

# Submission

December 19, 2016



**Minister for Industrial Relations John Rau**  
**SafeWork SA Executive Director Marie Boland**

Review of the Work Health and Safety Act 2012 (SA), November 2016



**MASTER BUILDERS**  
SOUTH AUSTRALIA

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## 1. Introduction

This submission is made on behalf of Master Builders Association of South Australia Inc (“Master Builders SA”), established in 1884 as the peak body representing South Australia’s building and construction industry.

Master Builders SA is committed to building a productive industry and a prosperous South Australian community and economy.

The South Australian building and construction industry directly employs more than 55,000 South Australians across all sectors, including residential, commercial, civil engineering, land development and building completion services. Indirectly, the industry supports tens of thousands more South Australian jobs.

The industry undertakes about \$15 billion of work every year, contributing more than \$1 for every \$7 of economic activity within the State. Indirectly, more than one-quarter of South Australia’s wealth is produced by the building and construction industry.

South Australia’s building and construction industry is focused on the development and transfer of skills into a life-long career. It is consistently among the leading sectors when it comes to training and apprentices and last year provided new apprentice places for more young workers than the Northern Territory, ACT and Tasmania combined.

Master Builders SA is proud of the industry it represents, the jobs it creates, the 11,000 homes it built and extended for families last year and the offices it has built for South Australian businesses.

## 2. Purpose and context of this submission

Master Builders SA understands that this review is constrained to the South Australian Act and its differences variations from national or “model” regulations<sup>1</sup>. The structure outlined in the Discussion Paper has been used within this submission for the purposes of clarity.

However, the Act remains an essential piece of legislation for the building and construction sector. As such, members and our specialists have raised additional items of concern for discussion. These have been outlined in a separate section.

Finally, Master Builders SA is pleased that SafeWork SA extended the deadline for consultation beyond one month. We endeavour to consult widely amongst our membership and also reach out to specialists for their feedback. This is a lengthy process and – considering the topic in question – worthy of allowing time for reflection. The original consultation period would have severely curtailed that process and thus limited the quality of the outcome, particularly given the lack of forewarning. Master Builders SA recommends further consultation undertaken by SafeWork SA consider this feedback to improve outcomes and stakeholder engagement.

### 3. Recognising need for control and capacity to influence

The model Work Health and Safety Act and section 17(2) of the South Australian WHS Act differ by the South Australian inclusion of the following phrase:

...but only to the extent to which they have the capacity to influence and control the matter.

While it might be argued that this limitation is implied by the phrase “reasonably practicable”, making such a limitation an express limitation is much clearer for regulators, practitioners, the judiciary and industry.

The failure to respect the control or influence of a party might lead to the absurdity where a person with no control or influence is found to have contravened a statutory duty and so be exposed to penalties as a result. While penalties might not amount to incarceration – a potential flaw in the proposed industrial manslaughter legislation – it is likely to result in an unjust outcome that will dilute respect for the regulator and the system itself.

## Recommendations

1. Master Builders SA recommends the retention of that element of section 17(2) that recognizes a person’s capacity to influence and control a matter as it offers a clear connection between capacity and responsibility.
2. Master Builders SA suggests this connection could be further clarified by amending the section to recognise a person’s ability to “command, direct and compel”.

Conversely, including the limitation sends a very strong message to all industry participants: they must eliminate or minimize those risks where they can influence or control the risk.

This distinction is vital in the building and construction sector where there is a high rate of contracting with specialist trades. A principal contractor or developer will be aware of the need for the trimming of a concrete footing; however, only a specialist contractor will be aware of the inherent risks and controls of operating a concrete saw to obtain the desired result and be in a position to best eliminate or minimize those risks. “Capacity to influence and control” is a reasonable and fundamental measure of managing risk.

If anything, this ability to control risk could be strengthened to recognise a person’s actual and legal ability to manage risk. Greater certainty would be achieved by introducing a new test reliant upon a person’s ability to “command, direct and compel”.

The existing formulation matches responsibility and capacity. Failure to meet that duty when there is a capacity to act is therefore justifiably met with a penalty. Master Builders SA recommends the retention of this distinction or further clarification to recognise a person’s ability to “command, direct and compel”.

### 4. Additional exemption for volunteer officers in strata/community titles

Master Builders SA believes the capacity of volunteer officers in mixed residential/commercial strata and community titles to control or influence risks should be considered. As such, their responsibilities

are understood to fall within the scope of section 17(2) of the South Australian Act.

