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**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

Work Health and Safety Amendment Bill 2018

EXPLANATORY STATEMENT

**Presented by
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WORK HEALTH AND SAFETY AMENDMENT BILL 2018

Outline of the Bill

The purpose of this Bill is to amend the *Work Health and Safety Act 2011* and *Work Safety Regulation 2011* to improve safety in the construction industry by enhancing consultation and collaboration.

The construction industry is a high risk industry when it comes to workplace health and safety. The nature of the work and the culture of the workplace are both contributing factors to the construction industry's relatively poor safety record.

As set out in detail below, the Bill:

1. mandates consultation with workers and their representatives in the establishment of workgroups;
2. mandates the election and training of Health and Safety Representatives (HSRs); and
3. mandates the election of Health and Safety Committees (HSCs) as well as training for HSC members.

The amendments are limited to major construction industry projects, which are defined as projects with a contract price of \$5 million or more, or alternatively, an amount prescribed by regulation. The amendments will not apply to single dwelling residential construction projects.

Human Rights Considerations

This section provides an overview of the human rights which may be engaged by the Bill, together with a discussion of the reasonableness of any possible limitations.

Section 28(1) of the *Human Rights Act 2004* (HR Act) provides that human rights may be subject to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. Section 28(2) provides that in deciding whether a limit on a human right is reasonable, all relevant factors must be considered, including the following:

- a) the nature of the right affected;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relationship between the limitation and its purpose; and
- e) any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve.

Rights in criminal proceedings (presumption of innocence) – s 22(1)

Section 22(1) of the HR Act provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to law.

The nature of the right affected

This Bill introduces two strict liability offences. Strict liability offences engage the right to be presumed innocent (s 22(1) of the HR Act) by removing the fault elements of an offence which in turn requires the defendant to prove mistake of fact (a defence to all ACT offences under the *Criminal Code 2002* (the Code)) or other defences available under the Code for strict liability offences. Strict liability can be reasonably justified in certain circumstances:

- strict liability offences should only be used where a person knows, or ought to know, their legal obligations;
- strict liability offences must be relevant, rational and proportionate to their objective;
- examples of where strict liability offences are considered to be appropriate include regulatory regimes such as work health and safety, to support the integrity of the legislation, and where offences are minor with no custodial penalty.

The importance of the purpose of the limitation

The purpose of the WHS Act is to ensure the health and safety of workers while at work. A necessary role of the WHS Act and supporting legislation is to ensure the effective deterrence of behaviour and minimisation of risks that increase the likelihood of injuries or deaths in the workplace.

Enhancing consultation and collaboration in the ACT construction industry is an important public safety matter which requires regulatory mechanisms to ensure compliance with the safety duties and obligations to achieve a workplace standard that puts the health and safety of workers first.

Specifically, a 2017 survey of the safety culture in the ACT construction industry undertaken by the Royal Melbourne Institute of Technology's Centre for Construction Work Health and Safety Research (RMIT) found that the safety culture across the industry was variable resulting in an inconsistent approach to engaging workers on health and safety matters.

The WHS Act, which is based on nationally agreed model legislation, already utilises formal mechanisms for consultation and collaboration between employers and workers, such as the negotiation and agreement of work groups to facilitate the election of HSRs and the election of HSCs. However, the use of these mechanisms currently relies on a worker requesting they be engaged or the employer engaging them on their own initiative.

In the construction industry it is no longer sufficient to rely on a worker's request in order to establish these important collaborative tools with regard to health and safety. As such, the amendments in the Bill are designed to put an obligation on the principal contractor of major construction projects to:

- consult with an eligible union, which is based on the type of workers present at a workplace, for the purposes of obtaining advice in relation to the number and composition of work groups and numbers of HSRs — this is a consultation requirement separate to the negotiations that would then happen with workers regarding the agreement of work groups;
- require election and training of HSRs; and
- require the election and training of HSCs.

The purpose of these amendments is to achieve a consistent approach to safety consultation, participation and training on major construction projects. In particular, the training of HSRs and HSCs is an important aspect of enhancing the role of HSRs and HSCs on major construction projects and educating workers about health and safety obligations under the WHS Act and identifying and addressing risks in the workplace.

The nature and extent of the limitation

The offences in this Bill are consistent with the existing application of the work health and safety legislation, specifically in applying strict liability to the physical elements of offences created under the work health and safety legislation. The WHS Act, s12A, expressly states that under that Act strict liability applies to each physical element of an offence.

Strict liability will apply to the following new offences created under this Bill:

- it is an offence for a principal contractor not to consult with each eligible union for the project about matters relevant to the formation of a work group;
- it is an offence for a principal contractor to not provide training to a HSR in accordance with a course and costs decided by an inspector; and
- it is an offence for a principal contractor to not provide training to a HSC member in accordance with a course and costs decided by an inspector.

