used initially, with the workplace given the information, tools and opportunity to voluntarily address their issues before an inspector visits. In instances where the inspector still finds significant unmanaged risks, notices will be issued. The likelihood of there being outstanding risks however is considered to be lessened. In these cases, it is the combination of the educative phase and the likelihood of a site visit by an inspector which achieves widespread improvements even if an inspector does not select that particular workplace to visit.

2.2 Stakeholder Feedback

Stakeholders provided the following feedback in relation to compliance and enforcement policy and the provision of information and assistance by WorkSafe:

- Unions submitted that Infringement Notices are required to go through an "avalanche of bureaucracy" before an inspector can issue them and that this self-generated bureaucracy deters inspectors issuing them. Some inspectors agreed.
- Unions, employers and inspectors all expressed frustration at the lack of clear guidance on "how to do things right" from the inspectorate to Persons Conducting Business or Undertakings (PCBUs). It was noted that Small to Medium Enterprises (SMEs) in particular need assistance identifying what regulation is relevant to them and then assistance in implementing it for their specific context (i.e. what to do, or why, and how).
- Inspectors suggested a series of "best practice" templates for notices.
- The Key Principles (Consistency; Constructiveness; Transparency; Accountability; Proportionality; Responsiveness; Target) of the National Compliance and Enforcement Policy were supported.

⁷ National Compliance and Enforcement Policy, p7.

- The way in which inspections are conducted by individual inspectors (i.e. some may be flexible and look to the 'spirit' of the provision whereas others may stick to the written rules) can make identical regulation translate to very different compliance realities.
- Guidance material is critical to businesses understanding their duties and managing risk. This could include NT WorkSafe advising of its compliance priorities from time to time. Even more critical however is how inspectors interpret and use that guidance and apply it to the business they are present at for the inspection. The regulatory delivery needs to mirror and enhance the regulation. Any inconsistencies only serve to create further confusion and uncertainty about responsibilities under the law. The more complex the regulations are and the larger the volume of supplementary materials, the more likely you are to have inconsistencies.
- SMEs in particular need assistance identifying what regulation is relevant to them and then assistance in implementing it for their specific context (i.e. what to do, or why, and how). At the same time, SMEs are typically cautious of inspectors and do not necessarily know what to expect, what is required of them and what the inspector is looking for leading to fear and hostility.
- Codes or guidance material should reflect what an inspector will be looking for during an inspection and outline the corresponding risk management approach for that particular hazard. The inspector is clear on what to look for and what controls should be used and so is the business.

2.3 Development of the Australian Work Health and Safety Strategy 2012-2022

The Australian Work Health and Safety Strategy 2012-2022 (the Australian Strategy) builds on the National Occupational Health and Safety Strategy 2002–2012 and provides a framework to help improve work health and safety in Australia. The Strategy's vision is healthy, safe and productive working lives and its purpose is to drive key national activities, through collaboration between governments, industry, Unions and other organisations, to achieve improvements in work health and safety.⁸

Development of the Australian Strategy was informed by consultation with work health and safety experts and the wider community, and the final strategy was endorsed by all ministers responsible for work health and safety (including Queensland), the Australian Council of Trade Unions, the Australian Chamber of Commerce and Industry, and the Australian Industry Group.

The Australian Strategy sets out four outcomes to be achieved by 2022, these include reducing the incidence of work-related death, injury and illness; reducing exposure to hazards and risks; improving hazard controls; and improving work health and safety infrastructure⁹. To achieve these outcomes, the Australian Strategy highlights a number of priority industries and disorders that should be the focal point of prevention activities. It also provides national targets and performance indicators to determine the success of these activities. These targets and priority areas are outlined in Table 1 below.

⁸ Australian Work Health and Safety Strategy 2012-2022, p4.

⁹ Australian Work Health and Safety Strategy 2012-2022, p6.

Targets ¹⁰	Priority industries ¹¹	Priority disorders ¹²
A reduction in the number of worker fatalities due to injury of at least 20 per cent	Agriculture	Musculoskeletal
	Road transport	Mental disorders
	Manufacturing	cancers (including skin cancer)
	Construction	asthma
	Accommodation and food services	contact dermatitis
disorders resulting in one or more weeks off work of at least 30 per cent.	Public administration and safety	noise-induced hearing loss
	health care and social assistance	

Table 2 – National targets and priority industries/disorders

Reports on progress against the Australian Strategy are published annually¹³ and the strategy is being reviewed in 2017 to ensure it continues to generate sustained improvements in work health and safety.

2.4 Partnerships and collaboration

Working with industry, the community and other government departments to develop and implement health and safety strategies is a core pillar in regulatory efforts to build sustainable improvements in work health and safety outcomes. Through collaboration and partnerships, regulators are able to incorporate input and feedback from key stakeholders – an approach that has the ability to translate into a willingness to participate, engage and implement safe work behaviours and initiatives.

2.5 Stakeholder Feedback

Stakeholders provided the following feedback in relation to collaboration and partnerships:

- Partnerships can be advantageous if Employers in the NT embrace the opportunity to form a partnership with worker and employer groups.
- A number of research papers have demonstrated the intermediary role of industry associations, particularly for small and medium enterprises. Greater use of employer networks and partnerships would increase the effectiveness of regulator campaigns and help disseminate information to industry in greater numbers.

¹⁰ Australian Work Health and Safety Strategy 2012-2022, p7.

¹¹ Australian Work Health and Safety Strategy 2012-2022, p17.

¹² Australian Work Health and Safety Strategy 2012-2022, p17.

¹³ <http://www.safeworkaustralia.gov.au/sites/swa/australian-strategy/progress/pages/australian-strategy-progress>

- The key elements of successful engagement with industry are regular and importantly industry specific information provided in highly accessible formats. Having information filtered through an industry body is seen as preferable to receiving it through a regulator. Regulator bulletins and information while useful are seen as too general and focusing on high profile changes.
- Larger corporates who directly liaise with NT WorkSafe submitted that current processes and systems foster an environment of open communication and collaboration between the regulator and operator, which has provided mutual benefit to both. This environment of collaboration has assisted in interpretation of legislation and regulation, allowed better compliance with the intention of this legislation and also encouraged shared learnings with NT WorkSafe, this in turn has increased workforce safety. Of concern is that significant change to how NT WorkSafe communicate, administer and enforce the compliance functions of the WHS Act may endanger the current open and collaborative relationship.
- Measures for the success of partnerships suggested included attendance numbers could at advisory councils or sub committees, interactions with Unions, the number of organisations reached and qualitative feedback for engagement positive
- It was noted that a number of interstate regulators have established industry reference groups or committees such as Safe Work SAs – Construction Industry Safety Committee (CISC) or WorkSafe WAs – Construction Industry Safety Advisory Committee. An industry example is the oil and gas industries member led initiative ‘Safer Together WA / NT’. These groups meet every couple of months to discuss and progress matters of safety in the building and construction industry. Officers report on interventions and accident investigations and discuss upcoming campaigns and other relevant issues.
- Engaging with industry throughout the campaign development and delivery process enables greater targeting of relevant issues, industry-specific knowledge sharing, and greater buy-in which ultimately leads to greater safety and health outcomes.
- It was suggested that a data driven approach be taken to selected target industries for collaboration projects, for example using reportable Incidents, complaints raised, and reports from HSRs etc. A consultative approach via Reference Groups, Safety Councils or Sub Committees was also suggested.

2.6 Investigations

NT WorkSafe undertake investigations for a number of reasons including to determine the causes of an incident, to assess compliance with work health and safety laws, to determine what action may be needed to prevent further occurrences of similar incidents and to determine what action may be appropriate to enforce compliance with work health and safety laws. Lessons learnt from investigations also inform the development of work health and safety guidance and policy and may inform future changes to work health and safety laws.

It is clear that the inspectorate has a wide range of valuable experience and vocational training that many inspectors have brought with them from other occupations, such as police. However, this wide range of prior experience and training may be over relied upon in circumstances where an insufficient emphasis is placed on initial and CPD. For

example, many inspectors complained of having no, or at least inadequate, initial training and also of being unable to attend relevant vocational courses.

NT WorkSafe's lack of consistency in training would seem to have a direct impact on the consistency of its investigations. It seems to the Reviewer that there would seem to be very little consistency amongst investigations at the inspectorate level prior to a matter being reviewed by management. This occurs both within the Darwin office and outside of it. Such inconsistency amongst investigations is concerning. The Reviewer believes that the lack of consistency amongst investigations is negatively effecting consistency amongst prosecutions.

Consistency amongst investigations requires formal training. The Reviewer believes that the inspectorate conducting generalist investigations must have consistent initial and continuation training in the following areas:

- Legislative framework.
- Codes of practice.
- Initial scene attendance.
- Investigative skills – starting a file, proving legislative breaches, guarding against confirmation bias.
- Interviewing skills – Intermediate (witnesses, victims) and Advanced (Victim Impact Statements, Duty holder interview, PCBU interviews).
- Prosecutions – putting the file together, writing the case report and making recommendations, and giving evidence in court.

Having received this formal training, it is then incumbent on staff and management to maintain investigative standards in accordance with their training.

2.7 Stakeholder Feedback

Stakeholders provided the following feedback in relation to investigations:

- Inspectors sought greater information sharing on cases, and better guidance about when to prosecute.
- Inspectors raised what were said to be long delays in the processing of Incident assessments by managers.
- Inspectors sought better access to early legal advice when doing an investigation to better streamline our process and collect relevant evidence.
- All stakeholders supported nationally recognised accredited training and more Industry specific experience as part of the selection criteria and job application process, and ongoing CPD for inspectors.
- Time limits directed to be met to ensure close out of investigations is more expedient.

2.5 Prosecutions

Part 13 of the WHS Act provides the framework for NT WorkSafe to undertake prosecutions in relation to alleged breaches of the offence provisions under that Act. Under ss31-33 of the Act, legal proceedings can be commenced against a person or corporation for:

- reckless conduct (category 1 offence);
- failure to comply with a health and safety duty that exposes an individual to a risk of death or serious injury or illness (category 2 offence); or
- failure to comply with a health and safety duty (category 3 offence).

The decision to prosecute is guided by Northern Territory prosecutorial guidelines and model litigant rules, and the *National Compliance and Enforcement Policy* (National Policy). Broadly, the tests to be met before making a decision to prosecute are:

- the existence of a *prima facie* case, that is, whether the evidence is sufficient to justify the institution of proceedings;
- a reasonable prospect of conviction, that is, an evaluation of the likely strength of the case when it is presented in court; and
- a public interest test, which may include the following considerations:
 - the seriousness or, conversely, the triviality of the alleged offence or whether it is only of a technical nature;
 - any mitigating or aggravating circumstances;
 - the characteristics of the duty holder—any special infirmities, prior compliance history and background;
 - the age of the alleged offence;
 - the degree of culpability of the alleged offender;
 - whether the prosecution would be perceived as counter-productive, that is, by bringing the law into disrepute;
 - the efficacy of any alternatives to prosecution;
 - the prevalence of the alleged offence and the need for deterrence, both specific and general; and
 - whether the alleged offence is of considerable public concern.