Master Builders SA sees no compelling case to alter the existing balance as captured with section 34 of the South Australian Act. Removing this provision might otherwise expose such volunteer officers to officer duties framed to reflect full-time professionals, and thus result in a greater reluctance to take on such roles. Given that that these roles are vital for the proper running of this class of investment, removing the provision might have a broader impact on the property sector.

For these reasons and without additional evidence to the contrary, Master Builders SA recommends there be no change to this provision.

## 5. Recognising capacity to assist health and safety representatives

Health and safety representatives are given the power under the model WHS to seek assistance from any person whenever carrying out a legislative function<sup>2</sup>. This is limited in the South Australian legislation<sup>3</sup> to those who work at the workplace, is involved in the management of the relevant business or undertaking or an approved consultant<sup>4</sup>.

### Recommendations

- 3. Master Builders SA recommends no change to the protections afforded to volunteer officers of strata and community titles as presently provided for in section 34.**
- 4. Consistent evidence of union abuse of right of entry provisions compels the retention of health and safety representatives to call for assistance beyond the workplace. The South Australian provisions within section 68 should be retained.**

Sadly, the use of this section is not limited to health and safety concerns. Members of Master Builders SA have repeatedly raised issues of similar sections being used to grant what might otherwise be considered illegal entry to union representatives. This is more extensively discussed at *Right of entry for Entry Permit Holders for suspected contraventions*, below.

In the immediate context, removing this provision would allow union officials to enter sites with no requirement for Commonwealth Fair Work Permits or State-based WHS Entry Permits. Thus, a small change would effectively come into conflict with state- and Federal-legislation, introducing greater uncertainty and ultimately requiring industry participants to litigate to the High Court to determine the primacy of Commonwealth- and State-based provisions.

The issue of the misuse of these provisions dominated Parliamentary debates during the introduction of the original Bill. The Hon. Kelly Vincent MLC dismissed concerns about the abuse of such power:

I do not believe that Black Hawk helicopters will appear above houses, with union officials rappelling down to invade your average home renovator in their own house. I also do not believe union entry into industrial work sites will be abused by the union, and research provided to me by Dr Kevin Purse certainly supports this assertion. Unions in South Australia do not generally have a reputation for aggressive or bullyboy tactics and I do not expect them to take this on in the future.<sup>5</sup>

It has since been recorded that the South Australian branch of the Construction, Forestry, Mining and

Energy Union is the most heavily-fined branch for right of entry abuses with their members footing the bill for more than \$1 million of penalties, excluding the financial impact of legal fees and additional court costs<sup>6</sup>.

Concerns relating to union abuse of this power provide support for the inclusion of such limitations<sup>7</sup> but it is also important to look at more recent national developments.

Recent amendments to the model WHS now require those assisting health and safety representatives to give notice of that proposed entry to the person conducting a business or undertaking in addition to the person with management or control of the workplace. These notices must comply with existing regulations and be given during normal working hours at least 24 hours before the entry in question<sup>8</sup>.

Master Builders SA submits this is clear evidence of concerns about areas of overreach or abuse of health and safety laws for union entry on sites. Removing this difference would therefore allow for a divergent approach within South Australia that ignores all available evidence.

Considering national moves to limit the scope of this section and recent evidence of union abuse of right of entry powers<sup>9</sup>, Master Builders SA recommends against any attempt to dilute these restrictions.

## 6. Recommended training days

Health and safety representatives are entitled to seven days' training over three years under the model WHS Regulations<sup>10</sup> and 10 days under South Australian provisions<sup>11</sup>.

## Recommendations

- 5. Master Builders SA recommends the adoption of model WHS laws regarding health and safety training by the immediate amendment of section 72(9) to reflect regulation 21 of the model laws.**

The current South Australian provisions place business owners at a relative cost disadvantage to their national competitors. The need to send health and safety representatives offsite for training is essential but means less time they are available to undertake onsite duties. This has a direct impact on every employer's ability to continue normal operations and provide an offering that measures up against interstate competition.

As a matter of productivity and competitive equality, Master Builders SA recommends the immediate adoption of the national model of five days' training in the first year, one day in the second and one in the third.

## 7. Right of entry for Entry Permit Holders for suspected contraventions

The potential for abuse of this right of entry makes it one of the most contentious aspects of the current law for members of Master Builders SA. Generally, we believe the treatment of this section by some industrial players cheapens the importance that industry attaches to safety. At the very worst, this abuse can distract parties from focusing on improving safety for all parties.

## Current state of the law

Section 117 of the South Australian Act allows the holder of a WHS entry permit to enter a workplace for a suspected contravention where it relates to a relevant worker.