The first offence will only apply in relation to a new obligation that is limited to ensuring that the principal contractor of a major construction project consults with an eligible union about their obligations to establish a work group. This will facilitate a focus on health and safety matters by the principal contractor for major construction projects at the beginning of the project.

The latter two offences are essentially identical and relate to the mandatory requirement under this Bill for principal contractors to ensure HSRs and HSC members receive training in the respective roles. In relation to the obligation on a principal contractor to ensure HSRs and HSC members are trained, if there is a dispute about any of the matters required under this obligation, then a work safety inspector has the power to resolve and decide matters in dispute. Where an inspector has made such a decision and the principal contractor does not comply with the decision of the inspector, a criminal offence may be pursued with penalties of up to \$10,000 (for individuals) and \$50,000 (for a body corporate).

The provisions applying strict liability offences to the physical elements of the offence will only be applied when an inspector has decided a dispute in relation to the attendance of a worker at a HSR or HSC training course, or the payment of costs associated with a worker's attendance at such a course. This means that the principal contractor in every circumstance will have been informed by an inspector under the WHS Act that they must allow a worker to attend a particular course and/or pay particular costs associated with attendance at a particular course.

In addition, the obligations and consequently the offence of strict liability, are limited to the principal contractor for a major construction project. This limited application recognises the important role of the principal contractor in setting the expectations and approaches to health and safety matters for a major construction project. As such, the obligation and thereby the offence, is not being applied to every person conducting a business or undertaking at the same workplace (e.g. a subcontractor).

Finally, none of the new offences impose a custodial penalty.

The relationship between the limitation and its purpose

The new obligations requiring training of HSRs and HSC members are amendments to the WHS Act that are aimed at facilitating consultation and collaboration between employers and workers on health and safety matters on ACT construction sites. As the strict liability offence will only apply when a principal contractor does not comply with their obligations to consult with an eligible union, and ensure the training of HSRs and HSC members it is directly linked to the consultation, cooperation and coordination objectives of the WHS Act.

Any less restrictive means reasonably available to achieve the purpose the limitation seeks to achieve

The limitation under the Bill is considered to be the least restrictive means of ensuring that there are effective levels of communication between employers and workers regarding health and safety matters on ACT construction sites.

Detail of the Bill

Part 1 Preliminary

Clause 1 — Name of the Act

This clause provides that the name of the Act is the *Work Health and Safety Amendment Act 2018*.

Clause 2 — Commencement

This clause provides that the Act commences on 1 January 2019.

Clause 3 — Legislation amended

This clause provides that the Act amends the *Work Health and Safety Act 2011* and the *Work Health and Safety Regulation 2011*.

Part 2 Work Health and Safety Act 2011

Clause 4 - New Subdivision 5.3.1A

Subdivision 5.3.1A inserts definitions. Section 49A inserts a definition of *major construction project* for part 5 of the WHS Act. A major construction project is a project involving construction work with a contract price of \$5 million or more, or alternatively, if a different amount prescribed by the regulation, that amount. The definition of major construction project specifically excludes construction projects that solely relate to a single dwelling residential construction.

A definition of *contract price* is also included to clarify that a decision as to whether a construction project is categorised as a major construction project is made based on the initial project contract price. In other words the contract price, which must be more than \$5 million to be a major construction project, is determined by reference to the contract price agreed before work commences under the contract and is not to consider any subsequent variations to the contract price, even if the variations result in the contract price exceeding \$5 million.

New section 49B inserts a definition of *principal contractor* for part 5 of the WHS Act.

New section 49C inserts a definition of *eligible union* for part 5 of the WHS Act.

Clause 5 – New Sections 50A to 50C

Section 50A imposes a duty on the person conducting a business or undertaking (PCBU) who is the principal contractor for a major construction project to consult with each eligible

union before work starts at the workplace. Subsection (2) outlines what constitutes consultation with each eligible union.

The maximum penalty for contravening subsection 50A(2) is \$10 000 for an individual and \$50 000 for a body corporate. Strict liability applies to each physical element of the offence. As this offence arises in the regulatory context where public safety is paramount, there is an interest in ensuring regulatory schemes are observed (refer to the human rights discussion above).

Subsection (3) provides that subsection (2) does not apply to a principal contractor if the regulator has granted an exemption under 50B.

Subsection (4) states that the principal contractor must give each eligible union written notice of the major construction project and the requirement to consult with the union about the matters mentioned in subsection (2).

Under subsection 50A(5), the notice must include a statement that the union must respond to the notice no later than 14 days after receiving the notice if the union intends to participate in the consultation.

Under subsection (6), the principal contractor is taken to have consulted with an eligible union if the PCBU gives the eligible union notice under subsection (4) and the union does not respond within the 14 day timeframe.

