

Australian Industry Group

Review of the Work Health and
Safety Act (SA)
Discussion Paper

Submission to
SafeWork SA

NOVEMBER 2016

Ai
GROUP

REVIEW OF THE WORK HEALTH AND SAFETY ACT 2012 (SA)

SUBMISSION TO SAFEWORK SA

Introduction

The Australian Industry Group (Ai Group) is a peak industry association and has been acting for business for more than 140 years. Along with our affiliates, we represent the interests of more than 60,000 businesses employing more than 1 million staff. Our longstanding involvement with diverse industry sectors including manufacturing, construction, transport, labour hire, mining services, defence, airlines and ICT means we are genuinely representative of Australian industry.

Ai Group is a member of Safe Work Australia (SWA) and its sub-group Strategic Issues Group – Work Health and Safety (SIG-WHS), which had oversight of the development of the Model Work Health and Safety Laws. We are also actively involved in consultative forums with state and territory regulators in relation to the application of safety and workers' compensation legislation.

We have ongoing contact and engagement with employers in all Australian jurisdictions on workplace safety issues, including informing them of regulatory changes, discussing proposed regulatory change, discussing industry practices as well as providing consulting and training services. We promote the importance of providing high standards of health and safety at work, and we hear from them about their success, issues and concerns related to workplace health and safety.

Ai Group welcomes the opportunity to make a submission in relation to the three-year statutory review of the operation of the South Australian WHS Act. We note that the [Discussion Paper](#) has identified that the review will only be focusing on the operation of the provisions of the Act that vary from the Model WHS Laws; we respond accordingly.

We will provide detailed input on broader issues when the national review of the Model WHS Laws occurs in 2018.

Ai Group's feedback on the provisions of the SA WHS legislation outlined in the Discussion Paper is provided in the following table.

Model WHS Act/Regulations	WHS Act SA	Ai Group comment
<p>Provides that in managing risks, a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable (section 17 (1), model WHS Act).</p>	<p>Provides that a person must eliminate or minimise risks to health and safety, so far as is reasonably practicable, but only to the extent to which they have the capacity to influence and control the matter (section 17(2), WHS Act).</p>	<p>It is Ai Group's view that this section provides helpful clarification about the extent of the duty, without changing the intent from the Model WHS Act. No issues have been brought to our attention about the operation of this provision.</p> <p>The provision should be considered for incorporation within Model WHS Act as part of the national review in 2018.</p>
<p>Provides for prosecution exceptions for:</p> <ul style="list-style-type: none"> • volunteers so that volunteers cannot be prosecuted for a failure to comply with a health and safety duty, other than as a worker or 'other' person at the workplace; and (section 34 (1), model WHS Act). • unincorporated associations (although unincorporated associations may be PCBUs for the purposes of the model WHS Act, their failure to comply with a duty or obligation under the WHS Act does not constitute an offence and cannot attract a civil penalty)(section 34(2), model WHS Act). 	<p>The WHS Act (SA) includes an additional provision to clarify that volunteer officers in mixed residential/commercial strata/community titles corporations will not be liable for a breach of officer duties under the WHS Act (section 34, WHS Act).</p>	<p>Ai Group is not aware of any issues that have arisen from this provision.</p>

Model WHS Act/Regulations	WHS Act SA	Ai Group comment
<p>Provides that a health and safety representative (HSR) can seek assistance from any person whenever necessary in exercising a power or carrying out a function under the legislation. There are no limitations in the model WHS laws on the types or categories of people from whom assistance can be sought (section 68 (2)(g), model WHS Act).</p>	<p>As per the model WHS laws a HSR can seek assistance from any 'person'.</p> <p>However, the WHS Act (SA) provides that 'any person' is limited to:</p> <ul style="list-style-type: none"> • a person who works at the workplace; • a person who is involved in the management of the relevant business or undertaking; or • a consultant who has been approved as required by the legislation (section 68(3) and (6)), WHS Act). 	<p>Ai Group believes that this is a valuable amendment to the Model WHS Laws.</p> <p>In other jurisdictions we are finding that the Model provisions are being utilised for union organisers to enter a workplace without being bound by the provisions that are placed on <i>union right of entry</i> within WHS laws and the Fair Work Act.</p> <p>This provision of the Model WHS Act will be a focus for the 2018 national review of the Model WHS Act.</p>
<p>Provides that an HSR is entitled to five training days in the first year, one in the second year, and one in third (regulation 21, model WHS Regulations).</p>	<p>The WHS Act (SA) provides for an increase in the number of training days for HSRs to five in the first year, three in the second and two in the third (section 79, WHS Act).</p>	<p>Ai Group does not believe that it was necessary to make these amendments.</p> <p>However, as the provisions are equivalent to what existed in SA prior to the introduction of the Model WHS Laws we have received limited feedback on this approach.</p>