Statistics on prosecutions and enforceable undertakings are set out in Table 3 below.

NT WorkSafe WHS Prosecutions

	12-13	13-14	14-15	15-16	16-17	17-18	18-19
Finalised legal proceedings	1	1	0	1	3	2	0
Total fines awarded by courts (\$'000)	120	5	0	152*	230	195	0

*Pay costs to the Work Health Authority in the sum of \$12,290

NT WorkSafe legal spend

	12-13	13-14	14-15	15-16	16-17	17-18	18-19 YTD
Amount (\$)	109,780*	48,341	5,199	64,719	24,618	137,798	23,918

*2012-13 agency-based lawyer provided for a period of time at \$88,785 and outsourcing.

NT WorkSafe WHS accepted Undertakings

	12-13	13-14	14-15	15-16	16-17	17-18	18-19
EUs accepted	0	0	0	3	2	3	2
Total min financial commitment (\$'000)	120	5	0	(1183)	94	(1213)	247
Regulator costs (\$)	0	0	0	20,718	4,400	102,278	4,054*

* Regulator costs for 2nd EU to be confirmed (approx. \$15,000)

Table 3 – Notifiable Incidents Investigated 2017-2018¹⁴

¹⁴(<http://www.worksafe.nt.gov.au/LawsAndCompliance/Pages/Prosecutions.aspx>) and (<http://www.worksafe.nt.gov.au/LawsAndCompliance/enforceable-undertakings/Pages/default.aspx>)

Death of a person

Description of Activity	Completed No.	Ongoing No.
Comprehensive investigations	20	6
Prosecution	3	5

Serious injury or illness of a person

Description of Activity	Completed No.	Ongoing No.
Preliminary investigations	11	2
Comprehensive investigations	9	1
Prosecution	0	0

Dangerous incidents

Description of Activity	Completed No.	Ongoing No.
Preliminary investigations	6	2
Comprehensive investigations	2	2
Prosecution	0	1

Note: These tables refer to 2 types of investigation. A preliminary investigation establishes jurisdiction and evaluates the evidence at hand, and is triggered when there is reasonable belief a breach of legislation has occurred requiring possible comprehensive investigation. A comprehensive investigation is authorised by the Director of Operations when the circumstances of an incident or complaint, such as severity of an injury or gravity of a contravention, warrants consideration of higher order enforcement tools (Court or Regulator sanctions). A comprehensive investigation is undertaken for all fatalities notified, including those out of jurisdiction or relating to other medical episodes. These activities are further broken down by type of notifiable incident and the status of activity in the tables.

Table 4 – Notifiable Incidents Investigated 2017-2018¹⁵

2.8 Prosecutions since the commencement of the WHS Act in 2012

An overview of completed prosecutions since the commencement of the WHS Act is given below:

Barge Express Operations Pty Ltd – Delivered on 12 December 2018

On the 8 January 2017 a deckhand was found floating face down in the water after he lost his balance when climbing from the barge onto the wharf, with no gangway in place to bridge the gap.

On the 13 December 2018 the defendant was convicted and fined \$190,000 and the mandatory victim’s levy of \$1,000 for breaching section 32 of the WHS Act.

In the matter of *Work Health Authority v Barge Express Operations Pty Ltd* the sentencing remarks of Her Honour Judge Morris in the Local Court at Darwin are available online: <http://www.worksafe.nt.gov.au/Documents/barge-express.pdf>

Gibbo’s Tyres Pty Ltd – Delivered on 30 April 2018

On the 19 November 2015 a young child received fatal crush injuries after a truck tyre fell on him as his family waited for a tyre on their vehicle to be replaced at a Katherine business.

On the 19 March 2018 the defendant was convicted and fined \$135,000 for breaching section 32 and \$7,000 for breaching section 38 of the WHS Act. A victim’s levy of \$2,000 was also imposed.

¹⁵ Work Health Authority, Annual Report 2017-18, p 21 (<http://www.worksafe.nt.gov.au/PDF%20Conversion/wha-annual-report-2017-18.pdf>)

In the matter of *Stephen Gelding v Gibbo's Tyres Pty Ltd*, the sentencing remarks of His Honour Judge Macdonald in the Local Court at Katherine are available online: <http://www.worksafe.nt.gov.au/Documents/gibbos-tyres-pty-ltd.pdf>

NT Christian Schools – Delivered on 4 August 2017

On the 6 August 2015 a student was run over and killed by a four-wheel drive that he and fellow students were pulling at the Gawa School sports carnival on Elcho Island.

On the 4 August 2017 the defendant was convicted and fined \$50,000 for a breach of section 32 of the WHS Act. A mandatory \$1500 victims levy was also imposed in relation to the finding of guilt.

In the matter of *Work Health Authority v Northern Territory Christian Schools*, the sentencing remarks of Her Honour Judge Morris in the Local Court at Darwin are available online: <http://www.worksafe.nt.gov.au/Documents/nt-christian-schools.doc>

Top Developments (NT) Pty Ltd – Delivered on 12 May 2017

In February 2016 two separate complaints were received about a worker climbing a tower crane at a height of approximately 18 to 21 meters without appropriate fall protection.

On the 12 May 2017 the defendant was convicted and fined \$11,800 for a breach of section 32 of the Act. The defendant was also ordered to pay a victim levy and costs totalling \$3,500.

In the matter of *Work Health Authority v Top Developments (NT) Pty Ltd*, the sentencing remarks of Her Honour Judge Fong Lim in the Local Court at Darwin are available online: <http://www.worksafe.nt.gov.au/Documents/top-developments.doc>

Ben's Tree Service Pty Ltd – Delivered on 20 July 2016

On the 24 March 2015 a worker was seriously injured whilst shredding trees and palm fronds in preparation for an approaching cyclone.

On the 20 July 2016 the defendant was convicted and fined \$15,000 for a breach of section 32 of the Act.

In the matter of *Police v Ben's Tree Service Pty Ltd*, the sentencing remarks of His Honour Judge Cavenagh in the Local Court at Darwin are available online: <http://www.worksafe.nt.gov.au/Documents/bens-tree-service.doc>

The Rock Tour Pty Ltd – Delivered on 23 June 2016

On the 15 June 2014 a tourist was fatally injured when climbing down onto an overhanging ledge below Kestrel Falls look out.

On the 23 June 2016 the defendant was convicted and fined \$140,000 for a breach of section 32 of the Act.

In the matter of *Stephen Hugh Gelding v The Rock Tour Pty Ltd*, the sentencing remarks His Honour Judge Bamber in the Local Court at Alice Springs are available online: <http://www.worksafe.nt.gov.au/Documents/the-rock-tour.doc>

Perkins Welding & Fabrication Pty Ltd – Delivered on 15 July 2015

On the 10 April 2012 a worker sustained a workplace injury and was admitted as an inpatient at the Royal Darwin Hospital. Enquiries proved that the company never held an insurance policy or indemnity from an approved insurer, nor did they notify NT WorkSafe of the incident.

On the 15 July 2012 the defendant was convicted and fined \$58,625 for a breach of section 126 of the Workers Rehabilitation and Compensation Act and \$16,400 for a breach of section 38 of the Act.

In the matter of *Police v Perkins Welding & Fabrication Pty Ltd*, the sentencing remarks His Honour Stipendiary Magistrate Neill in the Work Health Court in Darwin are available online: <http://www.worksafe.nt.gov.au/Documents/perkins-welding-and-fabrication.doc>

Arafura Plumbing Pty Ltd – Delivered on 9 October 2013

On the 18 June 2012 Arafura Plumbing Pty Ltd were found to be in breach of a notice prohibiting the transport and storage of flammable gas in enclosed vehicles.

On 9 October 2013 the defendant was convicted and fined \$5,080 for a breach of sections 19 and 197 of the Act.

In the matter of *Police v Arafura Plumbing Pty Ltd*, the sentencing remarks of His Honour Stipendiary Magistrate Maley in the Work Health Court at Darwin are available online: <http://www.worksafe.nt.gov.au/Documents/arafura-plumbing.doc>

2.9 Stakeholder Feedback

Stakeholders provided the following feedback in relation to prosecutions:

- Employers supported the application of the National Compliance and Enforcement Policy is supported. In accordance with clause 6 of that Policy, the tools available to NT WorkSafe (giving advice; resolving safety disputes; through to enforcement action) would be appropriate. The use of enforceable undertakings is supported.
- Employers suggested working constructively with business, particularly small business, particularly with an emphasis on giving advice to help them create safer workplaces.
- Unions submitted that, to the best of their knowledge, most if not all prosecutions referred to at section 2.5 of the Discussion Paper were resolved by way of guilty plea. The apparent absence of any contested hearings regarding the extent of duties suggests that either (a) NT Worksafe is only prosecuting "sure things" or (b) businesses feel pressured to concede liability rather than to contest charges. It may be informative to analyse data regarding the circumstances and number of decisions in which decisions were made by NT Worksafe either not to prosecute matters, or to withdraw charges after commencing proceedings.
- Unions submitted that putting PCBUs or companies through the court system would be better deterrent than the approach NT WorkSafe demonstrates currently.
- Inspectors noted that the NT Worksafe relationship with the Coroner's office was historically very good but has deteriorated due to a failure to prosecute some cases.

- Inspectors raised the issue of jurisdictional questions issues continuously delaying the process, as well as an over emphasis on legal costs rather than providing justice.
- Unions submitted that the penalties are inadequate
- Unions sought a right to prosecute, where the regulator fails to initiate a prosecution, and a reduction in the time from six months to one month in section 231(1)(b) of the WHS Act to make a written request to the regulator that a prosecution be brought.
- Prohibit the accepting by the regulator of an enforceable undertaking where an incident has resulted in the death of a person.

2.10 Enforceable undertakings

Enforceable undertakings are voluntary agreements where a person agrees to take certain specified actions to rectify an alleged breach of the work health and safety laws or improve their work health and safety performance. In 2016-17, the Work Health Authority accepted two enforceable undertakings in relation to an incident in which a worker sustained serious injuries after falling from a height of approximately five metres at a construction site in Darwin.

A person can propose an enforceable undertaking as an alternative to prosecution for a contravention of alleged contravention of the Act, except in relation to a category one offence. An enforceable undertaking is seen as mutually beneficial in that:

- the person or company protects their reputation by not gaining a recorded conviction;
- tangible improvements are made to work health and safety as a result of the undertaking;
- the person or company agrees to cease and never again allow the behaviour that led to the contravention to occur; and
- a positive benefit to the community is made.

According to Parker's research¹⁶, in the context of trade practices, enforceable undertakings provide regulators with:

more innovative, expansive and preventive remedies than are available through court orders. They can both attract management attention, and then can capitalise on that by requiring the company to appoint appropriate staff and implement a compliance program to meet particular standards and by requiring ongoing attention to audits and reports. This will, however, only be done if enforceable undertakings require independent review or audit of compliance with the undertakings.