There must be a reasonable suspicion that the contravention has occurred or is continuing and involves a risk to the health and safety of a relevant worker<sup>12</sup>.

The permit holder must consider whether it is reasonably practicable to give notice to SafeWork SA about the entry to provide an opportunity for an inspector to attend, and if reasonably practicable, provide such notice in the required form<sup>13</sup>.

If the permit holder is not accompanied by an inspector, the permit holder must provide a report on the inspection in accordance with the Regulations<sup>14</sup>.

The model law, as amended in March 2016, imposes an additional requirement on the permit holder to notify the person conducting a business or undertaking and the person with management or control of the workplace of the proposed entry for the suspected contravention<sup>15</sup>.

That notice must be in the prescribed form and must be given during usual working hours with at least 24 hours' notice<sup>16</sup>.

The permit holder need not provide notice to the PCBU where the authorising authority has issued an exemption and an exemption certificate is handed to the workplace before entering or as soon as is practicable after entering the workplace<sup>17</sup>. This requires the union apply for a certificate of exemption and there is a reasonable believe that there is a serious risk to health and safety from an immediate or imminent exposure to a hazard at the workplace<sup>18</sup>.

Thus, the model laws require reasonable notice be given to the workplace in question but also provides unions with a way to gain immediate access where the authority "reasonably believes there is a serious risk to health or safety emanating from an immediate or imminent exposure to a hazard"<sup>19</sup>.

## Ideal and current operation

It is a clear failing of policy where the South Australian legislation does not require the permit holder to notify the workplace at first instance under section 117. Such notice allows those responsible in the workplace to prioritise resources to ensure those with the power to make change are fully focused on the issue being raised. The absence of this requirement creates an obvious point of conflict, muddying the water when safety should be the key focus.

Any fear of an immediate or imminent exposure to a hazard should serve as an immediate trigger for all parties to focus on preventing that hazard from eventuating. If that risk is identified in the workplace, the person conducting the business or undertaking has a general duty to manage that risk<sup>20</sup> and, it could be argued, all workers observing such a hazard should notify others to manage such a risk<sup>21</sup>.

Clearly, this approach allows for immediate rectification – the best outcome where a risk is considered "immediate or imminent".

Unfortunately, this approach is not always embraced. In confidential discussions, members of Master Builders SA have outlined experiences where these “immediate or imminent” risks have been identified by unions rather than being raised directly with those in control – and therefore able to promptly resolve – such issues.

Further, Master Builders SA has raised with the relevant Minister many examples where insufficient or vague reasons for entry are provided by WHS Permit Holders, and where the lack of clarity is accepted as an appropriate notification. This sadly supports one of the key findings of the Cole Royal Commission:

OH&S is often misused by unions as an industrial tool. This trivialises safety and deflects attention away from real problems... The scope for misuse of safety must be reduced and if possible eliminated...<sup>22</sup>

## Recommendations

- 6. Section 117 of the South Australian Act should be immediately amended to reflect the requirement to notify the PCBU and person in control of the workplace of the suspected contravention giving rise to the entry as required by the model WHS laws. This will allow a clear focus on resolving the inherent safety issue rather than allowing safety walks with no clear purpose.**
- 7. The requirement of “reasonably practicability” should be removed from section 117(3) to require such notice as a matter of course in the interests of safety.**
- 8. Master Builders SA recommends the model exemption laws of regulation 117(6) should also be adopted as a necessary check and balance.**

This lack of detail has been previously raised by Master Builders SA with instances of a generic notice of entry later being filed with SafeWork SA with additional information – leading to a conclusion that such notices were being doctored in a clear abuse of the law<sup>23</sup>.

Given the abuse of this right of entry, Master Builders SA recommends strengthening this entry provision.

### Making right of entry work in the interests of safety

Master Builders SA recommends the immediate adoption of the model WHS laws in so far as they incorporate a notification requirement. Ideally all parties will work together where an “immediate or imminent” risk presents itself, but the model WHS laws provide a means of resolving such an issue in the rare event where a workplace is not amenable to recognising such a risk. This procedure also places a burden on unions to ensure that any such application is bona fide.

All parties should also pay heed to the notice requirements of the South Australian Regulations which require entry permit holders to provide the particulars of the suspected contravention “so far as is practicable”.

Parties seeking to enter any construction site should be very much aware of the risks and concerns of entering such a site. Providing written notice of the nature of the concern giving rise to the proposed entry should be seen as a matter of good practice and good governance, issues that should override any concerns about nuisance value. A short description identifies the risk for all parties,

which can then be held to account. Allowing parties to enter a site without such notice – unless there is an “imminent or immediate” hazard – is tantamount to writing a blank cheque without recourse to a written contract or memorandum of understanding.

