LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

SELECT COMMITTEE ON PRIVILEGES 2022
Mr Jeremy Hanson CSC MLA (Chair), Ms Jo Clay MLA (Deputy Chair),
Mr Michael Pettersson MLA

Submission Cover Sheet

Inquiry into possible contempt of the Assembly: Imposition of prohibition notice by WorkSafe ACT

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Submission to the Select Committee on Privileges—17 October 2022

Joy Burch MLA, Speaker

Executive summary

1. I make this submission to the Select Committee on Privileges 2022 in my capacity as the Speaker of the Legislative Assembly for the Australian Capital Territory (the Assembly). Among other matters, I make the following points:

   - The Assembly's commitment to the separation between the Executive and Legislative arms of government is acknowledged in its endorsement (Continuing resolution 8 A) of the *Commonwealth (Latimer) House Principles on the Three Branches of Government.*
   - For clarity and understanding, in the context of the separation of the powers and parliamentary privilege, 'the Assembly' refers to the functions and proceedings of the Assembly and all of its committees.
   - MLAs must fiercely resist attempts—particularly by the Executive arm of government—to interfere with the functions performed by the legislature (i.e. the part of our system of government responsible for making laws, holding government to account/ensuring responsible government, and representing electors).
   - In deciding whether a contempt (due to improper interference) has been committed, the lawfulness of an act or omission is not a relevant consideration. Instead, it is the obstruction of proceedings and the intention to obstruct that paves the way for a finding of contempt.
   - The prohibition notices issued by WorkSafe on 12 August 2022 and 15 August 2022 appear to:
     - have been issued knowingly and intentionally, and despite clear advice from both the Clerk (in person on 12 and 15 August 2022) and me (in writing on 15 August 2022) about the very real tendency

for an improper interference in the work of Assembly committees to occur; and

- have had the effect of substantially obstructing the work of the Select Committee on Estimates 2022-2023.

- If the committee makes a finding/s of contempt, I submit that the committee and the Assembly seek to establish an unambiguous precedent so that there is no doubt as to the operation of the Assembly's powers, privileges, and immunities.
- I have received legal advice that the way in which WorkSafe ACT issued the relevant prohibition notices was not a valid exercise of power under the *Work Health and Safety Act 2011* (WHS Act).
- There has never been any suggestion by me or the Office of the Legislative Assembly that MLAs do not have duties under the WHS Act to ensure the health and safety of workers. The issues that are the subject of the committee's inquiry relate to 'improper interference' in parliamentary functions of the Assembly/its committees, which are constitutionally protected.
- It is critical that a memorandum of understanding between the Speaker and the Commissioner be developed to ensure that interference in the proceedings of the Assembly and its committees does not occur in the future.
- If there are to be amendments to the WHS Act clarifying the operation of certain provisions, amendments must also explicitly state that the WHS Act does not affect the powers, privileges and immunities of the Assembly, its committees or its members and that the WHS Act does not confer a power on an inspector or any other person to prohibit the proceedings of the Assembly or its committees.

Introduction

2. My submission is confined to the committee's terms of reference as they relate to the Work Health and Safety Commissioner and the issuing of two prohibition notices that purported to prevent Assembly committees from meeting.

3. Parliamentary presiding officers perform several important functions but perhaps none are more important than standing up for the integrity of our parliamentary system and ensuring that its constitutional roles can be performed unobstructed.

4. The Assembly is the cornerstone of democratic governance in the Territory—

- It is the body that makes and unmakes governments by electing a Chief Minister following a general Territory election and for considering votes of no-confidence.
- It is the body in which elected members come together to represent all of those who vote at Territory elections.
- It is the body in which elected members consider and make our laws.
- It is the body that holds executive government to account and gives effect to responsible government. Indeed, responsible government depends on a fully operational Assembly and committee system with a delegated power of inquiry.