Other arguments supporting the use of enforceable undertakings include that:

- enforceable undertakings are consistent with a graduated approach to enforcement;
- they provide a speedier and more predictable response to non-compliance than court proceedings;

¹⁶ Parker C. (2003) 'Arm Twisting, Auditing and Accountability: What Regulators and Compliance Professionals should know about the Use of Enforceable Undertakings', presentation to the Australian Compliance Institute, Melbourne, 28th May.

- by involving the alleged offender in developing the conditions of the enforceable undertaking, ongoing commitment to sustainable improvements is more likely and by allowing affected persons to express views, the principles of restorative justice will (to that extent) be applied; and
- depending on the nature of the undertaking it can provide significant benefits, not only to the immediate workplace and workers, but to the industry as a whole.

An overview of completed prosecutions since the commencement of the WHS Act is given below:

Northern Transportables Pty Ltd – Accepted on 25 October 2018

It was alleged that in October and November of 2015, Northern Transportables Pty Ltd were contracted to refurbish three properties and allowed unlicensed workers to remove asbestos from two of the properties without training or appropriate safety equipment, despite knowing the properties contained asbestos.

It was alleged that Northern Transportables Pty Ltd failed to comply with health and safety duties under section 32 of the WHS Act as well as breaching numerous Regulations.

An undertaking given by Northern Transportables Pty Ltd in relation to the alleged contravention has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act. Northern Transportables Pty Ltd has committed to a range of activities to improve health and safety standards in the workplace and deliver health and safety initiatives to the industry and wider community. These activities include:

- Undertake employee safety climate surveys.
- Create workplace safety training videos and online induction training.
- Update the current paper-based induction to an interactive cloud-based system.
- Undertake safety leadership training for all managers and supervisors.
- Employ a Senior Business Safety Strategist.
- Create a dedicated safety page on the company website and publish for industry use asbestos safety strategies, and other safety resources.
- Fund asbestos awareness training for Northern Territory manufacturing, building and construction industry apprentices.
- Provide \$20,000 towards Vocational Education and Training (VET) Scholarships for Charles Darwin University students.

The amount spent on work health and safety activities to date is \$33,180.

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace – \$124,050,
- industry – \$69,000, and
- the community – \$20,000.

The financial commitments to the undertaking have a total minimum expenditure of \$246,230.

FR Tiling Pty Ltd – Accepted on 11 September 2018

On 24 August 2016, a worker fell from the first floor of a residential home under construction. He was cleaning tile grout when he stepped into an unguarded void. The worker fell 2.9 metres resulting in a break of the left femur.

It was alleged that FR Tiling Pty Ltd and its Director, Mr Farshid Yaweri failed to comply with their health and safety duties under section 32 of the WHS Act.

An undertaking given by FR Tiling/Director in relation to the alleged contraventions has been accepted by the regulator as an enforceable undertaking under Part 11 of the WHS Act.

FR Tiling/Director has committed to a range of activities to improve health and safety in the workplace and deliver health and safety initiatives to the wider community. These activities include:

- FR Tiling staff to undertake additional work health and safety training.
- FR Tiling staff to undertake First Aid training.
- Training needs analysis conducted for FR Tiling staff and a training schedule developed for the company.
- FR Tiling director required to undertake to Due Diligence as a Director training.
- FR Tiling director required to undertake training for hazard identification and other WHS processes.
- Work health and safety documents translated for staff with limited English literacy.
- Video resource on fall protection developed for industry.
- Lessons learnt presentation by FR Tiling director during the WHS module of a career readiness program.
- \$18,400 worth of tiling services for the RSPCA Darwin Shelter to reduce the accumulation of biohazards, and reduce the risk of slips, trips and falls.

The amount spent on work health and safety activities to date is approximately \$10,000 (not included below).

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace - \$9,060;
- industry - \$7,000, and
- the community - \$18,400.

The financial commitments to the undertaking have a total minimum expenditure of \$34,460.

Austral Fisheries Pty Ltd – Accepted on 22 June 2018

On 29 November 2013 an accident occurred on an Australian fishing company Austral Fisheries Pty Ltd vessel “Newfish 1” in the Gulf of Carpentaria while travelling to Cairns from fishing activities.

A deckhand was electrocuted when a wave breached the deck while he was using an electric angle grinder. The grinder was plugged into an electrical socket that was not protected by a residual current device.

It was alleged that Austral Fisheries Pty Ltd failed to comply with health and safety duties under section 32 of the WHS Act.

An undertaking given by Austral Fisheries Pty Ltd in relation to the alleged contraventions has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act.

Austral Fisheries Pty Ltd has committed to spend \$967,700 (minimum) on a range of activities to improve health and safety in the workplace and deliver health and safety initiatives to the wider community especially focused on the fishing and related industries. The amount spent on work health and safety activities to date is in excess of \$200,000 (not included below). The activities include:

- Develop and implement an online learning management system (LMS) for all Austral employees, workers and contractors.
- Employ a dedicated workplace health and safety advisor.
- Purchasing and maintaining defibrillators for all Austral fleet vessels.
- Provide funding to create a project (SeSAFE) with a national focus for the Australian wild capture fishing industry.
- Provide and present lessons learned from the incident to various forums around Australia.
- Employ a dedicated senior executive to help develop and implement the SeSAFE project and to develop strategies to engage the broader fishing industry.
- Sponsor the National Seafood Industry Safety Award in memory of the young worker in 2019 and 2021.
- Donate to the Sea Shepherd for a full scale beach clean-up in conjunction with traditional owners on the Wessel Islands.
- Provide \$50,000 to the Tiwi College Junior Indigenous Guide program.
- Further provide \$50,000 to make the SeSAFE modules available to NT Training establishments to improve safety in the general NT fishing industry.
- Contribute and seek to raise up to \$1 million to provide extension and legacy support for the SeSAFE project.

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace - \$510,200;
- industry - \$307,500, and
- the community - \$150,000.

ACSM Builders – Accepted on 11 May 2018

On 24 August 2016, a worker employed by a subcontractor, fell from the first floor of a residential home under construction. He was cleaning tile grout and stepped into an unguarded void. He fell approximately 2.9 metres resulting in a break of the left femur.

It was alleged that ACSM Builders Pty Ltd and its Director, Mr Sakellarios Athanasiou failed to comply with their health and safety duties under section 32 of the Act.

An undertaking given by ACSM Builders in relation to the alleged contraventions has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act.

ACSM Builders has committed to a range of activities to improve health and safety in the workplace and deliver health and safety initiatives to the wider community. These activities include:

- Employ a dedicated Safety Officer in the workplace to develop, implement and continually improve appropriate systems of work. This includes monitoring all ACSM Builders workers and subcontractors on site.

- Develop the skill set of ACSM Builders workers by providing accredited training relevant to the construction industry.
- Improve the company's toolbox meetings.
- Purchase two scissor lifts and provide relevant training to reduce the risk of working at heights to ACSM Builders workers.
- Purchase a temporary power site board to reduce the risk of electric shocks.
- Fund the training in Certificate IV in OH&S for at least one worker to support the Safety Officer.
- Organise an accredited working at heights course for subcontractors regularly used by ACSM Builders.
- Present a 'lessons learnt' to apprentices in the NT construction industry, including details of the incident and the importance of following safety procedures.
- Organise working at heights or basic scaffolding courses for NT construction industry apprentices to supplement their training.
- Sponsor or assist in promoting the importance of fall protection in the construction industry during Safe Work Month 2018 or 2019.
- Donate \$10,000 to CareFlight.
- Mentor and provide information to local people and subcontractors on working at height techniques and fall protection when working in remote communities.

The amount spent on work health and safety activities to date is \$12,800 (not included below).

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace – \$176,500
- industry – \$23,000, and
- the community – \$10,000.

The financial commitments to the undertaking have a total minimum expenditure of \$209,500.

Downer EDI Mining – Accepted on 9 February 2018

On 22 March 2015 two workers loss consciousness after allegedly being exposed to a toxic environment.

It was alleged that Downer EDI Mining Pty Ltd failed to comply with health and safety duties under sections 32 and 39 of the Act.

An undertaking given by Downer EDI Mining Pty Ltd in relation to the alleged contraventions has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act.

Downer EDI Mining Pty Ltd has committed to a range of activities to improve health and safety in the workplace and deliver health and safety initiatives to the wider community. These activities include:

- Develop and implement a Digital Pre-Task Assessment Training Package (workplace inspections, ventilation and hazard rectification).
- Develop and implement an electronic storyboard health campaign on healthy lifestyle, healthy heart, prostate cancer, mental health and make available to NT industry through distribution at industry forums.

- Develop and implement a digital personal safety message campaign focused on hazard awareness and hazard rectification including ventilation and heat stress management and make available to NT industry through distribution at industry forums.
- Present the findings of the incident and activities committed to under the enforceable undertaking to NT industry forums including, Mining the Territory Conference, Katherine Regional Mining and Exploration Forum and NT Safe Work Month.
- Jumbo guard presentation to industry forums and/or sites.
- Sponsor the Mining the Territory Conference and provide information on the digital health campaigns and digital safety messages.
- Sponsor the Katherine Regional Mining and Exploration Forum.
- Donation to Careflight NT.
- Pay for four mental health first aid courses for community groups and members of the public.

The amount spent on work health and safety activities to date is \$20,000.

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace – \$60,000
- industry – \$40,000, and
- the community – \$36,000.

The financial commitments to the undertaking have a total minimum expenditure of \$136,000.

Tomazos Group Pty Ltd – Accepted on 5 April 2017

On 21 April 2015 a worker sustained serious injuries after falling from a height of approximately five metres at a Tomazos Group Pty Ltd construction site in Darwin.

It was alleged that Tomazos Group Pty Ltd failed to comply with health and safety duties under sections 32, 38 and 39 of the Act and regulations 39 and 300 of the Regulations.

An undertaking given by Tomazos Group Pty Ltd in relation to the alleged contraventions has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act. Tomazos Group Pty Ltd has committed to a range of activities to improve health and safety in the workplace and deliver health and safety initiatives to the wider community. These activities include:

- Providing Certificate IV in work health and safety training to workers and subcontractors.
- Creating an additional position to help oversee work health and safety.
- Providing additional training to workers and management to reinforce the right to stop unsafe work; and
- Providing donations to Men's Shed and Oz Help.

The amount spent on work health and safety activities to date is \$10,000.

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace – \$30,000;

- industry – \$10,000, and
- the community – \$10,000.

The financial commitments to the undertaking have a total minimum expenditure of \$60,000.

JGA Concreting Pty Ltd – 5 April 2017

On 21 April 2015 a worker employed by JGA Concreting Pty Ltd sustained serious injuries after falling from a height of approximately five metres at a construction site in Darwin.

It was alleged that JGA Concreting Pty Ltd failed to comply with health and safety duties under section 32 of the Act.

An undertaking given by JGA Concreting Pty Ltd in relation to the alleged contraventions has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act. JGA Concreting Pty Ltd has committed to a range of activities to improve health and safety in the workplace and deliver health and safety initiatives to the wider community. These activities include:

- Providing training to workers in work health and safety, dogging and rigging, working at height and forklift training.
- Translating Safe Work Method Statements (SWMS) and internal policy documents into Greek.
- Publishing translated SWMS on the JGA Concreting website for general industry use.
- Providing donations to the Charles Darwin University English Language Program, the Essington School, children's charities and sporting organisations.