Master Builders SA therefore recommends that the requirement of “reasonably practicability” be removed from s 117(3).

### Essential changes for interaction with other right of entry provisions

The Discussion Paper limits its discussion of right of entry to s 117 and s 120 of the Work Health and Safety Act 2012 (SA)<sup>24</sup>, yet the broader operation of the Act allows for the abuse of these provisions.

## Recommendations

- 9. Section 117 of the South Australian Act should be immediately amended to specifically exclude the use of powers conferred under sections 121 and 122 under any entry empowered by section 117. This vital amendment will stem a rising abuse of essential safety powers.**

A permit holder might gain entry to a worksite under s 117 and then seek to meet workers under s 121(1) (“Entry to consult and advise workers”). The entry itself carries no formal notice period. In contrast, permit holders must advise at least 24 hours’ ahead of any entry under s 121<sup>25</sup>.

This allows the subversion of the requirements of s 121 by the abuse of s 117. Master Builders SA has been notified of numerous examples of this practice – leading to accusations of the right being used to build union membership – and believes it abuses the very notion of safety that the system is built to protect. As outlined in our 2014 submission to the review of this Act:

There has been an increasing trend of union officials to utilise s 121 for the purpose of “site safety walks”. These are fishing expeditions, not for the purpose of consulting and advising but for the purpose of identifying breaches, something expressly not permitted by s 117. On many occasions, CFMEU officials specified “safety walks” as the purpose for entry in their entry notices. Interestingly, some of these notices themselves admit that they are going beyond the prescribed purpose – to consult and advise.<sup>26</sup>

It is disappointing to note that the lack of regulatory response to this concern has further cheapened the notion of safety in South Australia.

Master Builders SA therefore recommends that s 117 be specifically amended to exclude its connection or operation in conjunction with ss 121 and 122.

### Additional safeguards to prevent abuse of safety and rights of entry

Master Builders SA has received sufficient feedback from members to be concerned about the lack of accountability for state-based WHS permit holders. Whereas national right of entry abuses are being policed – and abuses exposed<sup>27</sup> – no such transparency is afforded at a state level. At the very worst, this exposes the Regulator to criticisms of collusion or bias, both of which have been expressed to Master Builders SA.

Master Builders SA therefore makes the following recommendations aimed at restoring value to the WHS right of entry:

- The entry permit holder must at all times while on site be accompanied by a nominee of the person conducting the business or undertaking: if safety is the key issue, the person with the ability to direct and control solutions on behalf of the PCBU should be present.

## Recommendations

- 10. All entries by South Australian permit holders should require the attendance of a nominee of the person conducting the business or undertaking or responsible for the site. Permit holders should also be required to follow the directions of those people. Given their responsibility for safety on each site – including the actions of permit holders – they should also possess the right to manage that risk.**
- 11. Such persons should have a right to request an inspector be present for right of entry processes.**
- 12. All permit holders should be required to hold nationally-recognised safety qualifications.**
- 13. Details of all entries should be published by the regulator in a timely manner together with the outcome of those entries. This level of transparency is required to protect against abuse of the permit system.**

- All holders of WHS Entry Permits should be required to hold nationally-recognised WHS qualifications under the Australian Qualifications Framework including a Certificate IV in Workplace Health and Safety. If all parties are serious about policing safety under the Act, all parties should recognise the importance of relevant qualifications. Ill-informed knee-jerk reactions to safety issues<sup>28</sup> do nothing to improve the industry or its ability to manage the most important aspect of its operation, safety<sup>29</sup>.

- The authorized regulator should publish all right of entry notices received to allow the closure of all matters and transparency around the outcomes of those inspections. Formal complaints could then be made if there appeared to be a systematic abuse of the system. Failure to disclose institutionalizes the ability of some industry participants to abuse safety.

- The Act should introduce the ability of the Regulator to suspend or revoke a WHS permit holder's permit if there is a finding that they have intentionally or recklessly breached WHS right of entry laws. Penalties should be attached to such abuse.

- The person conducting a business or undertaking should have a right to request an authorized inspector be present for right of entry processes.

### 8. Right of entry to inspect documents

The model WHS laws require WHS permit holders seeking inspection of documents to first be subject to holding a reasonable suspicion of a contravention<sup>30</sup>, and then to provide notice in the required form at least 24

hours' in advance<sup>31</sup>. This notice period is imported into the South Australian Act at s 120(5).

