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WHS Act Review  
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Dear Sir/Madam

## Statutory Review of the Work Health and Safety Act 2012 (SA) Discussion Paper

The Housing Industry Association (HIA) welcomes the opportunity to provide comment on the Statutory Review of the Work Health and Safety Act 2012 (SA) discussion paper.

On the whole the feedback HIA has received to date from members is that the current laws and regulations entail a large amount of unnecessary administrative burden. The amount of administrative regulation, that is not having any direct or indirect effect on the quality of safety on sites, is a waste.

It is HIA's view that the laws and regulations need to cut down on the management of safety through paperwork.

A summary of the issues and concerns for the residential construction industry are set out below and more fully in the attached table of comments.

	<b>Model WHS Act/Regulations</b>	<b>WHS Act (SA)</b>	<b>HIA's response</b>
<b>1</b>	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).	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>HIA notes that the primary duty is required to be held by any person conducting a business or undertaking (PCBU). The duty is to be discharged to the "extent that the matter is within the person's capacity to influence and control".</p> <p>As the term 'control' is not defined it is likely to be interpreted as 'control to any extent'.</p> <p>In HIA's view, the appropriate duty structure that provides for individual responsibility to the extent that the person is in <u>actual</u> control of a certain activity, and that the subsequent liability is apportioned based on the level of control.</p> <p>In a residential construction context it is neither fair nor practical that a principal contractor/builder as a PCBU cannot rely on the knowledge and skill of specialist contractors engaged to undertake specific task and for whom the PCBU exercises little to no control over.</p>

			<p><b>HIA submits that it is important to maintain this sub section to enable practical and direct control over risk and the realistic ability ensure the “cost effective supervision” of licenced sub-contractors. It also recognises the specialist trades superior ability to control and manage their trade related activities.</b></p> <p>Removing the current provisions pose confusion as it means those with no specific expertise are attempting to control, supervise and direct persons at work in situations where their employer, who is also a PCBU, may have implemented conflicting controls, supervision and direction.</p> <p>Accordingly HIA considers that for residential projects the term ‘control’ should be taken to mean ‘exercising actual and direct control’ over the relevant ‘worker’ and ‘workplace’.</p>
2	<p>Provides for prosecution exceptions for:</p> <ul style="list-style-type: none"> <li>- 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).</li> <li>- 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).</li> </ul>	<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>HIA supports the current provisions in the WHS Act (SA).</p>
3	<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"> <li>- a person who works at the workplace;</li> <li>- a person who is involved in the management of the relevant business or undertaking; or</li> <li>- a consultant who has been approved as required by the legislation<sup>2</sup> (section 68(3) and (6)), WHS Act).</li> </ul>	<p>HIA submits that the current provisions in the model laws can be used as a ‘backdoor’ right of entry by unions as it almost grants that person unrestricted right of entry. It has been used in such a manner in jurisdictions such as Victoria where a similar provision exists. HIA supports the retention of the restrictions in the SA Act but considers that 24 hour notice requirement should be given before access.</p> <p><b>HIA supports the current restriction on the types of people that may assist a HSR i.e. a person who works at the workplace, a person who is involved in the management of the relevant business or undertaking etc.</b></p>

4	Provides that an HSR is entitled to five training days in the first year, one in the second and one in third (regulation 21, model WHS Regulations).	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 72(9), WHS Act).	HIA does not support the current provision with respect to obligations to train HSRs. HIA submits that the current SA provisions present an unreasonable cost impost on PCBUs and employers. They should be deleted in their entirety.
5	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). 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).	The WHS Act (SA) includes certain policies and procedures relevant to when an EPH seeks to exercise a right of entry to require into suspected contraventions of the WHS Act (section 117, WHS Act). 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).	HIA recommends that the EPH be required to give written notice of the suspected contravention upon entering a workplace and prior to exercising any other powers – i.e. remove the "as soon as reasonably practicable" condition from s 119(1) of the WHS Act.  HIA believes that it is always practicable to provide written particulars of the suspected contravention in the notice of entry.  <b>HIA recommends that 'so far as is practicable' be removed from the WHS Regulations, sub-regulation 28(a).</b>
6	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: - 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.  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).	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. 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).	HIA notes that there is confusion among members as to how the WHS entry permits relate to Fair Work Act permits.  It is HIA's view that these permits should be consistent. Members have reported that work health and safety issues are being misused for industrial purposes.  HIA supports the requirement to give 24 hours' notice prior to entry or access to the workplace.  HIA submits that this would ensure consistency with the Fair Work Act and also to give sufficient notice to a PCBU to ensure they can appropriately respond.