Subsection (7) states that section 50A does not give an eligible union right of entry to the workplace.

Under section 50B the regulator may, in writing, exempt a principal contractor from complying with one or more of sections 50A, 50C, 52(2)(a), 72A, a regulation under 75 and 79A if the principal contractor makes an application to be exempt.

Subsection (2) states that the notice of exemption may include conditions the exemption is subject to whilst subsection (3) gives the regulator the ability to issue guidelines regarding matters it may take into account in deciding whether to exempt a principal contractor from complying with the sections detailed in 50B(1)(a) to (f).

Subsection (4) advises that a guideline is a notifiable instrument.

Section 50C states that the principal for the major construction project must, when work starts, facilitate an election of 1 or more HSRs to represent workers.

Clause 6 – Determination of work groups

Section 51(1)

This clause replaces existing subsection 51(1) so that section 51, which relates to the determination of work groups, also applies where a person is required by section 50C to facilitate the election of work groups.

The clause also inserts 51(1A), which states that the PCBU, or by virtue of this Bill the principal contractor, must facilitate the determination of one or more work groups of workers.

Clause 7 – Negotiations for agreement for work group

Section 52(2)

This clause replaces the existing subsection 52(2) to include different time requirements for negotiations for agreement for a work group when a major construction project is commissioned. This is to ensure that work groups, and following that HSRs, are established at the beginning of a major construction project.

Under the new subsection, on a major construction project, the principal contractor must take all reasonable steps to commence negotiations with the workers when the work starts. In any other case, a PCBU must take all reasonable steps to commence negotiations with the workers within 14 days after a request is made by a worker under section 50 of the Act.

Clause 8 – New section 52(7)

This clause includes a principal contractor when referring to a PCBU for the purpose of section 52.

Clause 9 – Section 54(3)(a)

This clause replaces the existing subsection 54(3)(a). The new subsection (3)(a) includes what constitutes a failure of negotiations for the purposes of a major construction project.

The subsection states there is a failure of negotiations where the principal contractor has not taken all reasonable steps to commence negotiations with the workers and the negotiations have not commenced: when the work starts at the workplace of a major construction project, or within 14 days of a worker making a request for election of a HSR under section 50, or within 14 days of a party to the agreement requesting a variation of the agreement.

Clause 10 – New section 54(5)

This clause includes a principal contractor when referring to a PCBU for the purpose of section 54.

Clause 11 – Determination of work groups of multiple businesses

Section 55(1)

This clause inserts an explanatory note under subsection 55(1) that states that where section 50A applies, the principal contractor must consult with the eligible unions before the start of any work at the workplace.

Clause 12 – Obligation to train health and safety representatives

New section 72 (8)

New subsection 72(8) ensures that section 72, which relates to a PCBU's obligation to train HSRs if requested by a HSR, does not apply to a workplace to which section 72A applies.

Clause 13 – Section 72A

New section 72A outlines a principal contractor's obligation to train HSRs at a workplace at which a major construction project is being carried out.

Subsection (2) states that the principal contractor must ensure the HSR for the project attends a course of training in WHS that is: approved by the regulator, that the HSR is entitled to attend under the regulation, and, subject to subsection 72A(6), chosen by the HSR in consultation with the principal contractor.

Subsection (3) states that the principal contractor must, as soon as practicable and within three months after a HSR is elected, ensure the HSR has time off work to attend the course of training, and pay the course fees and any other reasonable costs associated with the HSR's attendance at the course of training.

Subsection (4) states that a HSR must receive the same pay they would be entitled to receive for performing their normal duties during the time they take off work to attend the course of training.

Subsection (5) allows the principal contractor or HSR to ask the regulator to appoint an inspector to decide the matter if an agreement cannot be reached between a principal contractor and HSR as soon as practicable and within three months after the HSR is elected regarding the choice of course of training, time off for the HSR to attend the training course, and payment of course fees and reasonable costs associated with the HSR attending the training.

Under subsection (6), the inspector may decide the matter in accordance with section 72A.

Subsection (7) states that the principal contractor must ensure the HSR attends a course decided by the inspector and pay the costs decided by the inspector under subsection (7). The maximum penalty for contravening this section is \$10 000 for an individual and \$50 000 for a body corporate. Strict liability applies to each physical element of the offence. As this offence arises in the regulatory context where public safety is paramount, there is an

interest in ensuring regulatory schemes are observed, and in this context the sanction of criminal penalties are justified. Refer to the human rights discussion above.

Subsection (8) states that subsection (7) does not apply if an exemption has been granted under section 50B.

Clause 14 – Obligation to share costs if multiple businesses or undertakings
Section 73(1)(b)

Section 73 relates to the obligation to share costs if a HSR or deputy HSR represents a work group of workers carrying out work for two or more PCBUs.