The Model laws do not provide the authority with the power to direct a permit holder regarding their

collection of documents.

## Recommendations

- 14. The power of an inspector under section 120(6) to direct copies of documents or records not be taken should be preserved to prevent the use of the power for industrial purposes.**
- 15. Section 120 should be further protected against abuse by limiting the use of documents and records obtained under the section to matters concerning the specific breach. They should not be made available for alternative actions.**
- 16. Master Builders SA recommends the retention of the current South Australian right against self-incrimination as presently stated in section 172.**

There is a significant concern within the industry that this power is being abused to provide a means of collecting documents for use in industrial matters. This clearly contravenes other legal rights the party in question may have.

Master Builders SA therefore recommends that the direction power conferred by s 120(6) in the South Australian Act be retained, and consideration be given to introducing a limitation to s 120 that limits the use of such documents copied or obtained to matters concerning the specific breach. In short, they should not be used in bargaining ploys.

### 9. Right against self-incrimination

The South Australian legislation gives every person the right not to answer a question or provide information on the grounds that it might incriminate that person or expose them to a penalty<sup>32</sup>. The model WHS law expressly repudiates that position<sup>33</sup>. Instead, it attaches the protection to the evidence provided: the evidence itself is not admissible as evidence unless it is false or misleading<sup>34</sup>.

Any change to the right against self-incrimination – otherwise known as the right to silence – should be made only where such a change is proven as absolutely

necessary to prevent a greater evil. In short, according to Professor Anthony Gray:

Consistent with the presumption of innocence, with liberal values, and in recognition of the power that government has over the individual, it is for the government to prove the truth of an accusation it makes. An individual should not be required to assist the government to make its case, on pain of punishment.<sup>35</sup>

Master Builders SA supports this principle and recommends South Australia retain its current provision. Adopting the model WHS law would dilute that protection and should be rejected.

### 10. Codes of Practice

Master Builders SA recommends the retention of the additional consultative actions outlined in the South Australian version of s 274 of the Act. Work Health and Safety laws have a disproportionate impact on small businesses, which are unable to take advantage of scale to fund safety specialists. In fact, many members describe documentation requirements relating to safety as “red tape” – a clear indication of that disproportionate impact.

### Recommendations

- 17. Master Builders SA recommends the retention of those additional consultative elements relating to changes to the Code of Practice as outlined in section 274 of the South Australian Act.**
- 18. Master Builders SA recommends that section 274(3) of the Act be amended to specifically empower the Small Business Commissioner to publicly consult on changes to ensure the impact on small businesses is adequately considered.**
- 19. Section 274(2) of the South Australian Act should also specifically refer to South Australian representatives to ensure consultation considers the impact on state-based businesses.**
- 20. The Minister should consider broadening membership of the Industrial Relations Consultative Council given its current lack of building and construction experience.**
- 21. Master Builders SA recommends the retention of Parliament's right to disallow Code amendments under section 274(8).**

However, it is noted that the Small Business Commissioner's input is limited to providing information to the Industrial Relations Consultative Council. This feedback risks being diluted or overridden. Further, the Commissioner has no duty to consult individually. Master Builders SA therefore recommends that s 274(3) be amended to require the Office of the Small Business Commissioner to publicly consult on such changes and to publish its findings.

Master Builders SA is also concerned that the phrasing of s 274(2) might overlook the need for consultation with South Australian bodies. There may be a tendency to rely upon central or national bodies to provide essential input. Unfortunately, this can result in the details of any particular input on South Australian businesses and employees being diluted or disregarded. Master Builders SA therefore recommends the section be amended to emphasize the need to directly consult with South Australian representatives.

The primacy of the Industrial Relations Consultative Council in the provision of advice overlooks its lack of representation. The Code is part of a law to improve health and safety, and yet the Council contains no representation of the building and construction sector. Our sector is one of the biggest employers in the State and also acknowledged as a sector that is tasked with managing high levels of workplace risk. In its present composition, Master Builders SA is not convinced the Council has the industry knowledge to best manage that risk.

Master Builders SA supports the retention of the South Australian provision allowing Parliament to disallow any amendments to the Code<sup>36</sup>.

### 11. Additional issues for consideration

The fundamental nature of the Work Health and Safety Act 2012 is underlined by the breadth of issues raised by our members and specialists during consultation. Although SafeWork SA has narrowed this engagement to the differences between the model WHS law and the South Australian Act, we raise the following important matters for consideration.

## Increased penalties for contraventions

Model WHS laws were amended in March to increase penalties for contravention on entry permits<sup>37</sup>. Given the importance of the rights and responsibilities attached to these permits, Master Builders SA recommends the immediate adoption of increased penalties for any abuse of permit conditions.