The amount spent on work health and safety activities to date is \$9,000.

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace – \$10,420
- industry – \$14,000, and
- the community – \$20,000.

The financial commitments to the undertaking have a total minimum expenditure of \$53,420.

The Trustee for the Northline Unit Trust – Accepted on 6 April 2016

On 17 April 2014, a customer of The Trustee for the Northline Unit Trust (Northline) was severely injured by falling freight during the unloading of a truck at the Gunbalanya service station.

It was alleged that Northline failed to comply with health and safety duties under section 32 of the Act.

An undertaking given by Northline in relation to the alleged contravention has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act. Northline has committed to a range of activities to improve health and safety standards in their workplace and deliver health and safety initiatives to the heavy vehicle transport industry and the wider West Arnhem community. These activities include:

- Engagement of an independent WHS consultant to conduct a major review and upgrade of safety management systems for the Darwin depot and surrounding remote delivery locations as a pilot case. This will be rolled out nationally following Northern Territory implementation.
- Undertaking an external audit of Northline's Darwin safety management system to verify compliance with AS/NZS4801.2001.
- Introduction of new learning and development programs for staff.
- Implementation of a formal external program to verify competency of forklift and heavy vehicle drivers.
- Investigation and communication of best practice options for braking systems, external vehicle cameras and side under run protection to the industry to educate operators about advancements in heavy vehicle safety systems.
- Development and delivery of a Remote Community Heavy Vehicle Awareness Campaign designed to improve community awareness and safety understanding of heavy vehicles and loading zones used by operators.

The amount spent on work health and safety activities to date is \$8,400.

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace – \$120,400 for NT activities, with additional costs for national implementation,
- industry – \$25,780, and
- the community – \$15,000.

The financial commitments to the undertaking have a total minimum expenditure of over \$160,000.

Kalidonis Pty Ltd – Accepted on 4 March 2016

On 15 March 2014, workers engaged by Kalidonis Pty Ltd to renovate the office at 16 McMinn Street, Darwin were potentially exposed to asbestos.

It was alleged that Kalidonis Pty Ltd failed to comply with health and safety duties under section 32 of the Act.

An undertaking given by Kalidonis Pty Ltd in relation to the alleged contravention has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act. Kalidonis Pty Ltd has committed to a range of activities to improve health and safety standards in the workplace and deliver health and safety initiatives to the industry and wider community. These activities include the:

- Engagement of an independent WHS consultant to audit safety systems.
- Ongoing proactive consultation with workers and others to discuss WHS obligations in the construction industry.
- Development of safety systems working towards WHS compliance in accordance with AS 4801.
- Translation of safety systems into Greek to be distributed for use within the construction industry.
- Donation of concreting works and awning to the Darwin Surf Life Saving Club to provide a safe environment with shade cover.

The amount spent on work health and safety activities to date is \$16,000.

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace – an estimated ongoing cost of \$12,000 to \$24,000
- industry – \$5,000, and
- the community – \$44,000.

The financial commitments to the undertaking have a total minimum expenditure of \$77,000.

Alcan Gove Pty Ltd – Accepted on 18 December 2015

On 25 February 2014, an Alcan Gove Pty Ltd worker suffered fatal injuries while attending to a maintenance issue at the Lime Calcination Plant in Nhulunbuy, Northern Territory. The incident occurred while the worker was investigating a faulty reverse closing trap. The worker, who was working by himself at the time, was crushed between the counterweight and service hopper chute.

It was alleged that Alcan Gove Pty Ltd failed to comply with health and safety duties under Section 32 of the Act.

An undertaking given by Alcan Gove Pty Ltd in relation to the alleged contravention has been accepted by the regulator as an enforceable undertaking under Part 11 of the Act. Alcan Gove Pty Ltd has committed to a range of activities to improve health and safety standards in the workplace and deliver health and safety initiatives to the industry and wider community. These activities include the:

- Introduction of a mandatory 'Human Performance' safety program focused on identifying and assessing the human behaviours that impact safety performance in a workplace and equipping workers and leaders with the tools they need to manage those factors.
- Production of a training video based on the incident, to be used to communicate the lessons learnt and the importance of isolation in industrial environments.
- Provision of internal resources to develop and conduct mining safety courses at the proposed Gumatj Mining Centre.
- Delivery of presentations regarding the incident at relevant industry forums.
- Provision of funding to community groups to promote or undertake activities related to marine safety.
- Provision of funding for a subsidised St John's First Aid course for Nhulunbuy residents.
- Provision of funding to subsidise the cost of specialist health and safety systems advice and support for local businesses.
- regulator's costs.

The amount spent on rectifications and activities to date is \$806,908 (approximately).

The financial commitment of the activities proposed in the undertaking are:

- workers or the workplace – \$644,560
- industry – \$83,000, and
- the community – \$218,400.

The financial commitments to the undertaking have a total minimum expenditure of over \$945,000.

2.11 Stakeholder Feedback

Stakeholders provided the following feedback in relation to enforceable undertakings:

- Unions sought to exclude fatalities from the circumstances in which an enforceable undertaking can be used, citing community expectations of justice.
- Unions sought to exclude from enforceable undertakings PCBUs where there is evidence of previous breaches of the Act or Incident Notifications raised about the Officer, PCBU or Body Corporate.
- Unions submitted that a person that holds a duty in the Act should not have the option of a sanction if there is a fatality or serious injury as there is no finding of guilt or conviction attached with a sanction. The impact of either a death or serious injury on a worker's family, friends, or co-workers has everlasting, detrimental consequence.
- Employers supported the use of enforceable undertakings generally.
- Employers submitted that at the Category 2 offence level there are circumstances where an enforceable undertaking will be appropriate for a fatality, such as in the cases of suicide, deaths of family members or partners. The removal of the regulator's discretion as currently exists to allow an enforceable undertaking could stifle these far-reaching benefits and safety improvements. Employers strongly recommend that this option not be removed for Category 2 fatalities as its use often results in direct improvements to safety within businesses and industries that would not occur if prosecution was the only option (or limited to exceptional circumstances).
- Employers noted improvements resulting from enforceable undertakings. They were of the view that NT WorkSafe should use enforceable undertakings when the circumstances allow for it, but where a fatality occurs they should only be used in consultation with the family of the deceased.

TOR 3. Determine whether NT WorkSafe has the appropriate balance of regulation of safety (including prosecutions and enforcements) and education and awareness across the Northern Territory.

Compliance is best achieved through informed and cooperative measures. Consequently, awareness and education activities, the provision of information and guidance about what compliance looks like, and how to build a mature safety culture, should be a core element of the regulatory model. NT WorkSafe has been active in providing information and advice sessions.

Description of Activity	No.
Information / Education sessions	240
Workplace visits	5,171

Table 5 – Summary Inspectorate Activity for 2017-2018¹⁷

3.1 NT WorkSafe's engagement with industry

Ensuring employers and workers understand what compliance looks like and how to build a mature safety culture is a core element of NT WorkSafe's enforcement and compliance approach. In particular, providing workplaces with information that is practical, relevant, and easy to use for their specific industry is crucial in enabling businesses to implement their own safety strategies. This is especially so with regard to SMEs.

Additionally, the promotion of knowledge about how to build effective safety leadership and culture within organisations enables workplaces to sustainably drive safety improvements.

To improve proactive engagement with industry, NT WorkSafe has increased its contribution at industry conferences and events through sponsorship and participation as an exhibitor. Information relevant to attendees is on hand at the NT WorkSafe booth, which is manned by NT WorkSafe inspectors and Advisory staff.

In 2017-18, NT WorkSafe participated in the following events:

- AFL Northern Territory Ltd – Big Rivers Football League sponsorship from January 2016 to January 2019; and
- 2017 Skills, Employment and Careers Expo.

In 2016-17, NT WorkSafe participated in the following events:

- NT Resources Week – 16 to 17 August 2016;
- Safety Institute of Australia (OHS in Challenging Environments) – 6 to 7 September 2016;
- NT Cattlemen's Association Annual Conference – 30 to 31 March 2017; and
- AFL Northern Territory Ltd – Big Rivers Football League sponsorship from January 2016 to January 2019.

In 2015-16, NT WorkSafe participated in the following industry events:

- NT Resources Week – 25 to 27 August 2015;
- SIA WHS Conference – 7 to 8 October 2015;
- NT Cattlemen's Association Annual Conference – 17 March 2016;
- Katherine Regional Mining and Exploration Forum – 24 and 25 May 2016; and
- AFL Northern Territory Ltd – Big Rivers Football League sponsorship from 8 January 2016 to 8 January 2019.

In 2014-15, NT WorkSafe participated in the following industry events:

- NT Resources Week - 20 August 2014;
- SIA WHS Conference - 30 October 2014;

¹⁷ Work Health Authority, Annual Report 2017-18, p 21
<http://www.worksafe.nt.gov.au/PDF%20Conversion/wha-annual-report-2017-18.pdf>

- Alice Springs Mining Services Expo - 17 March 2015;
- NT Cattlemen's Association Industry Conference - 26 March 2015;
- Katherine Regional Mining Expo - 26 May 2015;
- Darwin Plumbing Trade Expo - 27 May 2015; and
- Australian Hotels Association Expo - 3 June 2015.

In 2013-14, NT WorkSafe participated in the following industry events:

- NT Resources Week – September 2013;
- Alice Springs Mining Services Expo – March 2014;
- Safety in Action Darwin – March 2014;
- Northern Territory Cattlemen's Association AGM and Industry Conference – March 2014;
- 2014 AHA (NT) Oamps Trade Show – May 2014; and
- Katherine Regional Mining and Exploration Forum – May 2014.

3.2 Small Business Safety Program

Since early 2016, the PAS unit has incorporated a Small Business Safety Program (SBSP). The program is confidential, free of charge and allows business owners to consult with Small Business Safety Advisors (the Advisors). The Advisors are not authorised officers and therefore have no delegated powers under the Act.

The SBSP is available to small businesses across the Territory. Advisors travel to regional and remote areas to assist, educate and empower small businesses to manage their own work health and safety processes.

In 2017 – 2018 a total of 146 businesses accessed the Small Business Safety Program, which was up from a total of 114 businesses in 2016-2017. These businesses cover a wide range of industry sectors including: building and construction, tourism and hospitality, agriculture, retail, manufacturing, and personal services.

3.3 Young Worker Program

In 2016 the Operations unit identified that young workers (aged between 16 and 24 years of age) are a high-risk work group, entering the workforce with limited skills and experience. Workers' compensation statistics show that approximately 300 young workers in the Northern Territory are injured in the workplace each year.

