



UNIONSACT SUBMISSION TO THE INDEPENDENT REVIEW INTO ACT'S WORK SAFETY COMPLIANCE AND ENFORCEMENT FRAMEWORK

INTRODUCTION

1. UnionsACT and its affiliate unions welcome the opportunity to provide a submission to the Independent Review of the ACT's work safety compliance infrastructure, policies and procedures.
2. UnionsACT is the peak council for the ACT's union movement, representing 24 unions and over 33,000 union members. Many tens of thousands more have their conditions of employment shaped by the work and representation performed by our affiliates. Formed in 1931 as the Trades and Labour Council of the ACT, UnionsACT and our affiliated unions have campaigned for, and successfully won, a wide array of rights and entitlements for working people in the ACT.
3. We have a long and proud history of independently and fearlessly advocating on behalf of union members, and our mission is to improve working standards and living standards for all working people, particularly where health and safety are concerned.

4. As the leading voice for working people in the ACT, UnionsACT is pleased to make this submission to the Independent Review.
5. UnionsACT has consulted with our affiliates, and we support the submissions made by affiliates.

CONTEXT OF THIS REVIEW

6. Although UnionsACT did not call for it, we welcome the establishment of an independent review. An independent examination of the Access Canberra/WorkSafe ACT's work safety compliance and enforcement infrastructure, policies and procedures will no doubt find the regulator has manifestly failed to keep workers safe or substantially improve workers' safety in the ACT. Further, we expect that the independent review will find that the structure of the regulator is out of date and ill suited to modern practice for workplace safety regulation.
7. Despite improvements in health and safety

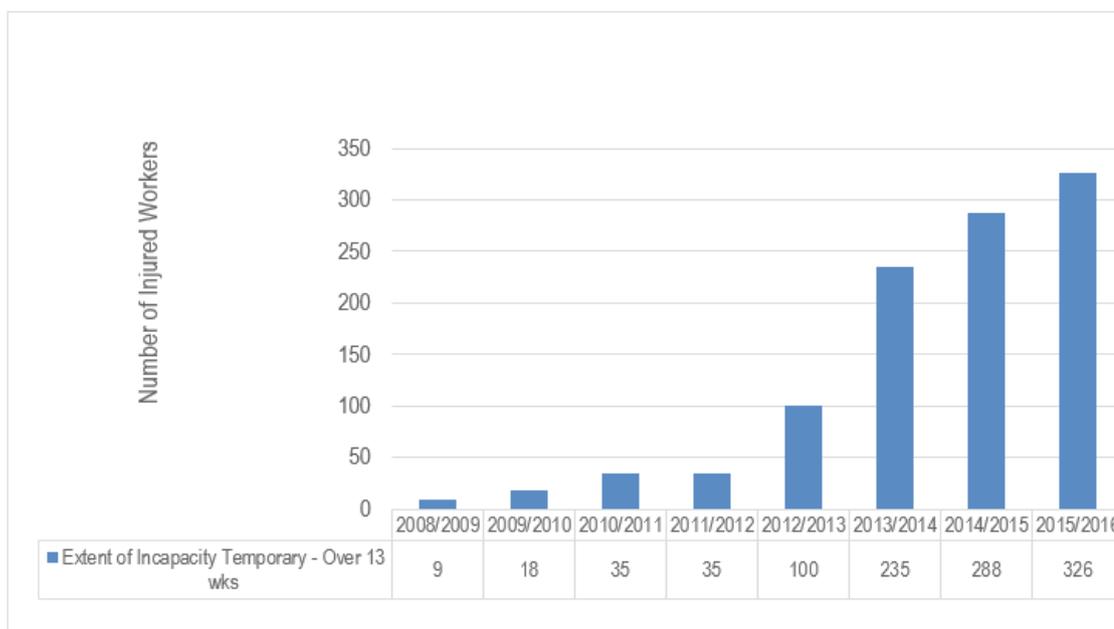


Figure 1: Severe Injuries in the ACT private sector, 2008 to 2016 (*Private Sector Insurance Annual Claim Experience Report, unpublished*)

performance in Australia in recent years, the ACT remains the least safe jurisdiction for a number of industries, and is the second least safe jurisdiction in Australia overall.

8. More than 3300 workers in the private sector are injured each year in the ACT, and approximately 500 are injured each year in the ACT public sector. For a small jurisdiction, this is a shameful record, and alone demonstrates the ineffectiveness of Access Canberra/ WorkSafe ACT as a safety regulator.
9. The rate of serious injuries in the ACT, shown in Figure 1 and Table 1, has substantially increased since 2008 (we consider incapacity over 13 weeks to be 'serious'). The incidence and frequency of injuries in the ACT is higher than the national average.

Table 1: Comparison of incapacity rates between 2012/2013 and 2015/2016 (*Private Sector Insurance Annual Claim Experience Report, unpublished*)

Incapacity type	2012/2013	2015/2016	Percentage change
Temporary - Over 13 wks	100	326	+ 226%
Temporary - Under 13 wks	2,868	3,619	+ 26%

Table 1a: Comparison of incapacity rates (Temporary - Over 13 Weeks) between 2012/2013 and 2015/2016 as proportion of total injuries (*Private Sector Insurance Annual Claim Experience Report, unpublished*)

Temporary - Over 13 wks	Number	Proportion of Total Lost Time	Percentage Change
2012/2013	100	4.9%	
2015/2016	326	9.1%	+ 229%

10. While the overall number of injuries in the ACT has decreased in the past eight years in line with a national decline, in recent years injury rates and injury numbers have increased. Between 2008-09 and

2015-16, injuries decreased from 4348 to 3585, a decline of 17%. However, since 2013-14, injuries have actually increased by 4%, from 3459 to 3,585.¹

11. Between 2012 and 2016, the ACT had the smallest reduction in serious claims compared to all other Australian jurisdictions, reporting a mere 9% reduction. This contrasts with a 16% reduction in Victoria, 30% reduction in NSW and 38% reduction in the NT for the same period.²
12. These figures may not even tell the full story: UnionsACT's research suggests that a substantial number of workers (as many as 30%), especially young workers, transient and migrant workers, and workers in precarious employment, are unwilling to report injuries due to fear of negative repercussions. Underreporting of injuries is likely to skew the reported data masking even poorer circumstances.³
13. Significant under-reporting of injuries, especially for young workers, is acknowledged by the ACT Government, and industry stakeholders including the insurance industry.
14. UnionsACT believes that a substantial contributor to these disappointing

statistics are: 1) a fundamentally weak, ineffective regulator that is failing to fulfil its legislative objectives, despite significant legislative reform and a broadening of its powers; and 2) a structure (Work Safe as a business unit within Access Canberra) that hinders the ability for work safety inspectors to enforce the law.