7	<p>The model WHS Act does not provide protection against self-incrimination (section 172, model WHS Act) but instead provides for use immunity.</p>	<p>The WHS Act (SA) provides for a protection against self-incrimination (section 172, WHS Act). The provision states that a person must answer questions or produce information or documents unless to do so would tend to incriminate or expose them to an offence.</p>	<p>It is important to maintain protection for all natural persons including Directors particularly PCBU's.</p> <p>Especially so given the broad powers of investigation and ability to compel the answering of questions of the PCBU and other parties, and importantly the significant penalties that can attach to individuals.</p>
8	<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). 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). 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. However, the WHS Act (SA) includes additional requirements in relation to approved COPs. These include:</p> <ul style="list-style-type: none"> <li>- 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);</li> <li>- 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</li> <li>- a requirement that COPs be subject to disallowance by Parliament (section 274(8), WHS Act).</li> </ul>	<p><b>HIA submits that it is important to maintain the Small Business Commissioner as an 'independent review' of all Codes of Practice and their impact on the ability (practicality and financially) of small business to be compliant.</b></p>

## OTHER MATTERS

### Safe Work Method Statements

In HIA's experience many jurisdictions have identified difficulty in getting subcontractors to understand and complete Safe Work Method Statements (SWMS). Additionally, one of the key difficulties faced by the majority of principal contractors is complying with the obligation to ensure a SWMS is completed and followed by the subcontractor.

Typically, a builder will have a number of sites under construction at any given time. Generally the builder will visit these sites at key predetermined times and rely on the expertise of their contractors as it is not reasonably practicable to provide 24 hours supervision on every individual construction site.

A duty on the principal contractor, to ensure that a written SWMS exists for the work carried out by subcontractors and that the SWMS are enforced and kept up to date is highly impractical for the housing industry and would take much higher levels of supervision (at significant cost) to ensure compliance.

The focus of responsibility for SWMS should be on the relevant PCBU performing the work. These are the persons with actual control over the method of work and are already required by virtue of s 17(2) of the WHS Act to eliminate or minimise risks to health and safety, so far as is reasonably practicable to the extent to which they have the capacity to influence and control the matter.

Given the lack of evidence to suggest that this type of administrative control actually improves safety, the increase in additional supervision and cost impacts on small business certainly does not justify its inclusion. As SWMS are fluid documents that should be changed and updated as risks change, the task of collecting them (and the amendments) is onerous and very artificial.

HIA submits that the duty to complete, provide and adhere to the Safe Work Method Statements (SWMS) under regulation 303 should be solely placed on the person undertaking the work.

HIA submits that the duty to provide a SWMS to a principal contractor and the duty to adhere to the SWMS is placed solely on the PCBU undertaking the work and that the duties on the principal contractor to collect SWMS and ensure compliance to such, be removed.

#### **Regulation 292 Meaning of Construction Project**

HIA notes that the dollar value of a construction project was initially set at \$250,000 or more when WHS legislation came into effect. However, it should be noted that the South Australian Government promised a review of the dollar value from the very start of drafting new WH S legislation and that the dollar value currently set at \$450,000 did not come into effect until 16<sup>th</sup> July 2015.

HIA submits that as it will be some time before the Act and Regulations are reviewed again, the threshold should be raised to \$500,000 and indexed to CPI. This dollar value is consistent with the value set in the Northern Territory and it also recognises the escalating compliance costs, materials and specialist labour as well as the increased costs of purchasing house and land packages.

Yours sincerely  
HOUSING INDUSTRY ASSOCIATION LIMITED



Brenton Gardner  
**EXECUTIVE DIRECTOR**  
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