5. These functions lie at the core of our democratic practice and as parliamentarians, all MLAs must fiercely resist attempts—particularly by the Executive arm of government—to interfere with them. The ACT Executive is established by s 36 of the *Self-Government (Australian Capital Territory) Act 1988* (Cth). Those administering executive functions, including regulatory (e.g. occupational health and safety) and other functions as set out in Schedule 4 of the Act, may be regarded as part of the Executive arm of government more generally. The Assembly's commitment to the separation between the Executive and Legislative arms of government is acknowledged in its endorsement (Continuing resolution 8 A) of the *Commonwealth (Latimer) House Principles on the Three Branches of Government.*

6. As members would be aware, while the matters associated with the issuing of the prohibition notices were in play, I had considered the possibility of court action. I was initially very keen to see an unequivocal judicial repudiation of what I regarded as a case of executive overreach, through a third party, in the proceedings of the Assembly. To be clear, 'the Assembly' refers to the functions and proceedings of the Assembly and all its committees.

7. However, notwithstanding that I believe the constitutional and legal position are clearly on the side of the Assembly, after careful consideration I have formed the view that the Assembly has all the necessary tools to address the relevant matters itself. I also consider that it is institutionally important for the Assembly to deal with these matters and to take on the task of protecting itself in the event that improper interference in its affairs is found to have occurred. As the committee would be aware, I sought legal advice through Counsel expert in these matters and that advice has been provided to all MLAs. The position I have adopted on this occasion does not preclude legal action if the Assembly or its committees are subjected to interference in the future.

8. The privileges committee, of course, has a special role to play in protecting the institution of parliament. As noted in the joint opinion of Mr Bret Walker SC and Mr Jackson Wherrett:

> It will be a matter for the Select Committee to decide whether the actions of the [WorkSafe] inspector in issuing the prohibition notices constituted a breach of parliamentary privilege. More particularly, the Select Committee will decide whether the issuing of the prohibition notices amounted to an improper interference with the free exercise by the Assembly or committee of its authority or functions. As was said in *Stockdale v Hansard* , "the members of each House of Parliament are the sole judges whether their privileges have been violated, and whether thereby any person has been guilty of a contempt of their authority ...
>
> For the purposes of parliamentary law, the determination of the Select Committee will have legal significance. That is because parliamentary law includes law that the Houses of Parliament make themselves by the way that they act.[1]

9. I consider that the privileges committee, through its delegation of power by the Assembly, is able to determine the relevant facts and apply the principles of parliamentary law to get to the bottom of the circumstances leading to the issuing of the notices and whether or not any contempt was committed in the course of those events—whether by officials or others.

10. If the committee makes a finding/s of contempt, I submit that the committee and the Assembly seek to establish an unambiguous precedent so that there is no doubt as to the operation of the Assembly's powers, privileges, and immunities. We must never permit incursions in the Assembly's proceedings.

Contempt power

11. The Assembly's contempt power is similar to the power of a court of law to punish interference with the administration of justice. Under section 4 of the Commonwealth Parliamentary Privileges Act, the offence of contempt against a house of parliament requires that the following elements be present:

> [There is conduct that] … amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

[1] Submission 6, p 4. More recently, the position is summarised as follows: '..it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise' (*R v Richards; Ex parte Fitzpatrick and Browne* [1955] HCA 36; 92 CLR 162).

12. This principle is picked up in the Assembly's standing orders. Standing order 277(a) provides that:

> A person shall not improperly interfere with the free exercise by the Assembly or a committee of its authority, or with the free performance by a Member of the Member's duties as a Member.

13. Standing orders 277(b) and 277(d) make similar provision. Under Assembly standing order 278(a), a privileges committee is to 'take into account' the principle that the contempt power should only be used where it is 'necessary to provide reasonable protection for the Assembly and its committees and for Members against improper acts tending substantially to obstruct them in the performance of their functions'.

14. Under standing order 278(b)-(c), a privileges committee is also to take into account whether there are other remedies available to address an act that is considered a contempt, whether the act was committed knowingly, and whether there is a reasonable excuse for the Act. These criteria guide but do not bind a privileges committee in undertaking an inquiry.[2]

15. In deciding matters of contempt, an often-referred-to advice provided in 1989 by the then Clerk of the Australian Senate, Harry Evans, to the Senate Committee of Privileges, states the position as follows:

> In establishing whether a contempt has been committed, the matters to be examined are the tendency, effect, and intention of the act in question, not the lawfulness of the act or whether there is otherwise a legal right to perform the act.[3]