15. Both of these factors contributes to an employer attitude (in both private and public sectors) that considers high standards of workplace safety to be a "cost", and considers it unlikely that the regulator will ever catch them.

HISTORY OF WORKSAFE ACT

16. The ACT has never had a modern, independent work safety regulator. UnionsACT considers this to be a contributor to the ACT's appalling workplace safety record.
17. The regulator under the WHS Act was (and remains) the ACT Public Sector Head of Service – not a dedicated safety regulator. A standing delegation is in place to the relevant deputy director general of the Office of Regulator Services(ORS)/Justice and Community Safety (now Access Canberra). Regulatory functions performed

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1 ACT Private Sector Insurance Annual Claim Experience Report 2015/16 (ACT Government, Unpublished)

2 Safe Work Australia (2017) Comparative Performance Monitoring Report: Part 1 – Work Health and Safety Performance (19th Edition), Canberra: https://www.safeworkaustralia.gov.au/system/files/documents/1806/comparative-performance-monitoring-report-19th-edition-part-1_0.pdf

3 Apprentice, Trainee and Young Work Advisory Committee (2018) Issues and Remedial Actions.

by WorkSafe are only under delegation, through the Director of the Work Safety Unit who is also the Work Safety Commissioner (a role with no regulatory powers). The Director of the Work Safety Unit otherwise remains answerable to the Deputy Director General of Access Canberra.

18. Prior to the creation of WorkSafe in 2010, the work safety regulator (known as WorkCover), was a unit within the ORS. At this time, the resources available to the unit (as well as its sister-unit, the Dangerous Goods Unit) were limited. Workcover (WorkSafe after 2010) had between three to eight staff.
19. The overall structure and governance arrangements for Workcover and WorkSafe were kept from 1997 inquest into the hospital implosion and death of Katie Bender: an “independent” Work Safety Commissioner with limited responsibilities and powers, who reported to the Minister but was also employed as a senior public servant within the ORS. The Work Safety Commissioner has never been the regulator of the WHS Act.
20. Over the years, the public servants who were appointed with the title of Work Safety Commissioner have also accumulated a number of additional statutory roles: including Environmental Protection Commissioner, and ACT Construction Occupations Registrar. These additional statutory roles diluted

the focus of the Director of Work Safety.

21. In 2015, the ORS was merged into and renamed as “Access Canberra”. This has continued the decline in the stature and standing of WorkSafe and the ever-diminishing role of Work Safety Commissioner, a role that falls well-short of the mark required for a modern, independent regulator.
22. The ACT is essentially without a dedicated workplace health and safety regulator, with the role diminished to a titular commissioner, essentially a ‘middle-manager’, who reports to a “super regulator”.
23. UnionsACT believes this has created a cost-conscious, risk-averse culture within the unit responsible for work safety regulation. The negative consequences include: 1) lenient treatment of serious and persistent offenders of workplace safety standards; 2) an unwillingness to require the ACT Government as a PCBU to adhere to WHS laws and other requirements; and 3) application of inappropriate standardised Access Canberra compliance standards onto WorkSafe.
24. UnionsACT supports a robust and independent regulator that is focussed on administering and enforcing the WHS Act and related Acts to their highest

THE ACT DESERVES A MODERN, INDEPENDENT REGULATOR

purpose of protecting workers from harm to their health, safety and welfare from hazards and risks arising from work.

25. To achieve this goal, the ACT needs a WHS regulator empowered to fulfil its paramount objective of protecting workers without fear or favour and irrespective of the identity of the duty holder.
26. Professor Gunningham, amongst others, emphasise the importance of granting regulators “statutory independence” to avoid the risk of “regulatory capture” by industry and government interests. He argues that there is a need to “make the regulator accountable to other stakeholders and to civil society more generally both as a democratic imperative and ... to maintaining public trust.”⁴
27. UnionsACT is concerned that this basic but fundamental requirement has been compromised in the ACT and the independence of its WHS regulator is at risk.⁵
28. The ACT Government has opted for establishing an advisory “commissioner” for workplace health and safety, rather

than an independent regulator. As noted, the role of commissioner is principally to promote an understanding and acceptance of, and compliance within the WHS Act, and report to and advise the Minister.⁶ However, unlike other equivalent commissioner roles in other jurisdictions, the Work Safe Commissioner has neither the powers to intervene legally in matters with the leave of the Court, nor the statutory right to direct enforcement activities.

WHS REQUIRES A FOCUSED REGULATOR AND A SPECIALIST INSPECTORATE

29. The enforcement of WHS matters is inherently complex as it is a duty-based regime. Effective administration requires a regulator and inspectorate skilled in exercising judgment to assess evidence on the ground against a mixture of broad duties under the WHS Act, prescriptive elements under the WHS regulations and assessing the five-factored test of what constitutes “reasonably practicable” control measures.

4 See: National Transport Commission (2004) Improving The Regulatory Framework For Rail Safety In Australia - Discussion Paper, page 52 (Accessed 10 June 2018: [http://www.ntc.gov.au/Media/Reports/\(BB3A18AA-DFD4-20EF-C6C4-42F699824EC3\).pdf](http://www.ntc.gov.au/Media/Reports/(BB3A18AA-DFD4-20EF-C6C4-42F699824EC3).pdf))

5 “Government executive cancelled breach against WorkSafe advice”, The Canberra Times (online edition, 26 October 2017) (See: <https://www.canberratimes.com.au/national/act/government-executive-cancelled-breach-against-worksafe-advice-20171026-gz8g8u.html>); see also files released under Freedom of Information: http://www.cmd.act.gov.au/___data/assets/pdf_file/0010/1121104/Binder-redacted.pdf

6 For example, see the roles of the Race Discrimination Commissioner at s. 20(b) of the Racial Discrimination Act 1975; the Sex Discrimination Commissioner at s. 48(1)(d) of the Sex Discrimination Act 1984.

30. An effective inspectorate relies on retaining and deploying inspectors who have experience with the sectors regulated under WHS, particularly in complex areas such as construction. The critical importance of an independent safety regulator was highlighted in the Royal Canberra Hospital Demolition Inquest in 1997, following the death of Katie Bender.