Model WHS Act/Regulations	WHS Act SA	Ai Group comment
<p>Allows for a WHS entry permit holder (EPH) to enter a workplace to inquire into a suspected WHS contravention, where the contravention is in relation to a 'relevant worker'. The EPH must reasonably suspect a contravention is occurring or has occurred when entering for this purpose. (section 117, model WHS Act).</p> <p>Prior to recent changes, the model WHS laws provided that an EPH was not required to give notice before entering a workplace. However, amendments to the model WHS Act now require an EPH to provide a minimum of 24 hours' and a maximum of 14 days' notice to the relevant PCBU and the person with management or control of the workplace before entry takes place.(section 68 (3B), model WHS Act).</p>	<p>The WHS Act (SA) includes certain policies and procedures relevant to when a EPH seeks to exercise a right of entry to require into suspected contraventions of the WHS Act (section 117, WHS Act).</p> <p>This includes providing that EPHs must give consideration as to whether it is reasonably practicable to notify the regulator prior to entry in order to provide an opportunity for an inspector to attend at the workplace at the time of entry (section 117(3)). However, if the EPH is not accompanied by an inspector, they must furnish a report on the outcome of his or her inquiries at the workplace to the regulator, in accordance with the WHS Regulations, after the entry has occurred (section 117(6)), WHS Act).</p>	<p>We acknowledge the description of recent changes to the Model WHS Laws on this topic, but note that the jurisdictions have not adopted this approach within their legislation.</p> <p>It is difficult to comment on the operation of the SA amendments, other than to say that there is less disputation about <i>union right of entry</i> under SA laws than in other jurisdictions.</p> <p>This approach does allow the Regulator to know when entries are occurring, and for what reasons. It would be valuable for this review, and as input into the national review in 2018, for an analysis of entry activity to be undertaken.</p>

Model WHS Act/Regulations	WHS Act SA	Ai Group comment
<p>Provides that for the purposes of an inquiry into a suspected contravention, an EPH may enter any workplace for the purpose of inspecting, or making copies of:</p> <ul style="list-style-type: none"> • employee records that are directly relevant to a suspected contravention; or • other documents that are directly relevant to a suspected contravention and that are not held by the relevant PCBU. <p>Before doing so, the EPH must give notice of the proposed entry to the person from whom the documents are requested and the relevant PCBU. This notice must be given during usual working hours at least 24 hours, but not more than 14 days, before the entry (section 120, model WHS Act).</p>	<p>As per the model WHS laws, an EPH can enter a workplace for the purpose of inspecting or making copies of employee records and other documents directly relevant to a suspected contravention.</p> <p>However, The WHS Act (SA) provides that the right of an EPH to require copies of a document is subject to any direction that may be given by an inspector. This may include a direction that copies of a document not be required to be made and provided to the EPH (section 120(6), WHS Act).</p>	<p>Ai Group has not received any feedback on the operation of this provision.</p> <p>As with the preceding issue, it would be helpful if the Regulator was able to provide insight into the operation of the provision, and its practical impact.</p>
<p>The model WHS Act does not provide protection against self-incrimination (section 172, model WHS Act) but instead provides for immunity use.</p>	<p>The WHS Act (SA) provides for a protection against self-incrimination (section 182, WHS Act).</p> <p>The provision states that a person must answer questions or produce information unless to do so would incriminate or expose them to an offence.</p>	<p>Ai Group has not received any feedback on the operation of this provision.</p>

Model WHS Act/Regulations	WHS Act SA	Ai Group comment
<p>Provides that the Minister may approve a Code of Practice (COP) for the purposes of the Act and may vary or revoke an approved COP (section 274(1), model WHS Act).</p> <p>However, the Minister may only approve, vary or revoke a COP if it was developed by a process that involves consultation between the Governments of the Commonwealth and each State and Territory, unions, and employer organisations (section 274(2), model WHS Act).</p> <p>An approval of a COP, or a variation or revocation of an approved COP, takes effect when notice of it is published in the Government Gazette, or on date specified in the approval, variation or revocation (section 274(4), model WHS Act).</p>	<p>As per the model WHS laws, the Minister may approve a COP for the purposes of the Act and may vary or revoke an approved COP.</p> <p>However, the WHS Act (SA) includes additional requirements in relation to approved COPs. These include:</p> <ul style="list-style-type: none"> • a requirement for the Small Business Commissioner to be consulted before a Code of Practice is submitted to the Minister (section 274(3), WHS Act); • a requirement that the Industrial Relations Consultative Council recommend to the Minister approval of a COP made under the WHS Act (section 274(2), WHS Act); and • a requirement that COPs be subject to disallowance by Parliament (section 274(8), WHS Act). 	<p>When Codes have been referred to the Small Business Commissioner, a consultation process has been initiated to seek input from small business. Whilst this is not a requirement of the Act, it has allowed for consultation to occur on the issues that are of particular importance to small business.</p> <p>Ai Group supports this approach. However, it would be valuable for the SA Government to undertake an evaluation of the impact of the work undertaken by the Commissioner. This evaluation could focus on the number of recommendations that have been adopted and implemented following receipt of advice on the Codes.</p>