16. An act or omission that is accidental or is the unforeseen result of some act or omission is unlikely to be regarded as an 'improper interference'. However, an act or omission that might otherwise be regarded as 'authorised' or 'lawful',[4] may still amount to a contempt if it substantially obstructs the functions of the Assembly, an Assembly committee, or a member in their role as a parliamentarian. In deciding whether a contempt has been

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[2] Indeed, it has been noted by former Clerk of the Senate, Harry Evans, that it is open a privileges committee to 'treat particular contempts or even all contempts as strict liability offences, or to decide that different states of mind and intentions are elements of different contempts', see Advice No. 3, *Lawful Acts and contempt of the Senate*, 6 March 1989 to the Chair of the Committee of Privileges.

[3] Harry Evans, Clerk of the Senate, Advice No. 3, *Lawful Acts and contempt of the Senate*, 6 March 1989 to the Chair of the Committee of Privileges.

[4] Harry Evans, Clerk of the Senate, Advice No. 3:

> The submission appears to misinterpret the significance of the word "improper" in section 4 of the Parliamentary Privileges Act. The section provides that, to constitute an offence, conduct must amount to improper interference. It cannot be assumed, as the submission appears to assume, that "improper" there means "unlawful" or "improper in some other context". An act which may be otherwise perfectly lawful and proper may nevertheless be a contempt.

committed, the lawfulness of an act or omission is not a relevant consideration. It is the obstruction of proceedings and the intention to obstruct[5] that are the determinative factors.

17. While it is for the committee to decide, I note that the prohibition notices issued by WorkSafe on 12 August 2022 and 15 August 2022 appear to:

- have been issued knowingly and intentionally, and despite clear advice from both the Clerk (in person on 12 and 15 August 2022) and me (in writing on 15 August 2022) about the very real tendency for an improper interference to occur; and
- have had the effect of substantially obstructing the work of the Select Committee on Estimates 2022-2023.

18. In their joint opinion, Mr Walker and Mr Wherrett conclude that:

> It would be open to the Select Committee to conclude that the issuing of the prohibition notices amounted to a breach of parliamentary privilege. More particularly, it would be open to the Committee to find that the notices amounted to an improper interference with the free exercise by the Assembly or committee of its authority or functions, which is a privilege enjoyed by the Assembly by reason of s 24 of the Self-Government Act.

Health and safety matters

19. To place the matter beyond doubt, it has never been my position or that of the Office of the Legislative Assembly that the WHS Act does not apply to the Assembly, to MLAs or staff working within the precincts. During the pandemic a range of processes and internal controls have been adopted to provide a safe workplace for MLAs, their staff, OLA staff and others working in the precincts including:

- The development of the Assembly's COVID Safe Plan in June 2020, which has been continuously updated and consulted throughout the pandemic; and

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[5] Harry Evans, Clerk of the Senate, Advice No. 3:
For a contempt of Parliament to be established, it is not necessarily required to prove a culpable intention on the part of a person who has performed a particular act; as has already been noted, the effect or tendency of the act may be sufficient to constitute the offence. The same consideration applies to contempt of court, or at least contempt of court constituted by a publication (*R v Odhams Press Limited* and others ex parte Attorney General (1957) 1 QB 73 at 80; *Lane v Registrar of Supreme Court of NSW* (1981) 55 ALJR 529 at 534; *Registrar of Supreme Court v McPherson and others* (1980) 1 NSWLR 688 at 696).

- The ongoing work of the Standing Committee on Administration and Procedure and the Assembly's Health and Safety Committee to consider WHS risks.

20. The position that has been consistently expressed is that, given the fundamental constitutional significance of the roles performed by the Assembly, the WHS Act cannot properly be interpreted as conferring any power that would enable an inspector (or any other person) to prevent a meeting of a committee or the Assembly itself. That is, it is beyond power for the safety regulator to simply 'prohibit'—in whole or in part—the operation of parliamentary democracy in the ACT.

21. This is clearly what the terms of the notices issued by WorkSafe purported to do.

22. I am aware of commentary that seems to suggest that this episode has all been about the health and safety of ministers and their senior officials appearing at public hearings of the estimates committee. It is absolutely critical to emphasise that, as Speaker, I will always safeguard the health and safety of members, their staff, staff of the Office and visitors to the precincts. I have done so since the beginning of the pandemic and I will continue to consult with the Standing Committee on Administration and Procedure, the Assembly's Health and Safety Committee and party rooms, to put in place internal controls to eliminate or minimise WHS risks. I expect all other members to do the same.