[T]he very purpose of regulators (that is, to act with expertise and independence) is undermined when they are held to account, especially using strong accountability mechanisms that lead to responses imposed by those who do not possess the same level of expertise and independence as the regulators.⁸

31. Following the incident, the Coroner recommended that Workcover (as it was then) and the Dangerous Goods Unit should be an:

independent statutory authority with appropriate funding and resources ... created as one autonomous statutory unit independent of any departmental control answerable to a Minister of the Legislative Assembly. The models adopted in other states of Australia would seem to suggest that this is a practical way to ensure workplace and public safety is preserved. Consideration should be given to the adoption of the interstate models. All relevant stakeholders should constitute its Board again accountable to the Assembly.⁷

33. Unfortunately Bird's warning accurately describes the lived experience in the ACT, where a "super regulator" combining a disparate range of regulatory functions is overseen by a tier of generalist managers.

34. UnionsACT believes there is evidence that senior managers in Access Canberra fundamentally misunderstand the importance of specialist skills and experience in the inspectorate and have inhibited a well-functioning WHS regulator.

35. Consider for example the Access Canberra 'Regulatory Advisory Committee', which "considers the most appropriate regulatory action at an important stage of, or the conclusion of, an investigation. This may include taking no further action."

32. More generally on the nature of regulators, Bird (2011) has stressed that:

36. The Regulatory Advisory Committee was established by the Access Canberra Accountability Commitment

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7 Inquest Findings, Comments and Recommendations into the death of Katie Bender on Sunday, 13th July 1997 on the Demolition of the Royal Canberra Hospital Acton Peninsula, ACT (See: http://courts.act.gov.au/__data/assets/pdf_file/0017/1008080/Katie-Bender-redacted.pdf) Coroner Madden, p. 144

8 Bird, J. (2011) "Regulating the regulators: accountability of Australian regulators", Melbourne University Law Review, 35(3): 739 - 772; p 744.

policy". The RAC considers and makes recommendations across the wide array of Acts administered by Access Canberra, including the WHS Act.

37. However, the Regulatory Advisory Committee is not specifically referred to within the WorkSafe Compliance Framework or the WHS Act. It is therefore not clear or transparent about the role of the RAC in affecting or determining regulatory action for Work Safe compliance matters, other than the Framework refers in general terms to the Access Canberra Accountability Commitment.
38. It is not clear what standing the RAC has in considering decisions of WorkSafe, the Work Safety Commissioner, or work safety inspectors. It is not clear whether the RAC can overrule the Director of the Work Safety Unit or inspectors. It is not clear what the membership of the RAC is, or the expertise the members have to consider WHS matters.
39. As another example of how generalist managers over-rule specialists, consider the decision of Access Canberra Deputy Director General Dave Peffer's handling of the improvement notice issued to the Education Directorate in respect of the administration of insulin to school students.
40. Despite the valid legal basis for issuing the Improvement Notice (IN-05771-S9JJOS-1) having been reviewed and affirmed by Access Canberra's internal legal advisors, the Deputy Director General, in overruling the Work Safety Commissioner's decision, stated:
- it's my view that the requirements of the improvement notice no longer apply. It's also my view that the scope of the improvement notice, and our expertise as the regulator, doesn't position us well to offer medical opinion on whether the written agreement between the family... and directorate should be permitted.⁹*
41. In 2011, the Hawke Review Reforms recommended against the creation of generalist inspector roles where individuals are to exercise the total powers of multiple regulators noting:
- At inception, it was anticipated that ORS inspectors would regulate concurrent legislation and multi-task across an array of statutes. In practice this integrated model of regulation is complex, difficult to implement and the efficacy of these arrangements has not been fully realised. The concept of super-regulator does not easily translate to the functions, talents*

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9 Email from David Peffer to Greg Jones (amongst others) sent on 13 September 2017 11:12 PM (See files released under Freedom of Information: http://www.cmd.act.gov.au/__data/assets/pdf_file/0010/1121104/Binder-redacted.pdf)

*and capacity of an individual.*¹⁰

42. Despite these warnings, Access Canberra has over the years disrupted deployment of specialist inspectors with appropriate industry experience. UnionsACT understands this was on the basis of a misguided notion of “conflict of interest” arising from their previous roles. Even if its position was arguable, duty holders in the ACT are well-protected from risks of any conflict of interest by the checks and balances of the robust internal and external review processes regarding decisions of the inspectorate.¹¹
43. Access Canberra promotes the “multi-tasking” of inspectors as a virtue. For example, the Work Safety Minister highlighted in November 2017 an Access Canberra cross-team “blitz” of “structured visits” to local shopping malls.¹² The blitz ostensibly focused on awareness of Australian Consumer Law (ACL), but inspectors also raised awareness amongst shop-holders of “work health and safety issues, such as safe lifting, slips and falls and bullying and harassment”.
44. Johnstone and Bluff (2017) recently warned of the risks in combining regulatory functions in the manner of Access Canberra, noting that it “may influence, even compromise the monitoring and enforcement of compliance WHS laws”.¹³ They argue that “regulators must give careful consideration to the qualifications and experience of those recruited as inspectors,” noting also that “only some regulators have attempted to meet this challenge”.¹⁴
45. UnionsACT believes the practical consequence of this multi-tasking approach is to downplay the importance of compliance with both ACL and the WHS Act, and represents a potential misuse of WHS inspectors’ time.
46. In fact, Access Canberra suffers from an intractable conflict of interest with its Head of Service being responsible for managing public works (which included high risk construction work) and its construction safety inspectors. This inherent conflict of interest was highlighted in the Auditor General’s report into WorkSafe ACT’s responsibilities

10 Hawke, A. (2011). Governing the City State: One ACT Government – One ACT Public Service (See: http://www.cmd.act.gov.au/__data/assets/pdf_file/0011/224975/Governing_the_City_State.pdf).

11 For an example, see *Rovera Scaffolding (Act) Pty Ltd v Director-General Of The Chief Minister, Treasury & Economic Development Directorate (Administrative Review)* [2016] ACAT 127

12 See Standing Committee On Education, Employment and Youth Affairs, page 63 at: <http://www.hansard.act.gov.au/hansard/2017/comms/education03a.pdf>.

13 Johnstone, R. and Bluff, E. (2017) ‘Supporting and enforcing compliance with Australia’s harmonised WHS laws’, *Australian Journal of Labour Law*, 30(1): 30–57, p.31

14 As above, p. 33.

of the “Mr Fluffy” asbestos contamination, noting that a regulator “needs to be independent, and be seen to be independent, of those it regulates.”¹⁵ More pointedly, the the Auditor General raised concerns that:

there is a risk that this ‘independent investigation’ could be challenged as not being impartial since the investigator is employed within the same business unit as the contract management team for the demolition of the Government acquired loose fill asbestos contaminated houses, that is, Procurement and Capital Works. As such there is potentially prior experience amongst colleagues of the management of contractors, removal and demolition sub contractors and asbestos assessors, and an ongoing contractual relationship with these entities.¹⁶

47. UnionsACT believes that the only effective way of removing this inherent conflict of interest would be through the creation of a WHS regulator that is fully independent of other parts of government.