## Presumed authority of Health and Safety Representatives

Under both Model WHS laws and the South Australian Act, Health and Safety Representatives are entitled to issue provisional improvement notices in response to a contravention of the Act<sup>38</sup>.

## Recommendations

- 22. The South Australian Act should be immediately amended to reflect recent changes to the model WHS laws increasing penalties for abuse of right of entry provisions.**
- 23. The absurdity of granting the power to issue directions to an unqualified health and safety representative should be immediately rectified. Section 93 of the South Australian Act should be amended to reflect the model WHS laws where “direction” is replaced with “recommendation” and those recommendations carry no criminal or civil sanctions unless issued by the regulator.**

However, South Australian Health and Safety Representatives are effectively given the power of the State in contrast to their Model counterparts. South Australian representatives issue “directions” which may result in penalties for an offence of non-compliance, whereas model counterparts issue recommendations without the power of criminal and civil sanctions.

Health and safety representatives are required only to be elected with reference to their membership of an employee group<sup>39</sup>. They do not need any qualifications in health and safety; in many cases, they receive training only after their election by reason of the Act itself<sup>40</sup>. Yet these positions are given the power to direct qualified professionals and, if refused, to impose penalties. This is akin to allowing a person with a driver’s licence and no knowledge of mechanics to impose fines on motor mechanics for perceived shortcomings. Master Builders SA receives near-constant feedback about this disparity and the lack of safety qualifications among health and safety representatives.

In addition to recommendations above relating to minimum qualifications for health and safety representatives, Master Builders SA recommends the immediate adoption of Model WHS laws that allow representatives to issue “recommendations”<sup>41</sup> and the express exclusion of an offence arising from the matter<sup>42</sup>.

## Urgent review required over practicality of first aid requirements

As part of its current review of safety concerns in the housing industry, Master Builders SA has identified difficulties with the current provisions relating to first aid training and supplies.

The South Australian Regulations currently require that a person carrying out a business or

undertaking must ensure a workplace has first aid equipment, that worker have access to that equipment and to facilities for the administration of first aid<sup>43</sup>. Additionally, there must be an adequate number of people trained to administer first aid at the workplace<sup>44</sup>.

Although there is a requirement for an assessment of the environment<sup>45</sup>, there is rising concern about the difficulties in applying these provisions in the housing industry.

These provisions place an onus on all persons carrying out a business or undertaking: the principal contractor and all subcontractors. In many cases, subcontractors may work alone. There is concern

that principal contractors may be required to supply first aid trained people in these instances to fill their statutory duty, and that subcontractors will be required to do the same. A person undertaking defect work alone on a site would therefore need to be both first-aid trained and require a current certificate.

If this interpretation were adopted, all construction site employees would be required to be certified to comply, imposing an \$11.9 million cost burden on South Australian construction employers every three years<sup>46</sup>.

This problem is faced by all sectors where employees or contractors may work alone – including, for example, taxi and other related transport sectors – and so represents a significant issue that would benefit from clarification.

## Recommendations

**24. The difficulties implementing regulation 42 of the South Australian provisions should be immediately recognized and abated by the addition of the phrase “where reasonably practicable”. This would likely avert a \$12 million triennial bill for South Australia’s construction sector.**

Master Builders SA recommends the immediate amendment of regulation 42 to include the term “where reasonably practicable”. It is noted that this would reinforce the approach taken by the Code of Practice<sup>47</sup>, which requires a risk assessment be undertaken.

### More discussion needed around the monetary limit for “construction project”

Master Builders SA has received conflicting feedback around the monetary definition of a “construction project” as provided for in the regulations<sup>48</sup>.

From a practical perspective, the definition provides a boundary above which additional safety measures and costs are mandated. From a principled perspective, the definition then dilutes from the risk-based assessment upon which the Act is predicated.

Master Builders SA welcomed the increase of the threshold when announced in July 2015<sup>49</sup>. Master Builders SA recognises that the additional costs relating to these measures generally flow through to clients and therefore add to growing problems of affordability. While the cost may be considered small in some respects, it remains significant when considering the highly competitive environment that is leading to fine business margins – with builders often struggling to balance the need to find a constant pipeline of projects in an environment where many are investing in loss-leading builds.

The increase of the demarcation – from \$250,000 to \$450,000 – was the first change in many years. Some members have recommended this definition be immediately increased to \$500,000 and

indexed on an annual basis. This would represent parity with provisions in the Northern Territory and provide recognition of the escalating cost of compliance, materials and labour.