23. However, throughout this episode, I have heard various assertions about the lack of risk assessments, about large numbers of senior officials being required to be present in a room in breach of Covid Safe arrangements, about senior officials being directed to attend hearings, and about a lack of consultation with ministers and senior officials concerning their attendance at the hearings.

24. It is up to those making such claims to demonstrate that they are based in fact.[6]

25. Rather than a constructive approach to the resolution of the relevant issues, there was every appearance of the use of the prohibition notice power as a measure of first resort. It is unclear why WorkSafe adopted this approach when other approaches that would not have engaged the Assembly's privileges could have been utilised. For example, it is unclear why the Commissioner, in her role as the regulator, did not herself engage constructively in discussing relevant concerns about the conduct of the estimates committee hearings with me, the Clerk or the estimates committee itself. Such an approach would have been consistent with 152(e)-(g) of the WHS Act which states that:

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[6] At least some of these assertions appear to have been accepted as facts by WorkSafe to support the existence of a reasonable belief, pursuant to s 195 of the WHS Act, that a serious risk to the health and safety of a person existed or potentially existed. This is the jurisdictional test that must be met before an inspector's power to issue a prohibition notice power is enlivened.

The regulator [the Commissioner] has the following functions:

> (e) to foster a cooperative, consultative relationship between duty-holders and the persons to whom they owe duties and their representatives in relation to work health and safety matters;
>
> (f) to promote and support education and training on matters relating to work health and safety;
>
> (g) to engage in, promote and coordinate the sharing of information to achieve the object of this Act …

Legal advice

26. The advice of Mr Walker and Mr Wherrett proceeds from an interpretation of the terms 'workplace' and 'activity' in the WHS Act vis-à-vis the constitutional functions performed by the Assembly. The authors of the advice point out that the Assembly:

> … is a constitutional institution responsible for making laws for the peace, order and good government of the Territory and for holding the Territory Executive to account. To describe those functions as a "task" or "enterprise" is, in our view, inapt.
>
> Even if the Legislative Assembly is a "workplace", in our opinion, the better view is that the conduct of parliamentary debates or committee proceedings are not "activities" within the meaning of the Work Health and Safety Act. Although the word "activities" is broad, we consider that it is highly unlikely that the Legislative Assembly, in using such a general word, intended to include its core constitutional functions, such that they would be capable of being shut down by an inspector appointed under the Act.
>
> … For these reasons, in our opinion the inspector did not have power to issue prohibition notices to the Legislative Assembly of the kind issued in August 2022. If the Assembly had intended that it would be treated as a workplace in the same way as any other workplace that exists within the Territory, it is likely that intention would have been made more clear in the legislation.[7]

27. Accordingly, it is the view of Mr Walker and Mr Wherrett that:

[7] Submission 6, p 11.

> … an inspector does not have power under s 195 of the Work Health and Safety Act to issue a prohibition notice to the Legislative Assembly prohibiting either parliamentary debates in the Assembly or the conduct of parliamentary committee meetings.[8]

28. Mr Walker and Mr Wherrett note that the Commonwealth Parliament has amended the Commonwealth WHS Act so that, for the avoidance of doubt, parliamentarians are officers of the Commonwealth for the purposes of the Act 'in respect of the business or undertaking of the Commonwealth constitution by the provision by the Commonwealth of support for the functioning of the Parliament'.[9]

29. I, along with the Standing Committee on Administration and Procedure, the Assembly's Health and Safety Committee, and the Office of the Legislative Assembly have always regarded MLAs as being PCBUs[10] under the WHS Act and that those working in the Assembly precincts have been covered by relevant provisions (see legal advice previously sought from the ACT Government Solicitor at Attachment A). There is no inconsistency between the operation of healthy and safe workplaces and the imperative for parliamentary proceedings to protected from improper interference. No special exemption or immunity for MLAs has ever been claimed. The sole claim has been around the misuse of a power by WorkSafe ACT to stop the Assembly or its committees from performing their constitutional functions.