48. Further, and crucially, UnionsACT understands that Work Safety inspectors appointed by Access Canberra are

generally engaged under a temporary contract – rather than as permanent (ongoing) staff. UnionsACT holds that the lack of job security for inspectors results, in fact, in diminished will and capability of inspectors to perform their function in the face of resistance from powerful or influential employers, especially when the employer is the ACT Government itself.

49. UnionsACT has spoken with numerous inspectors employed on short-term contracts who warn that they must weigh the likelihood of employment contract renewal with the potentially controversial exercise of their regulatory function. Furthermore, the insecure nature of their employment makes inspectors at risk to influence from senior levels of Access Canberra management in circumstances where they are tasked to review the adherence of ACT Government employers to the WHS Act. This is not just a risk: inspectors, current and former, have reported to UnionsACT that this is the reality.

50. The insecure nature of employment for inspectors is due to management decisions of Access Canberra, and is a consequence of employment policies imposed on the Work Safe unit. A precariously employed inspectorate further diminishes the independence of regulatory actions

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 15 ACT Auditor-General’s Report Worksafe Act’s Management Of Its Regulatory Responsibilities For The Demolition Of Loose-Fill Asbestos Contaminated Houses, Report No. 1/2017 (See: http://www.audit.act.gov.au/__data/assets/pdf_file/0014/1180004/Report-No-1-of-2017-WorkSafe-ACTs-management-of-its-regulatory-responsibilities-for-the-demolition-of-loose-fill-asbestos-contaminated-houses.pdf), paragraph 2.64.

16 As above, paragraph 4.114.

in the ACT and falls short of the basic requirements of a modern regulator.

A “ONE-STOP-SHOP” MENTALITY THAT COMPROMISES THE GOOD GOVERNANCE AND ADMINISTRATION OF SAFETY REGULATION

51. The concept of “WorkSafe ACT” itself as a regulator is a misnomer – it misrepresents its role as an independent organisation, whereas it is merely a business unit of Access Canberra. As a result, the needs of highly specialised and resource intensive health and safety regulation must now compete with comparably less resource-intensive administration of licensing, payments, regulation of pets, racing and gaming and consumer affairs.
52. UnionsACT believes that co-locating multiple and unrelated regulatory functions under a single Head of Service risks incompatible objectives.
53. UnionsACT is concerned that this conflict has reduced the ability for WorkSafe ACT to seek additional resources, such as through the budget bid. Evidence suggests that the co-location of WorkSafe within Access Canberra has hindered the ACT’s ability to target resources to areas where interventions are likely to have greatest effect.
54. WHS enforcement, as outlined earlier, relies on an agile and skilled inspectorate that can be deployed effectively in response to prevailing activities at any given time. WorkSafe ACT does not exercise independence over its resources, but rather must compete amongst a disparate cohort of regulator business units and functions. The areas of greatest need are compromised by the resourcing objectives of Access Canberra, which has organisational objectives unrelated to the Work Health and Safety Act 2011.
55. UnionsACT is also concerned that the convoluted governance arrangements regarding ministerial reporting Access Canberra and the WHS Act reduce accountability and transparency.
56. Access Canberra, and therefore the WHS regulator, is responsible to the Minister for Regulatory Services (currently Gordon Ramsay). The Minister for Workplace Safety is advised by the Work Safety Commissioner on WHS matters but has no responsibility or power in relation to WorkSafe. Access Canberra reports annually as part of the Chief Minister, Treasury and Economic Development Directorate (CMTEDD). This structure diffuses reporting and accountability.

SAFETY COMPLIANCE REQUIRES A CREDIBLE REGULATOR

57. Access Canberra has adopted a compliance framework ill-suited to the current state of safety in the ACT, placing inappropriate emphasis on education. The result is a regulator unwilling to enforce penalties and undertake prosecutions – meaning that breaking WHS law may be a viable economic decision for business.
58. The Work Safety Commissioner noted in 2017 that the “majority” of interactions with non-compliant PCBUs were educative:

ACT WorkSafe as part of Access Canberra has an engage, educate, enforce regime. The majority of our interaction with the various organisations that we deal with on a compliance arrangement is to make sure they understand their obligations.¹⁷

59. Low levels of compliance activities by the regulator, including infringement notices and other penalties,¹⁸ means that businesses wilfully disregarding WHS laws can ‘roll the dice’, only paying the price if something

goes wrong, with the knowledge that the price (for the business) is very low.¹⁹ Simply put, there are diminishing prospects that a non-compliant business will be caught, and minor consequences for those who are.

60. Workers in the ACT’s building industry, as its highest employing, high-risk industry, have arguably has been let down by Access Canberra’s poor record as a regulator. The incidence of serious claims²⁰ in ACT’s construction sector is the highest in Australia at 23.8 claims per 1,000 employees. This is 50% higher than the Australian average (16 claims per 1,000 employees) and 25% above the next highest rate of 19.1 claims per 1,000 employees in Queensland.²¹

CASE STUDY: 2017 WORK SAFE SCAFFOLDING AUDIT

61. UnionsACT encourages the Independent Review to assess Access Canberra’s performance in its recent scaffolding audit as an exemplar of its failings in enforcing the law

17 See Standing Committee On Education, Employment and Youth Affairs, page 72 at: <http://www.hansard.act.gov.au/hansard/2017/comms/education03a.pdf>.

18 In 2016-2017 only a single infringement notice was issued: See <https://www.accesscanberra.act.gov.au/ci/fattach/get/180651/1510606313/redirect/1/filename/Access+Canberra+Statistics+2016-17+-+WorkSafe+ACT.pdf>

19 Briggs, L. and McCabe, M. (2012) Getting Home Safely: Inquiry into Compliance with Work Health and Safety Requirements in the ACT’s Construction Industry, p. 8. (See: <https://www.accesscanberra.act.gov.au/ci/fattach/get/116484/1480639491/redirect/1/filename/Getting+Home+Safely.pdf>)

20 A serious claim is a workers’ compensation claim for an incapacity that results in a total absence from work of one working week or more.