Other feedback has highlighted the artificial nature of the distinction, instead recommending that construction project be based on the definition of “high risk construction work” as contained in regulation 291. This principled approach would be consistent with the overall approach of South Australia’s work health and safety system.

There is some dispute as to the cost impact of such a change. Some members claim it might trigger higher costs for homebuyers given the additional items required for compliance. However, specialist feedback suggests costs may be reduced as current projects under \$500,000 do not involve high risks tasks such as tilt-up construction and multi-storey developments that trigger “working at heights” restrictions. Moving from a dollar value to a risk assessment would therefore recognise the risk without requiring a full WHS management plan based on a trigger value where there is no additional risk.

Master Builders SA makes no immediate recommendations regarding this matter but will seek further detailed feedback before advising SafeWork SA.

## 12. Conclusions

Master Builders SA is supportive of a strong Work Health and Safety system where all parties are focused on preventing injuries and fatalities. The 2012 changes have resulted in an improvement and South Australia can boast one of the better safety records across Australia.

While we embrace the benefits of a national system, we also believe that each issue should be reviewed on its merits. In short, we should adopt the best system for the South Australian environment. In some cases that means adopting national model laws; in others it means further amending South Australian laws to produce a system that best empowers industry and the regulator to focus on safety with recognition of the need for practical and reliable solutions.

We thank our members and specialists consulted for assisting with the preparation of this submission and look forward to working with SafeWork SA to implement these recommendations.

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<sup>1</sup> SafeWork SA, Review of the Work Health and Safety Act 2012 (SA) Discussion Paper, November 2016, 4. Available at [http://www.safework.sa.gov.au/uploaded\\_files/WHS%20Act%20Review.pdf](http://www.safework.sa.gov.au/uploaded_files/WHS%20Act%20Review.pdf) (accessed December 9, 2016).

<sup>2</sup> Section 68(2)(g).

<sup>3</sup> Section 68(4).

<sup>4</sup> Section 68(3), (6).

<sup>5</sup> Vincent MLC, The Hon Kelly, Hansard, November 29, 2011 at 16:08. Available at <http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-10-8480> (accessed December 9, 2016).

<sup>6</sup> Nankervis, David, “CFMEU branch in South Australia receives more than \$1 million in fines, highest in the nation”, The Advertiser, November 21, 2016, 4. Available at <http://www.adelaidenow.com.au/news/south-australia/cfmeu-branch-in-south-australia->

[receives-more-than-1-million-in-fines-highest-in-the-nation/news-story/955f54f4bdce92ff8c315143592a77f3](https://www.adelaidenow.com.au/news/south-australia/cfmeu-union-thug-intimidation-caught-on-camera-as-malcolm-turnbull-moves-to-tighten-union-regulations/news-story/2f73fc4f104d41fbf360d2d81d43c660) (accessed December 9, 2016).

<sup>7</sup> Bressington MLC, The Hon Ann, Hansard, op cit at 16:08.

<sup>8</sup> See Model Work Health and Safety Bill, s 68(3A), (3B).

<sup>9</sup> See, for example, Nankervis op cit and Shepherd, Tory, "CFMEU union 'thug' intimidation caught on camera as Malcolm Turnbull moves to tighten union regulations", Adelaide Now, October 18, 2016. Available at

<http://www.adelaidenow.com.au/news/south-australia/cfmeu-union-thug-intimidation-caught-on-camera-as-malcolm-turnbull-moves-to-tighten-union-regulations/news-story/2f73fc4f104d41fbf360d2d81d43c660> (accessed December 9, 2016).

<sup>10</sup> Model WHS Regulations, reg 21.

<sup>11</sup> Work Health and Safety Act 2012 (SA), s 72(9).

<sup>12</sup> Work Health and Safety Act 2012 (SA), s 117(1), (2).

<sup>13</sup> Work Health and Safety Act 2012 (SA), s 117(3).

<sup>14</sup> Work Health and Safety Act 2012 (SA), s 117(6)).

<sup>15</sup> Model WHS Regulations, reg 117(3).

<sup>16</sup> Model WHS Regulations, reg 117(4), (5).

<sup>17</sup> Model WHS Regulations, reg 117(6)

<sup>18</sup> Model WHS Regulations, reg 117(7).

<sup>19</sup> *ibid.*

<sup>20</sup> Work Health and Safety Act 2012 (SA), s 19.

<sup>21</sup> Work Health and Safety Act 2012 (SA), s 28.

<sup>22</sup> Cole Royal Commission, Final Report of the Royal Commission into the Building and Construction Industry, Summary of findings and recommendations, Volume 1, 57.