30. While there may well be value in amending the WHS Act to eliminate any potential ambiguity about the applicability of certain provisions of the Act to MLAs, staff and the Assembly as the Commonwealth has done, it is critically important that amendments in no way seek to alter the powers, privileges or immunities of the Assembly, its committees, or its members, which are foundational to the parliamentary form of government operating in the Territory.

31. Accordingly, given the history that the Assembly is now confronting with the work safety regulator's exercise of their powers pursuant to s 195 in the way that occurred—and for clarity—in addition to any amendments that might be considered in line with those passed to equivalent Commonwealth legislation, it would be appropriate to also amend the WHS Act to include a provision to the effect that:

    - nothing in the WHS Act abrogates or derogates from the powers, privileges or immunities of the Legislative Assembly, its committees, or its members; and

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[8] Submission 6, p 2.
[9] *Work Health and Safety Act 2011* (Cth), s 242(3)
[10] Persons Conducting a Business or Undertaking

- nothing in the WHS Act gives an inspector or any other person the power to prohibit the proceedings of the Assembly or its committees.

32. It is also critical that a memorandum of understanding between the Speaker and the Commissioner be developed in order to ensure that we can avoid the sort of overreach that has been in evidence on this occasion.

Final thoughts

33. The Assembly is the master of its own destiny and I have no doubt that it will be guided by the work of this committee, democratic principles, relevant legal perspectives, the imperative to protect the functions of the legislature, and the separation of powers that our system demands.

34. Whatever the findings of the committee, it is my sincere hope that we never see an episode like this again. I strongly encourage members to consider and deliberate on these matters as parliamentarians, rather than as members of the government, opposition or crossbench. The strength and integrity of our parliamentary systems depends on it.

35. I want to leave the committee with some thoughts that were expressed by former Senate President, Scott Ryan and then Senate Opposition Leader, Penny Wong, during the height of the pandemic. These statements were made in the Senate at a time when the Commonwealth Executive and some state and territory governments had purported to restrict the movement of members and senators to attend parliament. In a statement to the Senate, on 24 August 2020, President Ryan said:

> The right of those elected to attend and participate in parliament is an ancient one. For good reason the ability of others, including the executive, to restrict this has always been limited.
>
> The powers and immunities that enable and secure the work of the two Commonwealth houses belong to the houses themselves by constitutional design…
>
> The ability to scrutinise the executive and participate in legislative activity is unarguably even more critical in times of crisis due to the extraordinary powers being delegated, granted and exercised by officials and the executive.
>
> In the current pandemic, an important principle is at stake: notably, the ability of the executive or its officers, no matter the jurisdiction, to control attendance at parliament or constrain the work of members of parliament when it's directly related to parliamentary proceedings…

Unilateral action by executives—whether Commonwealth, state or territory—that impede the performance of Commonwealth parliamentary functions are problematic from a constitutional perspective.

This remains the case even where, as is the case with border restrictions and quarantine requirements imposed at a state and territory level, that action is founded on or in aid of genuine public health advice and goals. However, these problems may be largely avoided where the requisite action, in this case a response to the public health advice, is developed cooperatively by the institutions concerned.

The approach taken during this public health crisis will doubtless set precedents that will be looked to in the future…

In my view, simple acquiescence to these new assertions of control by officials of the executive of the Commonwealth, state or territories… poses a risk in that we cannot envisage how it may be used, or potentially even misused, at a future time in circumstances we cannot imagine. I doubt any of us imagined the current circumstances only a year ago.

Principles not defended in difficult times are in effect mere customs or conveniences.[11]

36. Senator Wong, responded to Senator Ryan's remarks as follows:

… we appreciate that you have taken your responsibilities in this office as encompassing some guardianship of this institution, and we respect and value that. We endorse, in particular, the point you make:

> The ability to scrutinise the executive and participate in legislative activity is unarguably even more critical in times of crisis due to the extraordinary powers being delegated, granted and exercised by officials and the executive.
>
> Put simply, parliamentary democracy needs a parliament. It's not an optional extra.
>
> Ceding untrammelled power to the executive is not who we are, and it's also risky…

[11] Statement by President Ryan, Australian Senate, 24 August 2020.