21 Safe Work Australia (2017). Comparative Performance Monitoring Report 19th Edition Part 1 – Work Health and Safety Performance (See: <https://www.safeworkaustralia.gov.au/collection/comparative-performance-monitoring-reports>)

and represents an inappropriate emphasis on education. In Australia, falls from a height in the construction sector have claimed the lives of 96 workers in the 10 years to 2016, accounting for one-third of construction-related deaths and 12% of all workplace fatalities. Of those fatalities, almost 40% occurred from a building or structure.²²

62. Part 4.4. of the Work Health and Safety Regulations 2011 (WHS Regs) clearly spells out to duty holders what must be in place where any work involves a risk of a fall from height; namely to ensure the work is undertaken on the ground or solid construction, so far as is reasonably practicable.²³ The term “solid construction” means a surface structurally capable of supporting workers, with barriers to prevent a fall and with a safe means of entry and exit. Further, these requirements and the means of compliance are set out in accessible language through a Safe Work Australia “Code of Practice”.²⁴

63. Access Canberra (and its predecessors) have conducted numerous proactive education campaigns in the construction (including residential) sector over many

years to raise awareness of compliance, and have conducted audits in the past. All have found repeated, significant and concerning levels of non-compliance. The state of knowledge is well-established for importance of safe scaffolding and ahead of the audit. Further, the risks around falls from a height have been regularly reported in the wider media.²⁵

64. Following four serious falls from heights in 2016 involving scaffolds, Access Canberra conducted an audit of the scaffolding industry between March and May in 2017. Despite the significance of these risks and their prevalence as a contributor to workplace fatalities, Access Canberra announced to duty holders that the objective of the audit was merely to:

*...identify current levels of compliance with scaffolding safety and provide education and advice to workers and site managers on the safe work practices and risks to health and safety posed by working on, and around, scaffolding.*²⁶

22 Safe Work Australia (2016), Work-related Traumatic Injury Fatalities, Australia (See: <https://www.safeworkaustralia.gov.au/system/files/documents/1710/work-related-traumatic-injury-fatalities-report-2016.pdf>)

23 Work Health and Safety Regulations 2011, reg. 78.

24 Safe Work Australia (2015) Managing the risk of falls at workplaces: Code of Practice (See: <https://www.safeworkaustralia.gov.au/system/files/documents/1705/mcop-managing-the-risk-of-falls-at-workplaces-v2.pdf>)

25 For example, see: “ACT construction sites most dangerous in Australia: Safe Work Australia report” The Canberra Times (15 July 2015), (<https://www.canberratimes.com.au/national/act/act-construction-sites-most-dangerous-in-australia-safe-work-australia-report-20150708-gi7p46.html>)

26 Access Canberra (2017). WorkSafe Act – Scaffolding Audit Report, ACT Government, p. 5.

65. Securing compliance with the WHS Act was not an objective of the audit. Non-compliant duty holders were advised in advance that there would be no serious enforcement activity or penalty arising from the audit.
66. Some aspects of fall prevention audited, such as the siting and of supporting bases, safe entry and exit set up and edge protection returned a non-compliance result of 40%. Yet only three prohibitions notices and three improvement notices were issued at the completion of the audit.
69. Workers aged under 25 years old are injured at twice the rate of older workers. Two apprentices in the construction industry are seriously injured every month on average.
70. Work Safe stated the audit would focus on “industries and trades of high risk for apprentices and young workers through the audit such as construction, electrical and utilities trades, hospitality, hairdressing and butchery.”
71. Despite the “high risk” of injury to young workers in the target industries, the audit did not actually commence until March 2018.

CASE STUDY: YOUNG WORKER AND APPRENTICE SAFETY AUDIT

67. In August 2017, the Workplace Safety Commissioner announced that an audit of apprentice and young worker safety had commenced.²⁷
68. The audit was in response to serious concerns raised by UnionsACT and unions about the poor standard of supervision of apprentices, and the very high injury rate for young workers in the ACT.
72. Liability under the WHS Act accrues primarily on the basis that a PCBU fails to eliminate or otherwise minimise risks to health and safety where it knew or ought reasonably to know of the reasonably practicable means of controlling those risks.²⁸ The risks associated with young and experienced workers are well-understood by industry and both Access Canberra and Safe Work Australia have provided a plethora of materials for PCBUs to understand these risks and their means of control.²⁹
73. Whilst it is agreed that WorkSafe as an

27 Access Canberra (media release: 22 August 2017) Young worker safety the focus of WorkSafe ACT's next proactive audit, see: http://www.cmd.act.gov.au/open_government/inform/act_government_media_releases/access-canberra/2017/young-worker-safety-the-focus-of-worksafe-acts-next-proactive-audit

28 See Work Health and Safety Act 2011, s. 18(c)

29 See for example: Young Workers - <https://www.safeworkaustralia.gov.au/subject-topics/young-workers> Australian Safety and Compensation Council (2006) Getting Students To Work...Safely: Guiding principles for health and safety education for students in transition from school to work.

organisation plays a critical role in increasing awareness of safe work practices for business and the community, the role of inspectors must be preserved for the purpose of enforcement. Where non-compliance is detected and of a kind that the duty knew or ought to have known about, it is not appropriate to “reward” this with mere “education”. This is especially the case when the worker is a child aged under 18, who is at risk of injury or is actually injured.

- 74. Given the limited number of inspections that a regulator can perform in a given period, each detection of a failure to comply with the Act must be met with some level of enforcement. This is necessary both for its deterrence effect as well as maintaining a “credible threat” for those who routinely ignore safety responsibilities.

CASE STUDY: PFAS CONTAMINATION

- 75. In 2016, the Environmental Protection Authority (EPA) as a unit within Access Canberra, provided a briefing to the Environment Minister regarding contamination of PFAS (Per- and poly-fluoroalkyl substances) in a number of sites in the ACT.
- 76. Freedom of Information documents obtained by Fairfax media show that the EPA Commissioner advised that

contaminated sites included a number of current and former fire stations. The EPA Commissioner was himself briefed by the relevant EPA manager.³⁰

- 77. The EPA Commissioner at this time was also the Director of the Work Safety Unit, and the Work Safety Commissioner, Mr Greg Jones.
- 78. Although the briefings refer to risk assessments being undertaken by the EPA and the Emergency Services Agency (ESA), at no stage does it appear that the information regarding contamination of worksites crossed from the EPA to WorkSafe.
- 79. The purported benefits of the Access Canberra “super agency” (multitasking senior executives and a “one-stop-shop”) seem to be absent with regard to WHS.