<sup>23</sup> Master Builders SA, Submission to the Review of the Operation of the Work Health and Safety Act 2012, August 2014, par 4.9.3.

<sup>24</sup> Discussion Paper, 5-6.

<sup>25</sup> Work Health and Safety Act 2012 (SA), s 122.

<sup>26</sup> Master Builders SA, Submission to the Review of the Operation of the Work Health and Safety Act 2012, August 2014, par 4.9.5.

<sup>27</sup> See note 9, above.

<sup>28</sup> See calls for mandatory use of hard hats: ABC News, "Teen apprentice killed by wall frame collapse", August 10, 2016. Available at <http://www.abc.net.au/news/2016-08-10/apprentice-killed-wall-frame-collapse-at-adelaide-building-site/7713066> (accessed December 12, 2016).

<sup>29</sup> Castello, Renato, "Builder Scott Salisbury Homes beefs up safety measures at worksites in wake of death of carpenter Clyde Norris", Adelaide Now, August 26, 2016. Available at <http://www.adelaidenow.com.au/news/south-australia/builder-scott-salisbury-homes-beefs-up-safety-measures-at-worksites-in-wake-of-death-of-carpenter-clyde-norris/news-story/d456b07d3970fe0c394428be3b0d950a> (accessed December 12, 2016). The comments of Mr Norris are echoed by feedback from our committee members where mandated use of protective personal equipment (PPE) fails to acknowledge the inherent risks in their use. Examples include: roofers required to use steel-cap boots that provide less traction and thus increase risk; concrete cutters required to use gloves that swell with water and provide less control of dangerous equipment; and wall liners unable to do their jobs and exposed to high heat when working indoors in finished spaces with no overhead risks.

<sup>30</sup> Model WHS Regulations, reg 120(1).

<sup>31</sup> Model WHS Regulations, reg 120(3)-(5).

<sup>32</sup> Work Health and Safety Act 2012 (SA), s 172.

<sup>33</sup> Model WHS Regulations, reg 172(1).

<sup>34</sup> Model WHS Regulations, reg 172(2).

<sup>35</sup> Gray, Professor Anthony, "Constitutionally heeding the right to silence in Australia", Monash Law Review, Volume 6 of 2013. Available at <http://www.austlii.edu.au/au/journals/MonashULawRw/2013/6.pdf> (accessed December 12, 2016).

<sup>36</sup> Work Health and Safety Act 2012 (SA), s 274(8).

<sup>37</sup> See, for example, Model WHS Regulations, reg 123.

<sup>38</sup> Model WHS Regulations, reg 90(2); Work Health and Safety Act 2012 (SA), s 90(2).

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<sup>39</sup> Work Health and Safety Act 2012 (SA), s 60.

<sup>40</sup> Work Health and Safety Act 2012 (SA), s 72(9).

<sup>41</sup> Model WHS Regulations, reg 93(1).

<sup>42</sup> Model WHS Regulations, reg 93(2).

<sup>43</sup> Work Health and Safety Regulations 2012 (SA), reg 42(1).

<sup>44</sup> Work Health and Safety Regulations 2012 (SA), reg 42(2).

<sup>45</sup> Work Health and Safety Regulations 2012 (SA), reg 42(3).

<sup>46</sup> Based on: Australian Bureau of Statistics, Labour Force, Australia, Detailed, Quarterly, August 2016 (6291.0.55.003, Table 05). Available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6291.0.55.003Aug%202016?OpenDocument> (accessed December 13, 2016). St John, Accredited First Aid Courses. Available at <http://www.stjohnsa.com.au/training> (accessed December 13, 2016),

<sup>47</sup> SafeWork SA, How to Manage Work Health and Safety Risks – Code of Practice, December 2011, 10. Available at [http://www.safework.sa.gov.au/uploaded\\_files/CoPManageWorkHealthSafetyRisks.pdf](http://www.safework.sa.gov.au/uploaded_files/CoPManageWorkHealthSafetyRisks.pdf) (accessed December 13, 2016).

<sup>48</sup> Work Health and Safety Regulations 2012 (SA), reg 292.

<sup>49</sup> Holderhead, Sheradyn, “State Government to cut red tape for construction projects worth less than \$450,000”, Adelaide Now, July 16, 2015. Available at <http://www.adelaidenow.com.au/news/south-australia/state-government-to-cut-red-tape-for-construction-projects-worth-less-than-450000/news-story/e3894f6ab64c67e34df8d0bbc1294fe2> (accessed December 13, 2016).