In response, the Operations unit developed and implemented the Young Worker Program. The program is designed to educate young workers and their employers about various work health and safety topics including:

- rights and responsibilities of employers and workers;
- duty of care;
- incident notification;
- workplace consultation;
- hazard identification; and
- risk management

Through the program, the Operations unit engages with young workers and their employers by delivering information sessions, workshops, toolbox talks, team meetings and management presentations. In 2017-2018 the program delivered 36 sessions to young workers and their employers, which was up from 26 sessions in 2016-2017.

A dedicated page has been published on the NT WorkSafe website to support the program.

3.4 Remote Community Work Health and Safety Initiative

In 2016 the Operations unit designed, developed and implemented the Remote Community Work Health and Safety Initiative in partnership with North East Arnhem Land Aboriginal community stakeholders. Twenty-one businesses and three Aboriginal Corporations were involved in development of the program which aimed to improve the safety culture in workplaces and encourage participants to apply the same safety focus at home.

The program aimed to ensure that remote Aboriginal workers were given accessible, culturally appropriate work health and safety training to improve the safety culture throughout the East Arnhem community.

NT WorkSafe developed three culturally appropriate short films for the region as well as other guidance and educational materials. Films were produced locally, starred local workers and residents and were aired in-country and published online through the Safe Work Australia virtual seminar series website. The films are:

- *NT WorkSafe WHS Consultation in North-East Arnhem Land* – developed to promote the Remote Community Work Health and Safety Initiative;¹⁸
- *Djaka Madagarritj'ku (Keep Safe From Danger)* – developed to highlight the importance of identifying hazards and risks encountered in daily life as well as the workplace;¹⁹ and
- *Wänayi Ruñiyi (Come Home Safely)* – developed as a local version of the successful Victorian “homecomings” work health and safety film. The film explores the potential impacts of poor safety practices on family.²⁰

Following interest in the program from stakeholders on Groote Eylandt, the Tiwi Islands, the Victoria Daly, Roper Gulf and Central Desert regions the Operations unit will plan for further expansion of the program.

NT WorkSafe commenced initial consultation with remote Aboriginal community organisations in Alice Springs in January 2018 and met with stakeholders in Alice Springs at the Central Land Council's 2018 Ranger Camp at Hamilton Downs Youth Camp on 20 to 21 March 2018.

NT WorkSafe began mentoring a Yolngu Safety Champion in February 2018, in both North East Arnhem Land and in Darwin. This mentoring was designed to help increase work health and safety knowledge in the community.

3.5 Stakeholder Feedback

Stakeholders provided the following feedback in relation to NT WorkSafe's effectiveness in relation to providing compliance information and promoting work health and safety awareness:

¹⁸ Available online at: <https://www.safeworkaustralia.gov.au/improving-indigenous-work-safety>

¹⁹ Available online at: <https://www.safeworkaustralia.gov.au/media/djaka-madagarritjku-keep-safe-danger>

²⁰ This film was produced in 2016-2017 for broadcast and online publication in 2017-2018.

- Unions submitted that that there was a lack of directive compliance, awareness programs or sufficient engagement activities with major stakeholder in the NT.
- Chamber NT was not aware of a number of programs outlined in the discussion paper, nor any broader awareness of engagement activities. Member feedback in this respect is also minimal. However, the engagement by NT WorkSafe with industry set out in the Discussion Paper is acknowledged. Given the NT Chamber represents over 1250 members across all industries and business sizes the Chamber would welcome NT WorkSafe events through its member network; for example, making use of Business at Sunset events; presenting at Chamber seminars and training sessions
- It was submitted that remoteness and language barriers in remote areas limits the understanding of the safety laws. Education and training of staff within NT WorkSafe on the tools and resources available to be able to close the language gap and help promote safety effectively in remote areas.
- The regulator should consult with Unions to help identify shortfalls in industry safety systems. This would assist the regulator when approving an EU guide companies to appropriate actions to address those industry shortfalls.
- Employers indicated that industry would welcome:
 - A tool that will assist duty holders to ascertain which WHS regulations and industry coded of practice apply to their business or undertaking.
 - Development of further guidance to provide to PCBUs in the correct and safe use of expert independent contractors in various situations (particularly in high-risk industries).
 - Practical and clearly understood guidance relevant to various modern situations in which multiple duty holders may need to consult.
- Employers also suggested supplementary materials reflective of how an inspector will conduct an inspection (i.e. what they will look for, what they expect is reasonably practicable for that business and what specific controls or risk management systems are in place) with relevant and real examples.

TOR 4. Identify any organisational, management, systems or cultural issues that may affect the organisation's ability to operate in a best practice model for safety regulators.

4.1 Morale

Staff retention is important given the training burden and the difficulty in backfilling. Morale was raised with the Reviewer on several occasions, both by NT WorkSafe staff and the NT Unions and their affiliates. The issues of morale were all raised confidentially, leading the Reviewer to conclude that employees were fearful to speak openly due to negative repercussions from management. The Reviewer is uncertain whether these repercussions were real or perceived and makes no finding either way. However, the fact

that some NT WorkSafe staff do not feel that that they can openly voice their concerns and have them adequately dealt with is itself a concern.

NT WorkSafe staff raised managerial issues that effected morale. Many staff were confused as to their reporting chains and who they look to for leadership on matters ranging from prosecutions to human resources. Human resources issues ranged from issues with recruitment and development opportunities, to inadequate management of unacceptable behaviour.

The Reviewer has no specific evidence of any nepotism, unacceptable behaviour, or 'shopping around' and so makes no finding about the management of specific incidents. However, given that Executive staff account for 16 per cent of NT WorkSafe its Operations staff in particular should all have total clarity on their reporting chains.

Grounds for recruitment and development opportunities must be clearly communicated to staff and Executives must ensure that these grounds are also understood. Likewise, bad behaviour in the workplace must be effectively managed and the disciplinary provisions of the *Public Sector Employment and Management Act (NT)* employed with full utility. Staff must have confidence in management, and, for this, management must earn that confidence.

4.2 Stakeholder Feedback

There is clearly a morale issues amongst staff which need to be addressed. Feedback from WorkSafe staff on these issues included:

- Communication and change management need to improve. Internal escalation process is blurred. Bad behaviour is not being managed effectively.
- Access to development and promotion opportunities needs to be fair and transparent.
- Internal reporting and communication need to be more effective.
- There is no leadership and communication from the top levels of the organisation and perceived lack of knowledge at the director level. Chain of command is not followed and reporting lines. This is happening at all levels.
- We have issues with conflicting opinions in our directorship in regard to issuing notices. There is a knowledge gap here.
- Our organisational structure has no clear reporting lines and because of that staff can just 'shop around' for the answer they want.
- Management of staff is not making it up the line to the top until it has become a big issue. These scenarios could have been sorted a lot earlier.

TOR 5. Identify any capability gaps that may exist with current structural and staffing arrangements.

5.1 Executive

The Executive unit of NT WorkSafe comprises four areas which function under the direction of the Work Health Authority to support the effective administration of legislation including the Act, the Return to Work Act and the Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act.

The Regulatory Reform area is responsible for participating in local and national reviews of relevant legislation, representing the Northern Territory on various national committees and groups, coordinating legislative amendments, and undertaking public consultation as required. The unit consults and develops policy specific to NT WorkSafe's regulatory functions.

The Communications area is responsible for developing and publishing various information products, coordinating NT WorkSafe involvement in local and national safety events, and developing and implementing communication strategies.

The Business Administration area is responsible for providing support services within NT WorkSafe including ministerial liaison, committee and council arrangements, delegations, finance assistance, corporate governance, travel arrangements, building maintenance and vehicle management.

The Training area is responsible for developing a comprehensive training management system for NT WorkSafe in consultation with all business units. The training area supports the other business units by helping them to identify and prioritise training needs for inclusion in the annual NT WorkSafe training plan.

5.2 Operations

The Operations unit comprises the inspectorate and is the public face of NT WorkSafe. The Operations unit provides safety education and advice to workers and employers throughout the Northern Territory to help them to understand and meet their work health and safety obligations. The Operations unit investigates notifiable incidents, and monitors and enforces compliance with the WHS Act and Regulations in line with the National Compliance and Enforcement Policy.

There are three work teams in the Operations unit:

- **Electrical Safety Team** – assists the Electricity Safety Regulator to monitor and regulate electrical safety and technical standards from the point of network connection at the premises to the outlet, as well as providing advice and assistance to licenced electrical workers, individual home owners, occupiers and persons conducting a business or undertaking.
- **Remote Safety Team** – monitors and regulates work health and safety and provides advice and education to workers and businesses located in remote and regional areas of the Northern Territory.
- **General Safety Team** – monitors and regulates work health and safety and provides advice and education to workers and businesses located in urban areas of the Northern Territory.

The Operations unit develops and implements targeted campaigns to identified high risk sectors to increase awareness of workplace health and safety and support Northern Territory industry to achieve and exceed national safety standards and targets.

Section 160 of the Act outlines the functions and powers of inspectors as follows:

- (a) to provide information and advice about compliance with this Act;
- (b) to assist in the resolution of:
 - (i) work health and safety issues at workplaces; and
 - (ii) issues related to access to a workplace by an assistant to a health and safety representative; and
 - (iii) issues related to the exercise or purported exercise of a right of entry under Part 7;
- (c) to review disputed provisional improvement notices;
- (d) to require compliance with this Act through the issuing of notices;
- (e) to investigate contraventions of this Act and assist in the prosecution of offences;
- (f) if permitted under section 40(3) of the Coroners Act, to attend coronial inquests in relation to work-related deaths and examine witnesses;
- (g) to monitor compliance with this Act.

5.3 Permissioning and Advisory Services

The Permissioning and Advisory Services (PAS) unit of NT WorkSafe performs various functions in the administration of the WHS Act, the Transport of Dangerous Goods by Road and Rail (National Uniform Legislation) Act, the Dangerous Goods Act, and all associated Regulations. PAS functions include:

- providing specialist advice and support to businesses and individuals;
- issuing licences, permits and registrations;
- approving course delivery by training providers; and
- issuing high risk work licence assessor accreditations.

The PAS unit accepts and triages notifiable incidents and complaints as well as mandatory notifications including notification of demolition, asbestos removal, pipelines, lead work and Schedule 11 hazardous chemicals. The PAS unit provides businesses with practical tools to help them to identify hazards, helps businesses and workers to identify relevant and functional solutions, and offers ongoing support and advice on work health and safety matters.

Throughout 2017-18, the PAS unit received 13,747 telephone enquiries regarding work health and safety and responded to 7,367 general enquiries through its generic email address. This was down on 2016-17, when the PAS unit received 15,158 telephone enquiries regarding work health and safety and responded to 8,273 general enquiries through its generic email address.

5.4 Rehabilitation and Compensation

The Rehabilitation and Compensation unit of NT WorkSafe performs various functions in the course of administering the Return to Work Act including:

- providing advice and information to employers, workers, insurers and the public about workers' compensation matters;
- coordinating mediations (between claimants, employers and insurers) in accordance with legislation;
- arranging permanent impairment reassessments in accordance with legislation;
- approving insurers and self-insurers in the Northern Territory;
- approving rehabilitation providers; and
- collecting statistical information from insurers and self-insurers for work health safety activity and for national reporting to Safe Work Australia.