A MISGUIDED APPROACH TO PREVENTION, COMPLIANCE AND ENFORCEMENT

- 80. A key principle of Access Canberra’s *Workplace Safety: Compliance Framework* claims that:

Access Canberra will apply a risk-based compliance approach to ensure

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30 Toxic foam contamination could impact nine more sites across Canberra, via <https://www.canberratimes.com.au/national/act/toxic-foam-contamination-could-impact-nine-more-sites-across-canberra-20180608-p4zkfa.html>

*resources are targeted to where the risks of harm, unsafe practices or misconduct are the greatest, thereby strengthening its capacity to take action where the community, workers and the environment are most at risk.*³¹

81. Further, the Compliance Framework states at para. 1.5.1:

Engage, educate and enforce are the three fundamental steps used by Access Canberra. Compliance is encouraged through education but escalating enforcement action will be Workplace Safety: Compliance Framework applied to those whose conduct will, or is likely to, cause harm, or those who demonstrate a disregard for the law.

82. UnionsACT suggests that Access Canberra's "risk-based" enforcement is in practice ill-suited to contemporary business practices and attitudes towards workplace safety, especially in the construction sector where a culture of disregard for safety still prevails. (It took four serious incidents involving scaffolding and a major public awareness campaign by UnionsACT and unions, to drive Access Canberra to commence the scaffolding audit,

demonstrating the inadequate nature and/or implementation of this framework.)

83. Access Canberra claims through its compliance framework to operate on a risk-based compliance model that:

*enables the targeting of resources to those areas where they are most needed and will be most effective.*³²

84. At the same time Access Canberra seeks to be a kind of "business partner" for various sectors, including the construction sector, providing "Useful links for the building industry" and promising to support ACT business with statements such as:

*Our city is growing and our construction and building industry is at the forefront of the ACT becoming a vibrant place to live, work and play. Here is a list of links and information to assist the building industry with their compliance requirements, helping to deliver construction projects to a safe and high standard for our community.*³³

85. Access Canberra's risk-based compliance model expressly states that its highest priority from a resource allocation

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31 Access Canberra, Workplace Safety: Compliance Framework, p. 2.

32 As above, para.1.5.2

33 See Access Canberra: https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/4522/, updated (Updated 16/04/2018)

perspective is “workplace incidents causing death of a worker or a member of the public”. Access Canberra, however, states it will direct its greatest level of resources after a workplace death, not where the risk of workplace death arises.

86. This approach demonstrates a fundamental misunderstanding of the preventative nature of the WHS Act and that Access Canberra has not kept pace with the judicial thinking on the correct application of preventative, duties-based legislation in Australia.

87. A preventative approach to enforcement is particularly important for hazards of a cumulative nature, for example hazardous manual handling, exposure to hazardous noise, exposure to hazardous chemicals and materials (e.g. asbestos, lead) and increasingly psycho-social hazards such as workplace bullying and stress/mental health. These hazards have detrimental impacts on long-term worker and community health and yet are unlikely to register as important under Access Canberra’s

compliance and enforcement policy.

88. A proactive preventive approach also require the regulator to expand its profiling of businesses and associated risks to consider factors such as the prevalence of employing young workers, women, transient and migrant workers, workers with a disability, and culturally and linguistically diverse workers. For example, risks affecting these classes of workers are prevalent in areas such as retail, hospitality and health and community services. Yet under Access Canberra’s fatality-focussed, risk-based approach, are routinely overlooked for scrutiny. This is despite ACT Retail returning the highest serious claim rates in Australia.³⁴

89. This undue focus on responding to harm rather than risk created by non-compliance is now clearly out of step with the preventative approach required under the WHS objectives and out of step with the primacy of risk prevention being observed in other jurisdictions.³⁵

.....
 34 Safe Work Australia (2017) Comparative Performance Monitoring Report: Part 2 – Work Health and Safety Compliance and Enforcement Activities (19th Edition), Canberra see: <https://www.safeworkaustralia.gov.au/system/files/documents/1806/comparative-performance-monitoring-report-19th-edition-part-2.pdf>

35 The Victorian Court of Appeal decision in *DPP v Vibro-Pile* [2016] VSCA 55 is worth noting here. In that decision, the Court was at pains to correct an apparent belief that evidence of actual harm is an element of charges under the State’s safety law. The Court stressed that “proof of a breach of the OHS Act does not require proof that the breach caused actual harm to any person. The offences created by the Act ... are risk-based, not outcome-based, offences. The breach consists in the employer’s failure to eliminate or reduce a risk to employee safety. The occurrence of death or injury is of evidentiary significance only. It is not an element of the offence.” See also the decision in *DPP v Frewstal Pty Ltd* [2015] VSCA 266 [48].

RISK-BASED ENFORCEMENT IS FAILING – NEW MODELS MUST BE CONSIDERED

90. UnionsACT requests that the Independent review examines newer emerging models for meeting the objectives of the WHS Act. Johnstone and Bluff (2017) have recently drawn attention to the limits to risk-based regulation, urging “WHS regulators need to extend their focus from incidents (after the fact) to hazardous exposures”.³⁶ They argue that regulators must move beyond the risk-based framework and explore alternative regulatory theories and models.

91. For example, “restorative and responsive regulation” advocates an elevated role for workers and their representatives to pursue private prosecutions for regulatory breaches.³⁷ The current WHS Act provides a right for any person to at least require that the regulator or the DPP to consider prosecution in relation to an occurrence of a breach of the Act. UnionsACT believes it is time to consider elevating the role of others in holding duty holders to account.

92. The concept of such tripartite interactions is not new: Workers through their health and safety representatives have been empowered to take immediate action through the issuance of Provisional Improvement Notices for some time now.³⁸

93. However, even these tools are misunderstood by Access Canberra, whose compliance framework fails to appreciate the role of fundamental tools of a safety regulator for responding to non-compliance, stating:

*Access Canberra will apply the most appropriate regulatory tool to address the conduct and to achieve the desired regulatory outcome which, depending on the circumstances, may include: verbal compliance advice; a written warning; a referral to the ACT Civil and Administrative Tribunal (ACAT); civil action, or criminal prosecution.*³⁹

94. This statement omits use of Improvement and Prohibitions Notices as key tools for formalising a suspected breach to require a duty holder to be brought back into compliance. Even such notices are only appropriate where a duty holder has not

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36 Johnstone, R. and Bluff, E. (2017) ‘Supporting and enforcing compliance with Australia’s harmonised WHS laws’, Australian Journal of Labour Law, 30(1): 30–57, p.31

37 Braithwaite, J. (2004). ‘Restorative and responsive regulation of OHS.’ In OHS Regulation for a Changing World of Work, edited by Elizabeth Bluff, Neil Gunningham and Richard Johnstone, 194-209. NSW, Leichhardt: Federation Press.