> The parliament and the executive are separate institutions, and we each have a separate and unique responsibility within our system of government. The executive ought not and cannot interfere with the parliament.[12]

37. **On 3 September 2020, the Senate agreed to the following resolution jointly moved by the Leader of the Government in the Senate (Senator Cormann) and the Leader of the Opposition in the Senate (Senator Wong):**

> That the Senate, in the spirit of mutual respect and working with other institutions, agencies and officials managing the COVID-19 pandemic:
>
> (a) notes that:
>
> (i) the law of parliamentary privilege is intended to protect the ability of legislative houses, their members and committees, to exercise their authority and perform their duties without undue external interference, and
>
> (ii) the powers and immunities that enable and secure the work of the two Commonwealth houses belong to the houses themselves by constitutional design – a design which ensures that the Senate, in particular, can undertake its functions with an appropriate degree of independence ...

38. **These are the very same powers and immunities that have been threatened by the issuing of the prohibition notices against the Assembly. Like the Australian Senate, it is essential that we protect the Assembly and its committees from obstruction and interference wherever we detect it. It may be appropriate for the Assembly to consider a similar resolution.**

Joy Burch MLA

Speaker

17 October 2022

[12] Statement by Senator Wong, Australian Senate, 24 August 2020.

Attachment A—Legal advice concerning PCBU status

Australian Capital Territory
Government Solicitor

Our Reference
636045

Contact
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1 May 2019

By email: Ian.Duckworth@act.gov.au

Mr Ian Duckworth
Executive Manager
Business Support
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CANBERRA ACT 2601

Dear Ian

Does each Member of the Legislative Assembly constitute a Person Conducting a Business or Undertaking under the *Work Health and Safety Act 2011*?

I refer to your request for advice received on 25 March 2019.

A. Background

1. A person conducting a business or undertaking **(PCBU)** has a number of obligations in respect of his/her employees under the *Work Health and Safety Act 2011* **(WHS Act)**. These obligations include:

   (1) at the request of a worker who carries out work for a business or undertaking, facilitating the conduct of an election for 1 or more health and safety representatives **(HSR)** to represent workers who carry out work for the business or undertaking – see section 50 of the WHS Act; and

   (2) establishing a health and safety committee **(HSC)** for the business or undertaking – see section 75 of the WHS Act.

2. If a request is made by a worker under section 50 for conduct of an election for 1 or more HSRs, a PCBU must facilitate the determination of 1 or more work groups of workers – see section 51 of the WHS Act. The purpose of determining a workgroup is to facilitate the representation of workers in the work group by 1 or more HSRs – see section 51(2) of the WHS Act.

3. You have indicated that the Legislative Assembly **(Assembly)** has operated a HSC for many years on the assumption that the Assembly is a single work group. This has also meant that only a single HSR has been appointed for the work group. The Assembly's HSC has been structured with representation from management and staff representatives from the Office of the Legislative Assembly; from Members of the Legislative Assembly **(MLAs)** and Ministers offices and from unions.

4. In recent meetings of the HSC, the CPSU has claimed that its members do not support the single workgroup model and that workgroups should be formed along party lines.

5. In considering this claim, you have requested advice on whether each MLA could be considered to be a PCBU. In the event that each MLA is considered a PCBU, you have requested advice on whether sections 51-59 may offer any scope for alternative arrangements to each MLA separately facilitating elections for one or more HSRs and establishing HSCs for each of their own offices.

B. Summary

1. We consider that each MLA could be considered to be a PCBU on the basis that each MLA is conducting an undertaking at a workplace.

2. Section 55(1) of the WHS Act provides that work groups may be determined for workers carrying out work for 2 or more persons conducting businesses or undertakings at 1 or more workplaces. Accordingly, we consider that section 55(1) allows employees of 2 or more MLAs to be determined to be part of one workgroup. This is particularly so given that the employees of MLAs will usually perform similar types of work and have similar health and safety conditions within the workplace (particularly for those based at the Assembly). However, in order for a determination to be made under section 55(1) for a "consolidated" workgroup, the requirements set out at sections 55 – 57 of the WHS Act must be followed.