The Northern Territory Scheme is referred to as a privately underwritten scheme because private insurers carry the financial risk of pricing and claims. Privately underwritten schemes operate in Western Australia, Tasmania and the Australian Capital Territory while public schemes (where the financial risk falls to the government) operate in other jurisdictions.

The Northern Territory Government is a self-insurer under the Return to Work Act and carries the financial risk for its own workers. The Return to Work Act does not regulate the insurance premiums charged by insurers.

Four insurers have been approved under the Return to Work Act. These are:

- Allianz Australia Insurance Limited;
- QBE Australia;
- CGU (Insurance Australia Limited); and
- GIO (AAI Limited).

The Return to Work Act also establishes a Nominal Insurer for instances where an employer fails to insure or in cases where the insurer defaults. The Nominal Insurer meets claims liabilities by obtaining contributions from the approved insurance companies based on their market share.

The Return to Work Act also establishes a Scheme Monitoring Committee, whose role is to monitor the viability and performance of the Northern Territory workers' compensation scheme. The scheme is the subject of an annual actuarial report which is published on the NT WorkSafe website. Key trends on the performance of the scheme were:

- Number of claims incurred remained relatively stable at between 2,600 and 2,800 claims per year (not including self-insurers) since 2015
- A reducing claim frequency (number of claims divided by estimated number of full-time employees) was noted. This is attributed to a significant increase in wages without a corresponding increase in claim numbers.
- The average claim size for 2017 was \$45,600, which is comparable to \$42,500 in 2016 and \$44,400 in 2015.
- Incurred costs for 2017 is \$111.1 million, which is in line with prior years.
- Settlements, non-economic lump sums and weekly benefits combined account for two thirds of the total incurred cost and payments each financial year.

- Distribution of payments for the last seven accident years has remained fairly stable.

The Return to Work Act establishes the Workers Rehabilitation and Compensation Advisory Council to keep the operation of the workers compensation scheme under review.

5.5 Work Safe Capabilities

In a small jurisdiction it will always be challenging to ensure that a modestly sized inspectorate possesses the full range of technical and industry specific skills and knowledge to ensure safe workplaces. Larger jurisdictions are able to establish multiple specialist teams for high risk industries, or even stand-alone inspectorates for individual industries or sectors (such as electrical and mining.) Nevertheless, given the structure of the Northern Territory workforce, there is a need for technical specialisation (in addition to my general recommendations about ongoing CPD for inspectors to build skills in critical areas).

A 3-5 year plan should be developed to ensure that NT WorkSafe has sufficient capacity to deal with areas of technical complexity, with a focus on high risk activities, including:

- Maritime
- Transport of Dangerous Goods
- Radioactive Ores and Concentrates
- Mining
- Major Hazardous Facilities (including oil and gas production)

As an interim measure, consideration should be given to a partnership agreement with a larger regulator to provide assistance in these areas (including as an internal capacity building exercise.)

5.6 Stakeholder Feedback

Stakeholders provided the following feedback in relation to WorkSafe capabilities:

- It was suggested that the capability of NT Worksafe is hindered due to staff being seconded at level to other (government) departments. Positions are difficult to backfill due to inspectors needing to be trained.
- Team Leaders should be on the road more to mentor inspectors and more high-level visits requiring their expertise. As it stands, they are not able to due to workloads.
- There is a lack of specialist industry knowledge in the inspectorate, including in relation to some high-risk industries.
- Inspectors' prior technical experience is not being utilised to its full potential due to lack of numbers of staff on the actual coal face.
- All inspectors should visit sites as pairs. Currently inspectors are not able to due to staffing and workload.
- Technical skill deficiencies can be addressed with inhouse training and experience. Bringing in people at a lower level and training them up would be of benefit.

- Other jurisdictions have support networks for families of deceased persons. We don't have that, and we even have a policy prohibiting inspectors from contacting family to give updates on investigations or general welfare checks
- Communication, transparency, lack of documentation and circulation of decisions made within the organisation needs vast improvements.
- Employer experience and anecdotal accounts suggest that there may be room for improvement in NT Worksafe's role as a mediator of worker's compensation claims. There is apparently a significant divergence in the approaches of individual mediators, and while some provide excellent services, there may be room for improvement with respect to the efficiency and productivity of mediations. It is noted though that this issue may sit at the fringe of the Review's scope.

TOR 6. Identify any legislative gaps that may exist and proposed remedies.

Most matters relevant to TOR 6 are dealt with elsewhere in this report and my recommendations which would require legislative amendment.

6.6 Stakeholder Feedback

Stakeholders provided the following feedback in relation to Codes of Practice:

- Unions (principally but not only the CFMMEU) sought that the statutory basis of Codes of Practice be restored to the status they held under the *Work Health Act 1995* (NT). Unions raised questions about the enforceability of codes under the current regime and submitted this reduced their practical utility and general efficacy. Unions also noted the need for regular reviews to ensure codes reflected contemporary best practice.
- Employers opposed any change to the current status of Codes of Practice but agreed in relation to regular reviews.

6.6 Findings

While the CFMMEU proposal is opposed by employers, this position is apparently at odds with other points made by employers to the review: specifically, that employers sought clarity and firm guidance from the regulator in relation to specific forms of work. Accordingly, the Review believes it is appropriate to recommend that Codes of Practice, as practical guides that assist duty holders to achieve the standards of workplace health and safety required by the WHS Act, be given unambiguous legal status and clear enforceability.

TOR 7. Consider specific issues such as whether an offence of 'gross negligence causing death' should be introduced and whether current penalty levels under the current work health and safety laws act as a sufficient deterrent to non-compliance.

7.1 Existing penalties for work-related fatalities and injuries

The structure of offences and the penalty amounts in the NT changed significantly when the national model Work Health and Safety legislation was implemented.

Under the WHS Act penalties are based on the behaviour/issue rather than the outcome. The penalties are to:

- be proportionate and relevant to the seriousness of the conduct and reflect the consequences that may result from failure to remedy serious risks to health or safety i.e. risk to personal safety and potential loss of life arising from any breaches;
- reflect the recommendations from the national review of WHS legislation to strengthen the deterrent effect of the penalties;
- extend the ability of the courts to impose more meaningful penalties, where appropriate; and
- emphasise to the community the seriousness of the offences under the WHS legislation.

The maximum penalties set in the WHS Act reflect the level of seriousness of the offences and have been set at levels high enough to cover the worst examples of offences involving reckless conduct. Penalties and the possibility of imprisonment in the most serious cases are a key part of achieving and maintaining a credible level of deterrence to complement other types of enforcement action.

New South Wales, South Australia, Australian Capital Territory, Queensland and Tasmania have all adopted the model laws and have the same offences and penalties as the Northern Territory.

Victoria and Western Australia have not adopted the model laws and their offences and penalties differ from those in the Northern Territory and the other harmonised states.

A significant increase in maximum fines under legislation does not mean courts will automatically increase the level of fines they impose. The increase in legislated penalties takes time to be reflected in the penalties imposed by the courts. Courts are more likely to impose fines around the same level as they have for previous matters with only incremental increases. This has not been such an issue in other jurisdictions as they had substantially higher penalties prior to model WHS laws. For example, NSW had a maximum penalty for reckless conduct causing death of \$1,650,000 for a corporation under their repealed legislation and South Australia had a maximum fine for risk of death or serious harm of \$1,200,000 for a corporation.

7.2 National Review

The Australian National Review into Model Occupation Health and Safety Laws (2008/2009) emphasised that contraventions of the WHS statues, particularly the general duty provisions, were and should be 'criminal'. The Review noted "Providing for a breach of a duty of care to be a criminal offence is an essential element of modern OHS legislation.... Making non-compliance with a duty of care a criminal offence not only reflects the seriousness with which such conduct is regarded, but also reinforces the provision's deterrent effect."

In responding to the proposal under the National Review into Model OHS Laws (2009) that a Category 1 offence have the elements that the duty holder was reckless or grossly negligent, the Workplace Relations Ministerial Council (WRMC) considered that 'gross negligence' offences should be dealt with outside the model Act as they would otherwise cut across local criminal laws and manslaughter offences. Accordingly, the WRMC modified the wording of the Category 1 offence to cover the most serious breaches, for an offence of recklessly endangering a person to risk of death or serious injury at a workplace, thus removing 'gross negligence' from the categories of offences.

Occupational health and safety legislation – categories of offences

A person who is allegedly responsible for a work related death could be prosecuted under one of the three categories of offences for breaching a health and safety duty under occupational health and safety legislation.²¹ These offences focus on the failure to meet the safety duty, rather than the actual occurrence of a work-related fatality or injury. Category 1 is a crime under the Criminal Code. It has three elements: the existence of a duty; breach of that duty without reasonable excuse exposing a person to a risk of death, serious injury or serious illness; and recklessness by the offender as to the risk of harm. The maximum penalty is five years' imprisonment for individuals and monetary penalties of up to \$3 million for corporations, \$600,000 for officers, and \$300,000 for workers and other persons.

Unlike Category 1, Categories 2 and 3 do not have the element of recklessness and there is no provision for reliance on a 'reasonable excuse'. The elements in common are that there is a duty owed and that duty is breached. Category two has an additional element, i.e. the breach exposes a person to a risk of death or serious injury or illness. There have been successful prosecutions for Category 2 offences for work related deaths, both in Queensland and other jurisdictions. Categories 2 and 3 do not attract a penalty of imprisonment, only a sliding scale of monetary penalties according to the status of the offender (corporation, officer, or other individual).

Manslaughter – Criminal Code

A person can be charged with manslaughter and prosecuted under the Criminal Code for a work related death. Under Schedule 1, section 160 of the *Criminal Code Act (NT)* a person is guilty of the offence of manslaughter if:

- (a) the person engages in conduct; and
- (b) that conduct causes the death of another person; and

²¹ ss31 – 33 WHS Act; ss40B – 40D ES Act.

(c) the person is reckless or negligent as to causing the death of that or any other person by the conduct.

Under Schedule 1, section 161 of the *Criminal Code Act (NT)*, a person who is guilty of the offence of manslaughter is liable to imprisonment for life.

Recklessness and Gross Negligence

Work related incidents involving multiple fatalities have caused concern as to whether current penalties are sufficient in instances where actions or omissions allegedly involve gross negligence. This raises the issue of the difference, if any, between the concepts of recklessness and negligence in manslaughter offences.

In criminal law, conduct is reckless if the offender is, or should be aware, of possible consequences of his/her actions, but is indifferent as to whether those consequences occur.²² In the context of a category 1 offence, a natural person, or corporate entity (acting through their officers) would display recklessness if they were aware, or should have been aware, of a risk of serious harm or death, but their action or inaction showed that they were indifferent as to whether that risk eventuated.

Gross (or criminal) negligence is found where the actions or omissions of the offender, while not intending to cause serious injury or death, fall far short of the standard reasonably expected in the situation, and which involves such a high risk of death or serious harm, that the act merits criminal punishment.²³

While there is a fine distinction between the two concepts, they are both at the higher end of the scale of risk taking leading to possible death or serious injury.