38 See Part 5 of the Occupational Health and Safety Act 1989 (repealed); and Part 5 of current Work Health and Safety Act 2011

39 Access Canberra, Workplace Safety: Compliance Framework, 1.5.2

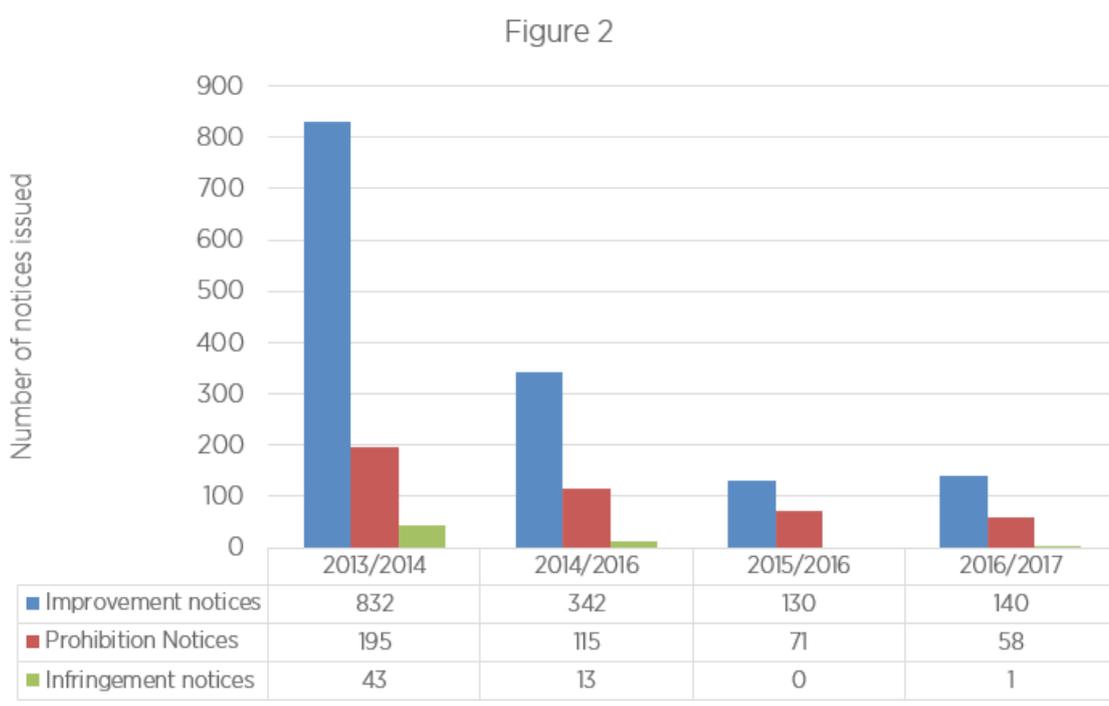


Figure 2: Number of improvement, prohibition & infringement notices issued in past three reporting periods (Source: https://www.accesscanberra.act.gov.au/app/answers/detail/a_id/1782/related/1#!tabs-2)

understood its obligations and deserves a chance to improve. An apparent decline in the use of these tools is also born out in Access Canberra's annual statistics as shown in Figure 2 and correlating with a reduction in workplace inspections.

95. Where Access Canberra has evidence that the duty holder was aware of their obligations (or ought reasonably have been aware) but has simply failed to comply, enforcement needs to take a more punitive route, initially through infringement notices and ultimately through prosecution.

96. UnionsACT is aware, however, that far from using its compliance tools effectively, inspectors are reluctant to issue notices during visits and instead are seeking advice from supervisors or internal legal first. UnionsACT is concerned that the oversight of the Regulatory Advisory Committee has

contributed to the reluctance of inspectors to issue notices. Apart from delaying the remedial action required to ensure a safe workplace, this failure to exercise judgment on the spot is inconsistent with the purpose of those tools and likely contributing to the disappointingly low issuance of notices in the ACT.

97. Table 2 illustrates the stark difference in performance of Access Canberra to discharge its regulatory obligations when compared to a jurisdiction with a dedicated safety regulator governed by an independent board. The Victorian safety regulator issues seven times the number of improvement notices.

Table 2: Comparison of compliance and enforcement activity and serious claims rates between ACT and Victoria

	ACT	Victoria
Employees*	194,122	2,375,099
Improvement notices per 1,000 employees**	1	7
Successful prosecutions per 100,000 employees**	2	4
Serious incident claims 2016 per 1000 employees in private sector***	10.7	8.1
Serious incident claims in construction 2016 per 1000 employees in private sector***	23.8	15.9

* Figures represent total number of full time and part time employees based on 2016 Census data⁴⁰

** Notices and prosecutions data obtained from Safe Work Australia⁴¹

*** Serious claims data from Safe Work Australia⁴²

98. Back in 2012 the Getting Home Safely inquiry into the construction industry concluded that:

the regulator (WorkSafe ACT) is under-resourced for the compliance work that it is tasked to do, and works within a soft penalty regime that makes breaking work health and safety laws a viable economic option for miscreants.⁴³

.....

40 Australian Bureau of Statistics 2016 Census QuickStats: Canberra (Note: ACT data presented) see: http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/CE0801?opendocument; Australian Bureau of Statistics 2016 Census QuickStats: Victoria, See: http://www.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/2?opendocument

41 Safe Work Australia (2017) Comparative Performance Monitoring Report: Part 2 – Work Health and Safety Compliance and Enforcement Activities (19th Edition), Canberra see: <https://www.safeworkaustralia.gov.au/system/files/documents/1806/comparative-performance-monitoring-report-19th-edition-part-2.pdf>

42 Safe Work Australia (2017) Comparative Performance Monitoring Report: Part 1 – Work Health and Safety Performance (19th Edition), Canberra, see: https://www.safeworkaustralia.gov.au/system/files/documents/1806/comparative-performance-monitoring-report-19th-edition-part-1_0.pdf

43 Briggs, L. and McCabe, M. (2012) Getting Home Safely: Inquiry into Compliance with Work Health and Safety Requirements in the ACT's Construction Industry, p. 8. (See: <https://www.accesscanberra.act.gov.au/ci/fattach/get/116484/1480639491/redirect/1/filename/Getting+Home+Safely.pdf> p. 6.

99. The Panel proposed that the ACT:

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

100. To date, this goal has not been achieved.

Poor performance and a general lack of credibility in Access Canberra as an independent regulator is creating a dangerous environment for the safety of workers where duty holders are incentivised to cut corners and play the odds of not being detected.