C. Application of the WHS Act

1. Section 75(1) of the WHS Act provides as follows:

> The person conducting a business or undertaking at a workplace must establish a health and safety committee for the business or undertaking or part of the business or undertaking—
>
> (a) within 2 months after being requested to do so by—

(i) a health and safety representative for a work group of workers carrying out work at that workplace; or

(ii) 5 or more workers at that workplace; or

(b) if required by regulation to do so, within the time prescribed by regulation.

2. In considering whether the obligation at section 75(1) applies to each MLA separately, we need to consider whether each MLA is conducting a ***business or undertaking*** at a ***workplace*** (our emphasis).

Is an MLA conducting a business or undertaking?

3. Section 5 of the WHS Act sets out when a person conducts a business or undertaking. Relevantly, section 5 provides that a person conducts a business or undertaking whether or not the business or undertaking is conducted for profit or gain. "Business" and "undertaking" are not defined in the WHS Act.

4. However assistance in interpreting those terms can be taken from the explanatory memorandum for the *Work Health and Safety Bill 2011* **(Bill)**[1]. The Bill provides:

> The phrase 'business or undertaking' is intended to be read broadly and covers businesses or undertakings conducted by persons including employers, principal contractors, head contractors, franchisors and the Territory

5. Whilst it is unlikely that an MLA could be said to be conducting a business, we consider that given the intention of the legislature for "undertaking" to be read broadly, we consider that it is reasonably arguable that an MLA could be said to be conducting an undertaking. The undertaking could be described as the running of an office to assist the MLA in his/her role as the elected representative of an ACT electorate.

6. "Undertaking" is defined in the Macquarie Dictionary to mean "a task, enterprise, etc., undertaken". We also note that our conclusion that an MLA could be said to be conducting an undertaking is supported by discussion in Interpretive Guidelines **(Guidelines)** that Safe Work Australia has issued in respect of the provisions of the *Work Health and Safety Act 2011 (Cth)*, on which the WHS Act is based. The Guidelines provide that an undertaking may have elements of organisation, systems and possible continuity, but are usually not profit-making or commercial in nature. We consider that these features are present in an MLA's office.

7. Section 10 of the *Legislative Assembly (Members Staff) Act 1989* **(LAMS Act)** provides that an MLA may, on behalf of the Territory, employ under an agreement in writing, a person as a member of staff of the member. Section 13(3) provides that

[1] Section 142 of the *Legislation Act 2001* provides that in finding the meaning of an Act the explanatory statement for the bill that became the Act may be considered.

an MLA may at any time, by notice in writing given to a person employed by the MLA, terminate the person's employment.

8. In determining whether an employment relationship exists and who, in that relationship is the employer, a court will look at all aspects of the relationship to determine those issues. Indicia of who is the employer will include who pays the salary, who approves leave, who exercises the power of hiring and dismissal, who provides the employee with the necessary facilities in which and with which to perform his/her duties, who fixes hours of duty, who signed the contract of employment, who has the power, and who exercises the power, to control the manner in which the employee performs his/her duties. In cases where the ordinary responsibilities of an employer are all performed by the one person, there is little difficulty in identifying the employer unless those responsibilities are exercised on behalf of another person, in which event the latter person may be the true employer.

9. Unfortunately, the LAMS Act does not admit of such a simple solution in the case of staff employed under it. The usual responsibilities of an employer under the LAMS Act are shared between the Territory, on the one hand, and the MLA/office-holder, on the other hand. The payment of salary, making of superannuation arrangements, provision of office requisites and facilities, workers compensation and the determination of terms and conditions of employment are handled by the Territory. The power of hiring and dismissing staff is, however, exercised by the MLA/office-holder. While the power to employ staff is expressed in sections 5(1) and 10(1) of the Act to be exercisable "on behalf of the Territory", that expression does not, however, have any strict legal meaning. Depending upon its context it may suggest an agency relationship. It may do no more than imply something done in the interests of or for the purposes of another (*R v. Toohey; ex parte Attorney-General of the Northern Territory* (1980) 145 CLR 374 and *R v. Portus; ex parte Federated Clerks Union of Australia* (1949) 79 CLR 428). The expression "on behalf of" is therefore not necessarily conclusive of the issue.