Manslaughter compared with WHS/ES Act category 1 offences

The essential difference between a manslaughter (industrial or otherwise) offence under the criminal law and a Category 1 offence is the Act provision arguably has broader coverage. A person commits a Category 1 offence where an Act duty is breached by engaging in reckless conduct exposing a person to risk of death or serious injury. Unlike a manslaughter offence, there is no requirement for death or serious injury to actually occur for a person to be prosecuted for a Category 1 offence. It therefore can be used for a wider range of incidents. It is also a proactive provision and can be used as a tool to address (by prosecution) serious systemic and corporate behaviour failures before a serious injury or death occurs.

Possible solutions to address concerns

Given the serious nature of work related fatalities, including incidents resulting in multiple fatalities, an increase in penalties, or amendment to the current penalty structure in the occupational health and safety legislation could be considered. For example, the *Workplace Health and Safety Act 1995 (Qld)* (repealed) provided for a scale of penalties.²⁴ Where a breach resulted in a single fatality, the maximum penalty was 1000 penalty units or 2 years' imprisonment. However, if a breach resulted in multiple fatalities, the maximum penalty was 2000 penalty units or 3 years' imprisonment. These penalties

²² *R v Nuri* [1990] VR 641, 643

²³ *Nydam v R* [1977] VR 430, 445; *Burns v The Queen* (2012) 246 CLR 334 French CJ [19]

²⁴ s24(1) *Workplace Health and Safety Act 1995 (Qld)* (repealed).

are both lower than the current year maximum, but the model of imposing penalties according to the number of fatalities might have value.

Another option could be to introduce a discrete offence of industrial or corporate manslaughter into the Criminal Code. This issue has previously been examined by Queensland and a number of other Australian jurisdictions.

This would still be a manslaughter offence but focussed on a particular class of offender, i.e. the corporate entity. However, to prove the necessary degree of negligence, the behaviour of the natural persons, such as company officers, responsible for the management of the entity would still need to be examined by the court.

One of the arguments for the introduction of a specific industrial manslaughter offence is that the current laws are not sufficiently 'criminal' in nature. However, section 31(3) of the Act specifically provides that a Category 1 offence is a crime and imposes a penalty of imprisonment (maximum 5 years).

Australian courts have repeatedly stated that the primary purpose of Act prosecutions is deterrence, both general and specific. Historically, work health and safety prosecutions have been kept separate from the general law partly because of the broader object of promoting and encouraging safe work practices.

7.3 Stakeholder Feedback

Stakeholders provided the following feedback in relation to penalties:

- Employers submitted that current WHS laws reflect the long-standing principle that penalties align with the level of risk to which a person is exposed, not on whether that exposure leads, perhaps because of confounding factors, to a fatality or multiple fatalities. As such, the current Category 1 offence is sufficient as it takes a risk based approach not an outcomes based approach.
- Employers also submitted that current penalties were sufficient and appropriate.
- Unions sought large increases in penalties and a partial reverse onus of proof should be introduced with 'so far as reasonably practicable' should be removed from the primary duty of care and relocated as a defence, with the onus on the defendant to prove that reasonably practicable
- Unions also raised issues around the difficulty in demonstrating recklessness for the purposes of offences under the WHS Act.
- Employers submitted that overall, whilst liability, reputational damage, compensation and sanctions are all important and interact to form a web of incentives for either compliance or non-compliance, there is no mechanical effect of "severe sanctions leading to higher compliance" – neither in criminal justice, nor in enforcement of business regulations.
- Employers also submitted that current penalties are proportionate to the seriousness of the risk. Whether the maximum statutory penalties are imposed by the court is a different matter and one that would be influenced by the seriousness of the offence.

7.4 Recent consideration of industrial manslaughter offences in Australia

Queensland

Following a detailed review, industrial manslaughter provisions commenced on 23 October 2017 in the *Work Health and Safety Act 2011*, *Electrical Safety Act 2002* (ES Act), and *Safety in Recreational Water Activities Act 2011* (SRWA Act).

These provisions make it an offence for a PCBU, or a senior officer, to negligently cause the death of a worker. In particular, the offence applies if:

- a worker dies, or is injured and later dies, in the course of carrying out work for the business or undertaking (including during a work break); and
- the PCBU's, or senior officer's, conduct cause the death of the worker (i.e. the action or inaction of the PCBU, or senior officer, substantially contributes to the death); and
- the PCBU, or senior officer, is negligent about causing the death of the worker (i.e. the person's action or inaction departs so far from the standard of care required).

Where a PCBU, or senior officer, commits industrial manslaughter, a maximum penalty of 20 years imprisonment for an individual, or \$10 million for a body corporate, applies.

As the industrial manslaughter offence is an indictable offence, the Director of Public Prosecutions is responsible for deciding whether to prosecute these cases. This is consistent with the approach taken for manslaughter prosecutions under the Criminal Code and the prosecution of Category 1 offences under the *Work Health and Safety Act 2011*, ES Act and SRWA Act.

All of the defences in Chapter 5 of the Queensland Criminal Code can be used to defend a charge of industrial manslaughter, except for the defence in section 23, which relates to the defence of an individual's act or omission being an 'accident'.

Examples of defences that can be used include ignorance of the law (section 22), mistake of fact (section 24), extraordinary emergencies (section 25) or insanity (section 27).

South Australia

In 2016, the Greens sponsored the *Work Health and Safety Act Amendment Bill* which proposed the imposition of jail terms of up to 20 years on company officers and individuals who recklessly cause a work-related death (see the inquiry report tabled 1 November 2016). However, a parliamentary committee declined to support the bill. Under a recommendation from the inquiry, SA public prosecutors will establish a protocol for ensuring due consideration is given to launching manslaughter prosecutions after workplace deaths.

Australian Capital Territory

In November 2003, the ACT passed the *Crimes (Industrial Manslaughter) Amendment Act 2002*, which commenced on 1 March 2004. That Act inserted a new Part 2A into the *Crimes Act 1900* (ACT), creating two new offences of industrial manslaughter [note, the term industrial manslaughter is not defined, nor is it used in the substantive provision]. These offences provide that employers (corporations) and senior officers can be prosecuted for the work-related death of workers and carries a maximum penalty of 20 years' imprisonment. To date, there have been no prosecutions under the Crimes Act provisions, however, there has been a successful Category 2 prosecution (for a breach

of duty resulting in death) of a corporate entity under the Work Health and Safety Act 2011 (ACT).²⁵

Commonwealth

After the passage of the ACT legislation, the Commonwealth was concerned that some Commonwealth authorities (particularly Government business enterprises, and the employees of such bodies covered by the ACT legislation) could be liable to prosecution for the industrial manslaughter offences contained in Part 2A. Accordingly, the Commonwealth government introduced a Bill to exclude Commonwealth employers and employees from the application of the ACT industrial manslaughter laws and any other similar industrial manslaughter laws enacted by a State or Territory in the future.²⁶

The Commonwealth opposed the ACT industrial manslaughter laws on the basis that:

- they created specific offences which duplicated existing offences in other ACT legislation (including OHS legislation) available to deal with workplace deaths; and
- Part 2A singled out the conduct of employers and senior officers.

The Commonwealth considered that creating industrial manslaughter offences under the general criminal law was inconsistent with the overall objective of the WHS legislative framework, i.e. to prevent workplace deaths and injuries, rather than just imposing punishment after the event.

Victoria

In Victoria, the government commissioned Chris Maxwell QC to conduct a review of Victorian OHS laws (the Maxwell Report).²⁷ That report rejected the introduction of an industrial manslaughter offence. The Report noted the widely-held view that prosecution of manslaughter should remain within the province of the general criminal law.²⁸

New South Wales

In 2000, a panel of legal experts was established to advise the New South Wales government about the *Occupational Health and Safety Act 2000* (NSW). The Panel considered that establishing each of the elements required by the offence in the ACT law provided a very high threshold to secure a conviction. It was believed that the elements in the ACT law were more onerous to satisfy than those which then existed under the NSW legislation. Consequently, it was believed that very few convictions would result, and therefore the deterrent effect of such laws would be lessened.

7.5 Stakeholder Feedback

Stakeholders provided the following feedback in relation to industrial manslaughter:

- Unions supported the measure, submitting that It is of considerable public concern when there is death or serious injury of a person at a workplace and that community

²⁵ *Brett McKie v Munir Al-Hasani & Kenoss Contractors Pty Ltd (in liq)* [2015] ACTIC 1

²⁶ Occupational Health and Safety (Commonwealth Employment) Amendment (Promoting Safer Workplaces) Bill 2004.

²⁷ C Maxwell, Occupational Health and Safety Act Review, March 2004, Government of Victoria; www.dtf.vic.gov.au/files/d602533b.../OHS-Maxwell-Report-Apr04.pdf.

²⁸ Maxwell, pp13-14.

expectations are not being met with the current penalties. They further submitted that Industrial Manslaughter laws would be a major deterrent for potential offenders.

- Employers submitted that the field was already covered under a category 1 offence, noted that this offence carries penalty carries 3 million dollars and 5 years in jail, and indicated that a better option would be to increase those penalties instead.
- Employers also submitted that an adequate penalty regime already exists under WHS legislation to address work related fatalities arising from reckless disregard by a person who owes a duty of care to a worker.
- Unions strongly supported the creation of new offences and submitted that the new offence should be called “Industrial Manslaughter” to signify its importance and be located in the WHS Act. They further submitted that there should be a body corporate and individual offence, in order to ensure prosecutors are able to pierce the corporate veil.
- Employers also submitted that the WHS Act has the object of deterrence. The WHS Act does not (and should not) aim to promote concepts of retributive justice wherein the punishment is linked to an ultimate consequence (i.e. death) rather than a controllable cause (i.e. negligence/recklessness), where the ultimate consequence might partially be a result of ill fortune as well as negligence. The WHS Act must focus on the critical element of negligence.

7.6 Findings

In 2017, the Reviewer conducted an equivalent process to this review for the Government of Queensland. The report of that review recommended the introduction of a body corporate and a senior officer offence of industrial manslaughter, to be located in the WHS Act. As noted above, the Government of Queensland accepted the recommendation and subsequently legislated to implement it.

Nothing has been advanced in the course of this review that suggest a different recommendation be made in this case. In fact, the very significantly higher fatality rate in the Northern Territory workforce make the case for industrial manslaughter laws compelling.

The material in the final Report of Best Practice Review of Workplace Health and Safety Queensland in the design of the offences is apposite to the recommendation made in this review:

‘Design and statutory location of the offence

There are two statutes in which an offence of negligence causing death could appropriately be placed. The first is within the WHS Act 2011, the second the Queensland Criminal Code.

Upon analysis of the two statutes it is considered that the WHS Act 2011 would be the most appropriate on the basis that it provides for imputing a person’s conduct to a corporate entity.