Clause 14 inserts subsection 73(1)(b), which has the effect that section 73 also applies to the costs imposed on the principal contractor of a major construction project under section 72A(3)(b).

Clause 15 – Constitution of committee
Section 76(1)

This clause amends subsection 76(1) so that section 76, which imposes requirements as to the constitution of a WSC, is subject to new subsection 76(4A).

Clause 16 – New section 76(4A)

Section 76(4A) states that if the HSC is established by a principal contractor at a workplace at which a major construction project is being carried out, at least half the members of the committee must be workers carrying out work on the project.

Clause 17 – New section 79A

New section 79A imposes an obligation on the principal contractor for a major construction project to train HSC members.

The course must be one that is approved by the regulator, that the HSC members are entitled under to attend under the regulation, and, subject to subsection 79A(6), chosen by the HSC in consultation with the principal contractor.

Subsection 79A(3) states that the principal contractor must, as soon as practicable and within three months after a HSC is elected, ensure the HSC members have time off work to attend the course of training, and pay the course fees and any other reasonable costs associated with the HSR's attendance at the course of training.

Subsection (4) states that a HSC member must receive the same pay they would be entitled to receive for performing their normal duties during the time they take off work to attend the course of training.

Section (5) allows a principal contractor or HSC to ask the regulator to appoint an inspector to decide the matter if an agreement cannot be reached between a principal contractor and HSC as soon as practicable and within three months after the HSR is elected regarding the choice of course of training, time off for the HSR to attend the training course, and payment of course fees and reasonable costs associated with the HSC member attending the training.

Under subsection (6), the inspector may decide the matter in accordance with section 79A.

Subsection (7) states that the principal contractor must ensure that members of the HSC attend a course decided by the inspector and pay the costs decided by the inspector under subsection (7). The maximum penalty for contravening this section is \$10 000 for an individual and \$50 000 for a body corporate. Strict liability applies to each physical element of the offence. As this offence arises in the regulatory context where public safety is paramount, there is an interest in ensuring regulatory schemes are observed, and in this context the sanction of criminal penalties are justified. Refer to the human rights discussion above.

Subsection (8) states that subsection (7) does not apply if an exemption has been granted under section 50B.

Clause 18 – Section 85(6)(a) and 90(4)(a)

This clause amends subsection 85(6)(a) and subsection 90(4)(a) to insert a reference to subsection 72A(2)(b) regarding the requirements for training of HSRs on major construction projects in these subsections.

This has the effect that a HSR cannot give a direction under section 85 or a provisional improvement notice under section 90 unless the HSR has completed initial training prescribed by regulation referred to in section 72A(2)(b) in addition to that referred to in section 72(1)(b).

Clause 19 – Which decisions are reviewable

Table 223, new item 2A

This clause inserts item 2A in table 223 so that a decision made under subsection 72A(7) (decision in relation to training of health and safety representative) is a reviewable decision.

Clause 20 – Table 223, new item 3A

This clause inserts new item 3A in table 223 so that a decision made under subsection 79A(7) (decision in relation to training of health and safety representative) is a reviewable decision.

Clause 21 – Dictionary, new definitions

This clause inserts the terms '*eligible union*', '*major construction project*' and '*principal contractor*' for the purposes of division 5.3 in the dictionary. The clause tells readers to refer to sections 49C, 49A and 49B for the definitions of these terms.

Part 3 Work Health and Safety Regulation 2011

Clause 22 – Section 21 heading

This clause amends the heading of section 21 to include reference to section 72A(1) and 72A(2) of the WHS Act.

Clause 23 – Section 21(1)

This clause amends subsection 21(1) so that it also applies to section 72A of the WHS Act.

Clause 24 – Section 21(2)

This clause amends subsection 21(2) so that it also applies to section 72A(2) of the WHS Act

Clause 25 – New sections 21A and 21B

This clause inserts new sections 21A and 21B.

New section 21A relates to the establishment of a HSC at a workplace at which a major construction project is being carried out. Subsection (2) states that a principal contractor at the workplace must establish a HSC for the business or undertaking. Subsection (3) requires a principal contractor to establish a HSC within two months after work starts on the project.

New section 21B provides that for the purposes of the new section 79A(2) of the WHS Act, HSC members are entitled to attend a course of training in WHS that is at least four hours long. Subsection (2) provides some relevant matters that a regulator may have regard to in approving a course of training in WHS for the purposes of the new section 79A(2)(a) of the WHS Act.

The explanatory note under the subsection explains the effect of section 21B is that it prescribes a course of training to which a HSR is entitled. The note states that in addition to the course, the HSR and the principal contractor may agree that the HSR will attend or receive further training.