101. Further, industry and regulators must accept that there is a widespread disregard for workplace safety across the ACT, fuelled by a low-level recognition of the ACT's workplace safety record. This disregard was acknowledged by government and industry with regard to young

workers and apprentices in particular.

102. While employers are encouraged by unions and governments to see workplace safety as an inherent part of running a business, the evidence over many decades is that strong regulations, personal liability for employers/PCBUs, reinforced by credible enforcement by regulators are essential motivators for safe work practices by businesses. Importantly, education, advice and information is far less effective in the absence of credible enforcement.

DATA COLLECTION, USE AND ANALYSIS IS A DIVERSION

103. UnionsACT notes the inclusion of the ACT's collection, use and analysis of data as part of the Terms of Reference for this review. The existing risk-based regulatory model requires the health and safety regulator to make strategic use of data and information for identifying, analysing and prioritising risks as the basis for the deployment of targeted, compliance inspections and for selecting compliance measures.

104. We are concerned that any focus on this area risks implying that the poor performance of Access Canberra since the rearrangement is one of information and data collection rather than as fundamental failure of structure and governance. We urge the Review not to allow matters of

information to become an excuse for poor performance, when it is the decision-makers themselves that require scrutiny.

105. UnionsACT is concerned that the inclusion of this in the terms of reference not be used to justify retaining the existing Access Canberra/WorkSafe ACT structure.

106. Rather, UnionsACT urges the Review focus on the core elements of a modern regulator, namely, the use of inspections, investigations, prosecutions, research, strategy, policy, stakeholder consultation, compliance and operational frameworks, and education and awareness activities, as well as organisational structure and governance.

107. An issue that could be addressed by this review, however, is the quality of data that Access Canberra publishes in relation to its functions. UnionsACT has requested repeatedly over the past three years information from Access Canberra regarding workplace visits data, staffing levels and employment types for inspectors, etc. This information is not published by Access Canberra, but would likely be published by WorkSafe if it were an independent authority.

108. In particular, UnionsACT has sought clarification about how workplace visit data was recorded prior to the establishment of Access Canberra. There is a distinct absence of transparency in the way that Access Canberra discloses the details of its compliance and enforcement activities,

in contrast to other regulators, such as WorkSafe Victoria. Of recent concern is the fact that Access Canberra has ceased annual reporting of meaningful data altogether – opting instead for aggregation of data across the organisation – masking its poor performance by failing to be transparent and accountable.

RECOMMENDATIONS

109. UnionsACT urges the Independent review consider the following improvements to the ACT's WHS performance:
110. Create a dedicated, stand-alone and statutorily independent WHS authority that is free from the conflicts currently created through co-location within Access Canberra, with a CEO answerable to a board on matters of strategic policy only. The CEO should be the statutory regulator, rather than the function and powers being delegated from the Head of Service. The WHS Authority should be governed by a Board of Directors, that reports to the Minister for Workplace Safety. (See figure 4.)
111. Abolish the position of Work Safety Commissioner. UnionsACT regards the position to be anachronistic and to serve no practical purpose. The functions of the Commissioner should be merged into the CEO of the WHS Authority.
112. The Authority and Regulator would be responsible for the WHS Act and related Acts, including Workers Compensation Act, Workplace Privacy Act, etc.
113. The WorkSafe Board would be appointed by the Minister for Workplace Safety, and include representatives of employees.
114. The Work Safety Council would continue as an important tripartite advisory body to the Minister, and the CEO of the WHS Authority would sit as an ex officio member of the Council.
115. UnionsACT recommends that WorkSafe structurally distinguish the functions of education and inspection. This would ensure that the role of the regulator in increasing awareness amongst PCBU's about their obligations was performed by staff with a specialisation in awareness raising and education. Similarly, the role of inspectors would focus on prevention and enforcement of WHS requirements. UnionsACT notes that this separation has recently occurred in SafeWork SA.
116. UnionsACT recommends that Work Safe ACT be allowed to consider and adopt alternative approaches to compliance and enforcement. There are other contemporary and effective regulatory models that:
- i. embodies a truly preventative approach, as was originally envisaged by the duties-based model of regulation, especially through greater emphasis on

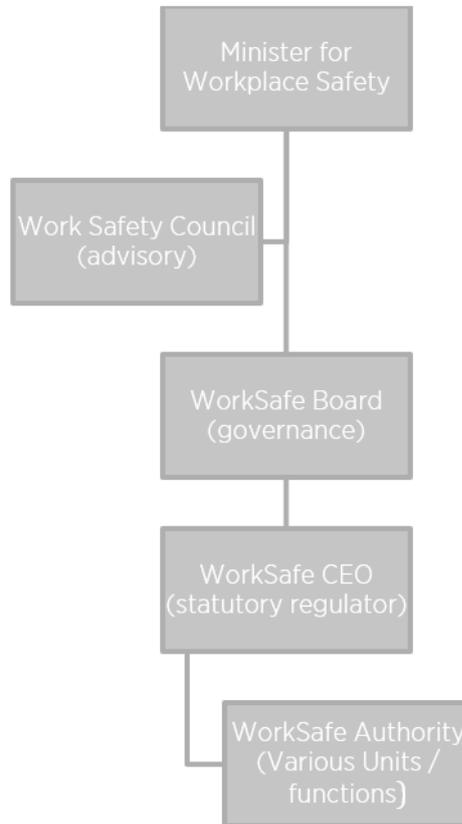


Figure 4: Model Governance Structure for an independent Work Safe Authority.

- workplace consultation;
 - ii. that better targets the antecedents to workplace fatalities, injury and illness, including hazards of a cumulative nature;
 - iii. provides a more appropriate escalation of enforcement options where it is clear that the “educative” approach has failed or where a duty holder “knew or ought to reasonably know” of a compliance requirement and has simply failed to take responsibility for implementing a risk control measure, including encouraging inspectors to better utilise the power to issue on-the-spot fines for “minor” breaches;
 - iv. that better empowers workers, especially young workers, and their representatives to be actively involved in the enforcement process, building on the existing base of Provisional Improvement Notices and strengthening the avenues for enabling prosecution of recalcitrant duty holders.
117. UnionsACT recommends that the WHS



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Trades & Labour Council of the ACT **ABN 31 724 041 495**

UnionsACT acknowledges that Canberra has been built on the land of the Ngunnawal people.

We pay respect to their Elders and recognise the strength and resilience of Aboriginal and Torres Strait Islander peoples.

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