Sections 244, 245 and 251 of the WHS Act 2011 apply to bodies corporate, States and the Commonwealth, and public authorities respectively (‘organisation’). These sections apply where there is an employee/agent/officer (‘individual’) of

the relevant organisation who engages in conduct either within the actual or apparent scope of their employment, or within their actual or apparent authority. In these circumstances, any conduct by the individual is to be taken to be conduct by the organisation.

This imputation also applies to proving elements of an offence that need to be proved, e.g. knowledge, intention, and recklessness. Likewise, any (reasonable) mistake of fact made by the individual is attributable to the organisation.

This mechanism (imputing individual conduct to an organisation where the criteria are met) enables the relevant elements of an offence to be proved in prosecution for an offence, e.g. a category 1 offence.

Prosecution of the organisation would not prevent prosecution of the individual where the conduct of the individual in failing to comply with their own duties (e.g. as an officer or worker) could also be imputed to the organisation. Of course, if the individual acted outside the scope of their employment or authority, they could still be prosecuted.

Conversely, the Criminal Code does not have any provisions analogous to those in the WHS Act 2011 regarding imputation of conduct to a corporate entity. Of course, responsible individuals (chief executive officers and the like, or even workers) could be prosecuted for manslaughter, even if they are also prosecuted under section 31 of the WHS Act 2011 for a failure of a duty.

Findings

As previously identified, there are long standing entrenched views from stakeholders regarding the offence of industrial manslaughter which are unlikely to change or resolve the debate. It is however the view of the Review that, following consultation and research, a case supporting the introduction of an offence of negligence causing death can be made. In particular, it is considered that, despite the view of some stakeholders, there is a gap in the current offence framework as it applies to corporations, specifically that existing manslaughter provisions in the Queensland Criminal Code only apply to individuals as opposed to corporations which makes it challenging to find a corporation criminally responsible. Additionally, a new offence is considered necessary and appropriate to deal with the worst examples of failures causing fatalities, the expectations of the public and affected families where a fatality occurs, and to provide a deterrent effect. In May 2017, the Queensland Government provided in principle support for this view.

In terms of terminology, it is the view of the Review that the offence should be that of 'negligence' causing death as opposed to 'gross negligence' causing death. The rationale for this view is that gross negligence has a particular legal meaning that requires more than negligence. The consequence of this is that it may make prosecutions more difficult to pursue and may be the reason minimal prosecutions have been pursued in jurisdictions who have industrial manslaughter provisions. Subsequently, proving negligence to the criminal standard of proof is considered to be the appropriate framing for the new offence.

The review believes it is important, from the point of view of the public message sent in relation to the new offences, that they be called 'industrial manslaughter'.

In terms of the design and statutory location of the offence, as previously stated, the Review considers the offence would be best placed in the WHS Act 2011 on the basis that it would send a clear message to PCBU's about the standard of safety required and the expectation on senior management to proactively manage health and safety risks. Additionally, the provisions under the WHS Act 2011 relating to the imputation of an individual's conduct to a corporation will ensure corporations are liable and reduce barriers to attributing criminal liability to a corporation in instances involving the most serious health and safety breaches. It is appropriate to provide for a maximum custodial sentence that matches the equivalent offence in the Crimes Act and for a greatly increased maximum fine for a body corporate. These measures will allow sentencing judges to have the appropriate scope to adequately deal with the worst examples of corporate or individual behaviour.

TOR 8. Examine any further measures that can be taken to discourage unsafe work practices, taking into account the national review.

8.1 Psychosocial risks

Unreasonable management action and workplace bullying is a serious issue that can have a profound psychological effect on the lives of workers. In conducting the national review, Ms. Marie Boland has noted that:

Most of those I consulted raised the management of psychosocial risks as a key issue. The common view is that the model WHS laws do not sufficiently focus on psychological health and that the 'how' part of ensuring the psychological health and safety of workers is not clear.²⁹

The NT Working Women's Centre's (NTWWC) made strong submissions with regard to the regulator's response to workplace bullying (including unreasonable management action) and gendered violence at work. There is some strength in the view that the model WHS laws do not sufficiently focus on psychological health.

The legal mechanisms of ensuring the psychological health and safety of workers is unclear. A significant recent example of this arose in the *Inquest into the death of Paula Michele Schubert* [2018] NTLC 020 [109]-[110]. In that inquest, the Coroner found that Ms Schubert had committed suicide after having been subjected to unreasonable management action and bullying at the Department of Territory Families. However, the Coroner did not refer to the WHS Act and nor is it entirely clear how the WHS Act may have been used to ensure the psychological health and safety of Ms Schubert. As it was, Ms Schubert's employer knew she was suffering mental health issues. The Coroner found, at paragraph [89], that her employer's treatment of her was inconsistent with section

²⁹ Marie Boland, *Review of the model WHS law consultation summary* (17 August 2018), 1, (<https://www.safeworkaustralia.gov.au/doc/review-model-whs-laws-consultation-summary>)

24(1) of the *Anti-Discrimination Act* (NT) where “A person shall not fail to accommodate a special need that another person has because of an attribute” (where “attribute” is defined to include “impairment”, which in turn includes “psychiatric or psychological disease or disorder, whether permanent or temporary”). It is an open question, and one to be determined on the facts of each case, if workplace bullying is primarily a WHS or anti-discrimination issue. It may equally be both, which poses a difficulty not just for NT WorkSafe but also for other agencies such as anti-discrimination commissions.

The NTWWC has sought that NT WorkSafe responds to workplace bullying complaints in the same manner and with the same resources as is provided to other hazards. Although there is merit in this approach, particularly in the light of the death of Ms Schubert, it is difficult to do so without amendment to the WHS Act as it presently stands so as to unambiguously empower the inspectorate to investigate the bullying incidents that effect psychological health and safety of workers. This would then assist with agency demarcation so that it is clear what is a NT WorkSafe responsibility and what is an anti-discrimination responsibility. Memoranda of Understanding may then further assist.

The NTWWC’s submission regarding gendered violence at work was of particular interest. The NTWWC noted the significant impacts of gendered violence at work. This included serious injury and illness, post-traumatic stress disorder, depression, anxiety, suicide and physical injuries. Noting that assault is expressly a criminal matter to be immediately reported to police, it is nevertheless reasonable to expect that psychological injury and illness may be sustained through non-criminal behaviors such as persistent sexual harassment. Sensibly, the NTWWC has recommended that NT WorkSafe take a leading role in supporting employers in implementing best practice policies. This is true, although the Reviewer notes that enforcement action must also be taken by NT WorkSafe where it is found that the WHS Act has been breached by gendered violence.

8.1 Stakeholder Feedback

Stakeholders provided the following feedback in relation to industrial further measures:

- Unions submitted that psychosocial and threats of violence provisions need to be legislated noting difficulties in obtaining convictions for workplace bully and harassment using current legislation.
- Unions submitted that the majority of unsafe work practices can be attributed to training shortfalls, employment status, remoteness, exploitation, and perceived production pressure and suggested these be priorities for NT WorkSafe.
- Employers submitted that the current system has scope to be made more balanced, through placing more equal emphasis on both prevention and enforcement. Penalties after the fact cannot be the primary driver of safer workplaces. regulators need to bolster their inspectorate capabilities to ensure active monitoring of compliance before any incident, as well as improved promotion and information to ensure more employers are focussed on making their workplaces safer through practical, implementable means (and such promotion and information which also engenders workplace cultures that support safe working).

TOR 9. Provide an opinion on improvements required in the organisation to achieve best practice for a safety regulator both now and into the future, ensuring those suggestions can be funded from and within current resources.

All matters relevant to TOR 9 are dealt with elsewhere in this report and my recommendations which go to organisational improvement.

Attachment 1: Terms of Reference

Purpose

The purpose of this review is to undertake a comprehensive assessment of the effectiveness of NT WorkSafe's policies, procedures and activities in communicating, administering and enforcing the compliance functions of the Work Health and Safety (National Uniform Legislation) Act as they relate to:

- Inspections
- Investigations
- Prosecutions
- Enforceable undertakings
- Research
- Strategy and policy development
- Education and awareness sessions

This should be undertaken where possible, through benchmarking NT WorkSafe with appropriate best practice safety regulators in other jurisdictions whilst taking into account the context in the Northern Territory.

Reviewer

The Reviewer is independent to government and will undertake the assessment. The Reviewer will work closely with an approved reference group comprising industry, union and government nominees.

Reference group

The reference group will comprise:

- three union representatives
- three industry representatives
- two ex officio government nominees (one from Treasury and one from Education).

Scope

The scope of the review is to:

1. determine the appropriateness and effectiveness of the current organisational structure, systems and processes in the administration of public safety and compliance.
2. determine the effectiveness of NT WorkSafe's compliance regime and enforcement activities (including inspection, investigations and prosecutions), dispute resolution processes and policy development.
3. determine whether NT WorkSafe has the appropriate balance of regulation of safety (including prosecutions and enforcements) and education and awareness across the Northern Territory.
4. identify any organisational, management, systems or cultural issues that may affect the organisation's ability to operate in a best practice model for safety regulators.

5. identify any capability gaps that may exist with current structural and staffing arrangements.
6. identify any legislative gaps that may exist and proposed remedies.
7. consider specific issues such as whether an offence of 'gross negligence causing death' should be introduced and whether current penalty levels under the current work health and safety laws act as a sufficient deterrent to non-compliance.
8. examine any further measures that can be taken to discourage unsafe work practices, taking into account the national review.
9. provide an opinion on improvements required in the organisation to achieve best practice for a safety regulator both now and into the future, ensuring those suggestions can be funded from and within current resources.

Attachment 2: List of consultations with key stakeholders

Australian Maritime and Safety Authority

Chamber of Commerce Northern Territory

Deputy Coroner

Department of Education employees

Director of Public Prosecutions and Deputy Director of Public Prosecutions

Fire and Rescue Service employees

General Manager, Alice Springs Correctional Centre

General Manager/Director of Nursing, Tennant Creek Hospital, Central Australia Health Service

Julalikari Council Aboriginal Corporation

NT WorkSafe Executive

NT WorkSafe inspectorate in Darwin, Katherine, and Alice Springs

Unions NT and Affiliates

Attachment 3: Schedule of persons and organisations who made written submissions to the review

Australian Education Union, Northern Territory

Allianz Australia Insurance Limited

Association of Mining and Exploration Companies

Chamber of Commerce Northern Territory

Community and Public Sector Union Northern Territory

Bernard Paul Corden

Darwin Community Legal Service Inc.

Department of Primary Industry and Resources, Northern Territory Government

EHS Essential Services

Housing Industry Association

Independent Education Union, Queensland and Northern Territory Branch

Maurice Blackburn

Northern Territory Police Association

Northern Territory Primary Health Network

Northern Territory Seafood Council

Northern Territory Working Women's Centre

Northern Transportables

Tanya Louth

St John Ambulance Australia (NT) Inc

Skillset New Zealand

Suncorp

The Construction, Forestry, Maritime, Mining and Energy Union, Construction and General Division – Queensland Northern Territory Divisional Branch

Unions NT General Secretary and Work Health and Safety Project Officer

United Voice

Warnayaka Art & Cultural Aboriginal Corporation