10. Although the rights to control both the duties which are performed and the way in which they are performed are not the sole criteria for determining whether an employment relationship exists and who is the employer, they are significant indicators that the person with the power to exercise that control is, in law, the employer - see for example *Macer v. Allen; ex parte Australian Mutual Provident Society* (1977) 16 SASR 237 and *Commissioner of Payroll Tax (Vic) v. Mary Kay Cosmetics P/L* (1982) 82 ATC 4444. In the case of staff employed under the LAMS Act these responsibilities are, of necessity, performed predominantly, if not exclusively, by the MLA/office-holder.

11. In *Tony De Domenico v Margot Marshall and Australian Capital Territory* [1997] ACTSC 20, Miles CJ of the ACT Supreme Court reviewed a decision of the ACT Administrative Appeals Tribunal **(AAT)** that a staff member of an MLA employed under the LAMS Act was the employee of the MLA rather than the Territory for the purposes of a complaint made under the *Discrimination Act 1991*. The Court

affirmed the decision of the AAT that the staff member was an employee of the MLA.

Is the undertaking being conducted at a workplace?

12. "Workplace" is defined at section 8 of the WHS Act as a place where work is carried out for a business or undertaking and includes any place where a worker goes or is likely to be, while at work. A person is a worker if the person carried out work in any capacity for a person conducting a business or undertaking, including, amongst other things, work as an employee, a contractor or subcontractor - see section 7 of the WHS Act. Accordingly, we consider that an MLA's office would be considered a workplace as it is a place where work is carried out for an undertaking and it is a place where a worker goes or is likely to be, while at work. We also consider that an MLA's office is a place where work, as that terms is ordinarily understood, is carried out.

13. We note that section 5(4) of the WHS Act provides that a person does not conduct a business or undertaking to the extent that the person is engaged solely as a worker in, or as an officer of that business or undertaking. Given the role and functions of an MLA including his/her powers to appoint and dismiss employees under the LAMS Act discussed above, we do not consider that an MLA could be said to be engaged solely as a worker in his/her own office. We also consider that an MLA could not be considered to be an officer of his/her office.

14. Given our conclusions above, we consider that each MLA can be considered to be conducting an undertaking at a workplace.

D. Are there alternatives to each MLA separately facilitating elections for one or more HSRs and establishing HSCs for each of their own offices?

1. As noted in the Background section of this advice, following a request made by a worker under section 50 of the WHS Act for conduct of an election for 1 or more HSRs, a PCBU must, pursuant to section 51 of the WHS Act, facilitate the determination of 1 or more work groups of workers.

2. Section 51(1) of the WHS Act provides that the purpose of determining a work group is to facilitate the representation of workers in the work group by 1 or more HSRs. It is understood that a work group usually consists of workers who perform similar types of work and have similar health and safety conditions within the workplace.

3. Section 55(1) of the WHS Act provides that work groups may be determined for workers carrying out work for 2 or more persons conducting business or undertakings at 1 or more workplaces. Accordingly, we consider that section 55(1) allows employees of 2 or more MLAs to be determined to be part of one workgroup. This is particularly so given that the employees of MLAs will usually perform

similar types of work and have similar health and safety conditions within the workplace (particularly for those based at the Assembly).

4. However, in order for a determination to be made under section 55(1) for a "consolidated" workgroup, the requirements set out at sections 55 – 57 of the WHS Act must be followed. These requirements include that:

   (1) The particulars of the work groups are to be determined by negotiation and agreement, in accordance with section 56, between each of the PCBUs and the workers – see section 55(2);

   (2) The parties to an agreement concerning the determination of a work group or groups may, at any time, negotiate a variation of the agreement – see section 55(3);

   (3) If agreement cannot be reached on a matter relating to the determination of a work group (or a variation of an agreement) within a reasonable time after negotiations commence under the WHS Act, any party to the negotiations may ask the regulator to appoint an inspector to assist the negotiations in relation to that matter – see section 56(3);

   (4) A PCBU involved in negotiations to determine a work group or a variation of an agreement concerning the determination of a work group must, as soon as practicable after the negotiations are completed, notify the workers of the outcome of the negotiations and of any work groups determined by agreement or the variation of any agreement – see section 57.

5. Please contact me if you wish to discuss any aspect of this advice.

Yours faithfully

ACT Government Solicitor

Avinesh Chand
Principal Solicitor